

Dep't. of Transportation v. Carranza-Piscoy

OATH Index No. 893/21 (Oct. 8, 2021), *adopted*, Comm'r Dec. (Nov. 12, 2021), **appended**
aff'd, NYC Civ. Serv. Comm'n Case No. 2021-0857 (Mar. 9, 2022), **appended**

The Department established that Respondent, an assistant city highway repair worker, improperly performed his duties on two occasions. Termination of employment is recommended.

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

In the Matter of
DEPARTMENT OF TRANSPORTATION
Petitioner
- against -
JOSE CARRANZA-PISCOY
Respondent

REPORT AND RECOMMENDATION

JOYCELYN McGEACHY-KULS, *Administrative Law Judge*

This disciplinary proceeding was referred by the Department of Transportation (“Department” or “petitioner”), pursuant to section 75 of the Civil Service Law. Civ. Serv. Law § 75 (Lexis 2021). The Department alleges that during the overnight shift on October 4-5, 2019, Respondent improperly performed his duties resulting in an unsafe work zone for Department employees. The Department alleges that during the overnight shift on October 21-22, 2019, Respondent improperly performed his duties resulting in the death of a road repair worker. The Department further alleges that Respondent’s misconduct is prejudicial to the good order and discipline of the Department and that his conduct tended to as a result bring the City of New York or the Department into disrepute.

Due to the COVID-19 pandemic, trial was held remotely over five days using videoconferencing. Petitioner presented documentary and video evidence and called eight witnesses: P. Spoto; L. Nickey; M. Morris; C. Hawkins; A. Linck; F. Huertas; S. Saltas; and V. Mykhaylyuk. Respondent testified in his own behalf, presented documentary evidence, and the testimony of D. Williams.

For reasons discussed below, I find that the charges are sustained and recommend a penalty of termination.

BACKGROUND

Respondent is an assistant city highway repairer (“ACHR”) in road repair maintenance assigned to night resurfacing in the arterials unit. An ACHR can be assigned to one of three crews on a road repair project: prep, safety, and paving. Workers on the prep crew are responsible for preparing the worksite by ensuring that there is sufficient lighting. They evaluate the street lighting and erect lighting towers on the corner facing the work zone. Prep duties also involve lining up the trucks that contain the paving materials so that they can enter the jobsite (Tr. 54, 58). Safety entails putting out barrels, signs, or trucks to close off streets to divert, slow, or stop traffic. Workers assigned to paving are responsible for milling and raking the roadway and for shoveling asphalt (Tr. 117, 271, 288). Supervisors are assigned to each crew on a rotating basis. Regardless of the crew assignment, safety is considered to be everybody’s job (Tr. 53). Respondent has been employed by the Department for 12 years and has worked as ACHR for 6 years.

CHARGE ONE

October 4-5, 2019

On the evening of October 4, 2019, the arterials unit was assigned to road repair work near the 96th Street exit on the southbound side of the Westside Highway in Manhattan. Respondent and another ACHR, Ms. Nickey, were initially assigned to prep but were then asked to work on safety. Mr. Spoto testified that Respondent was usually assigned to spot trucks because he was unable to perform other jobs. He explained that spotting is not physical or labor-intensive and that was “basically all [Respondent] could do” (Tr. 35). Ms. Nickey, who has been an ACHR for seven years, was assigned to put out safety cones and signs around the work zone before road repair began. When she completed those tasks, she was assigned to work with Respondent, who was spotting a flow boy (an extra-long dump truck used for hauling asphalt) as it backed up to the paving machine (Tr. 22, 84).

The primary function of the spotter is to guide truck drivers as they drive in reverse to their location in or out of the work zone and to insure that the path that the truck will be driving is clear of pedestrians or obstructions. During night operations, spotters are given red illuminated wands, called light wands, to ensure that the truck drivers can see them. The spotter also uses arm motions

to communicate with the driver. All ACHRs regardless of their assignments receive annual safety training that includes how to properly spot a truck. Mr. Spoto explained that when backing up a vehicle, the spotter needs to be at least 10 to 15 feet behind the truck, keeping his eye on the driver through the driver side mirror at all times. The spotter should be positioned toward the driver's side facing the driver and should be able to see the entire back of the truck on the left and the right side. The speed of the truck is approximately 3-4 mph (Tr. 22, 84).

Ms. Nickey testified that prior to spotting the flow boy, she needed to make sure that traffic did not enter the lanes in the work zone and that she told Respondent not to back the truck up until she had passed behind the truck. She testified that she asked Respondent to watch her and that Respondent said that he understood and that he would watch her. However, when Ms. Nickey passed behind the truck, the truck began backing up causing Ms. Nickey to jump over a highway barricade into an active traffic lane to avoid being hit by the truck (Pet. Ex. 5; Tr. 84-85). She insisted that Respondent did not warn her that the trailer was close to hitting her and that he continued to back up the truck while she was behind it (Tr. 96). Ms. Nickey testified that she suffered injury to her knee and back as a result of jumping over the barrier. She was also pregnant at that time and believes that Respondent's action put her unborn child at risk. Following the incident, Ms. Nickey went on medical leave and returned to work in 2020. She has not performed any safety assignments since returning to duty and is assigned to streets rather than highways (Tr. 100).

Ms. Nickey characterized Respondent as a "horrible" co-worker. She elaborated that Respondent often sleeps on the job and sifts through garbage bins collecting bottles and cans for recycling deposits instead of doing his assigned work. She said that Respondent does not listen to directions and pretends not to understand English. However, Ms. Nickey testified that Respondent speaks English and she has had conversations with him in English (Tr. 107).

Mr. Spoto was Respondent's supervisor and observed Respondent spotting up the flow boy as it backed up. He observed that Respondent was not in the proper position to back up the truck and not able to see Ms. Nickey at that time. He explained that with a truck of this size, the proper position for the spotter is to stand 10 to 15 feet behind the vehicle so that the spotter has a clear line of sight of the truck and the driver while the truck is moving. He explained that if the spotter is in the wrong position, they will not be able to see workers that might be behind the truck and "people can get hurt" (Tr 43). He observed that Respondent was instead positioned beside the

truck on the driver's side of the truck approximately 10 feet from the back of the truck (Pet. Exs. 2, 9 at 32; Tr. 43). Mr. Spoto testified that when he saw the truck moving, he ran toward Respondent and yelled for the truck to stop. Mr. Spoto also gave a written statement where he reported that he observed Ms. Nickey "jump over the jersey barrier to avoid injury" because "[Respondent] was backing up the flow boy in an unsafe manner (side of truck and not in rear like he's trained)." Mr. Spoto asked Respondent why he was backing up the truck under those circumstances and Respondent did not offer an explanation. Mr. Spoto said that at that time, Respondent acted like he did not speak English very well. Mr. Spoto testified that he gave Respondent a written warning for backing up the truck improperly (Pet. Ex. 2; Tr. 26, 42).

Respondent offered a different account of the events of that evening. He recounted that before the incident, Ms. Nickey had a sign in sheet and asked him to sign in. He declined to sign in because she was not his supervisor and he believed that she was interfering with Respondent while he was working. He elaborated that Ms. Nickey does not listen and does whatever she wants. He testified that he was in the correct position on the driver's side "like always, making sure that [the driver] can see me through the mirror" (Tr. 429, 512). He stated that he observed Ms. Nickey on the passenger side waving the truck back with her hands and without use of a light wand. Respondent said that Ms. Nickey then turned around and had her back to the trailer and "at that moment, [Ms. Nickey] tripped on something and she fell" (Tr. 429). When Respondent saw Ms. Nickey fall, he waved the light wand attempting to stop the truck from backing up. He testified that he repeatedly yelled for the truck to stop and he screamed "stop, you see my wand?" Respondent asserted that Ms. Nickey was at fault for this incident stating that she "made many mistakes" such as not having a light wand and standing "to the right of the [driver]" (Tr. 435). On cross-examination, Respondent insisted that Ms. Nickey walked behind the moving truck where she tripped and fell (Tr. 516). Respondent denied that Mr. Spoto issued a written warning regarding this incident or that Mr. Spoto yelled at him. However, during his interview with the Advocate's office on November 27, 2019, Respondent stated that Mr. Spoto yelled at him following this incident (Pet. Ex. 18 A-N at 23).

Given the divergent version of events from Respondent and DOT witnesses, it is necessary for me to assess the credibility of the witnesses. When analyzing witness credibility, this tribunal may consider such factors as witness demeanor, consistency of witness' testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness'

testimony comports with common sense and human experience. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 4, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998); *see also Admin. for Children's Services v. Yu*, OATH Index No. 269/13 at 4 (Apr. 4, 2013), *aff'd*, NYC Civ. Serv. Comm'n Item No. 35136 (Dec. 9, 2013). I credit the testimony of the Department's witnesses over the testimony of Respondent. The Department witnesses both testified in a direct manner. Although Ms. Nickey's negative opinion of Respondent was evident in her testimony, I do not believe that this tainted her recollection of events. The opinions that she expressed regarding Respondent's work habits were based on her observations and her interactions with Respondent. Ms. Nickey testified about the events as she recalled them and her recollection was consistent with her written statement given shortly after the incident (Pet. Ex. 16).

Mr. Spoto was earnest and indicated when he did not understand a question or when he did not know the answer to a question. He observed the incident on October 4, 2019, and testified in a straightforward and credible manner, giving an objective account of what he witnessed. His testimony is consistent with the incident report he drafted on the date of the incident where he stated that he saw Respondent backing up the flow boy in an unsafe manner ("side of the truck") (Pet. Ex. 2). Moreover, Mr. Spoto's testimony and statement corroborated Ms. Nickey's version of events.

On the other hand, I found Respondent's testimony regarding these events to be self-serving and did not comport with common sense. Further, his account was uncorroborated and was not consistent with the accounts of other witnesses. Given Ms. Nickey's experience as ACHR, I find it unlikely that she would begin to back up a large truck at night without a wand and that she would then turn her back to the truck as it moved toward her. Respondent testified that Ms. Nickey suddenly fell when she was behind the truck however, this is not corroborated by Mr. Spoto, who witnessed the incident. Respondent also testified that Mr. Spoto did not yell at him following the incident but admitted during a previous interview Mr. Spoto did yell at him. Given that Respondent faces significant penalty if these charges are sustained, I find that he has motivation to be untruthful and to misrepresent his conduct during the incident.

Respondent's testimony regarding his English proficiency is a matter that reflects on his credibility. Respondent testified with the assistance of a Spanish language interpreter and stated that he does not "understand a word of English" (Tr. 473). Yet throughout his testimony,

Respondent referenced instances where he spoke in English to his co-workers. Regarding this incident, Respondent testified that he attempted to stop the truck from backing up by yelling “stop” and “don’t you see my wand?” In addition, there was significant testimony from the Department’s witnesses regarding Respondent’s ability to speak English. Mr. Spoto, Ms. Nickey, and Respondent’s co-workers expressed certainty that Respondent speaks and understands English based on conversations and interactions with him. ACHR C. Hawkins testified that “[Respondent] would like you to think it was a language barrier” but that she has had “full conversations with him” in English (Tr. 228). Several Department witnesses testified that Respondent conveniently feigned his inability to speak or understand English when he did not want to engage with co-workers or supervisors, or when there was an attempt to discipline or correct him. AHCR S. Saltas testified that when Respondent was in trouble “suddenly he forgot [how] to speak English” (Tr. 329). Likewise, Mr. Spoto referenced a similar experience with Respondent. In light of the inherent hazards of the overnight road repair work, it is unlikely that Respondent is unable to communicate with his co-workers and supervisors.

Further, during his interview with the Advocate’s office, Respondent acknowledged that he had received annual safety training and classroom training on how to spot a truck. He stated that the class was given in English and declared that he understood the instructions given in class and disclosed that he also reviewed the book for the class that was also in English. He claimed that he did not understand everything (Pet. Ex. 18 A-N at 36). Based on witness testimony and his admissions, Respondent’s claim that he does not understand any English is not credible and this misrepresentation casts doubt on the veracity of his testimony.

Based on the credible evidence presented, Charge One, as it pertains to this incident should be sustained.

October 21-22, 2019

On October 21-22, 2019, Respondent’s overnight arterials unit was assigned to paving and road repair at 88th Street between York and East End Avenues in Manhattan. Mr. Spoto was the paving supervisor for the job. Respondent was assigned as spotter for the trucks entering the jobsite. Mr. Spoto explained that there are two paving runs in paving operations. During the first pass, the dump truck carrying asphalt is driven in reverse while being guided into the work zone

with the assistance of a spotter. The truck is backed up or attached to the asphalt paving machine (“APM”) and the asphalt is then dumped into the APM. The truck is driven out of the work zone until the second pass. The screw man then walks next to the APM and regulates the amount of asphalt that is then dispensed onto the street from the APM and the rakers and shovelers work behind the APM to smooth out the asphalt to the end of the street or work zone. When this first pass is completed, the workers then prepare for the second pass which involves backing the APM to the beginning of the work zone. The truck is again guided in with the assistance of the spotter to the APM machine and additional asphalt is dumped into the APM. The workers continue raking and shoveling behind the APM on the second pass to the end of the work zone (Tr. 73, 190-91).

Respondent was assigned to spot the dump truck and guide it to the APM. Mr. Calle-Abril was wearing a reflective vest and was assigned as a shoveler and worked behind the APM to cover any gaps in the asphalt. After the completion of the first pass, Respondent was supposed to guide the truck from the corner of First Avenue and 88th Street to 88th Street and York Avenue for the second pass (Tr. 131, 341). Mr. Spoto testified that he watched Respondent backing up the truck to enter the work zone and Mr. Spoto warned the workers the truck was approaching (Tr. 45). ACHR M. Morris was operating the screw that evening and was 40 feet away from the truck. He testified that ACHR E. Calle-Abril “screamed out.” Mr. Morris turned to see Mr. Calle-Abril getting hit by the truck. The rear wheels of the truck had run over Mr. Calle-Abril’s legs and he was caught under the truck. Mr. Morris testified that he was “screaming and yelling trying to get him to stop so at least the front wheels wouldn’t run over [Mr. Calle-Abril].” When Mr. Morris finally got the attention of the driver, the front wheel had also run over Mr. Calle-Abril. Mr. Calle-Abril died at the scene. Mr. Morris testified that there was no one backing up the truck at the time of the accident and that Respondent was not “anywhere around the truck.” He elaborated that Respondent was standing in the intersection “far away from what happened” (Tr. 129, 130, 135, 140, 148).

Several workers observed Respondent directing the truck into the work zone with his light wand and observed that Respondent then left the truck while it was backing up instead continuing to guide the truck while it was inside of the work zone. Mr. Saltas was working as a raker that evening and he observed the interaction between the truck driver and Respondent. He related that when the truck moved from First Avenue and turned the corner, into 88th Street in reverse, the driver’s window was open and the driver asked Respondent to back him up. Respondent then

walked up to the driver's window and told the driver to "go back." After that, Respondent left the truck and went to a trash can to collect bottles (Tr. 325, 328, 355). Ms. Hawkins also observed Respondent with a light stick directing the truck into the work zone. She testified that last time she saw Respondent prior to the accident, he was walking away from the truck after it entered 88th Street (Tr. 170, 173).

Several workers at the jobsite observed that when Respondent was spotting the truck, he was doing so incorrectly. Mr. Saltas noted that Respondent was standing at driver's window when directing the driver which he asserted was not the proper position to spot or back up the truck. He elaborated that "when you're a spotter, you're supposed to walk on the left side of the truck, right at the corner, at the end of truck, so the, the driver can see you as you're backing up so he can have full visual sight of what's behind him." He added that Respondent did not do that (Tr. 325). ACHR F. Huertas also observed Respondent spotting the truck. He testified that Respondent was spotting the truck incorrectly because he was backing up the truck from the front of the truck. Mr. Huertas did not correct Respondent because in his experience, Respondent got angry and did not listen to constructive criticism or correction. When Ms. Hawkins recounted a similar experience, testifying that when she previously attempted to assist Respondent, he told her "shut up lady" or "mind your business" (Tr. 177, 280, 283). Mr. Morris testified that Respondent can be combative. He described Respondent as "not one of the team players" adding that Respondent "doesn't want to do what he's assigned to do" (Tr. 132).

After the accident, workers called 911 and their supervisors. The workers were angry, shocked, and saddened by the accident and Mr. Calle-Abril's death. Highway Repairer A. Linck noted that the anger was directed at Respondent because the workers believed that that he did not do his job. He offered that workers were upset because Respondent was supposed to be spotting the truck adding that "if you're spotting the truck properly, there's pretty much no way possible somebody could be behind the truck while you're backing up a truck" (Tr. 245).

During cross-examination, Mr. Huertas said he believed that the driver and Respondent were both at fault (Tr. 300). Mr. Linck opined that the accident could have occurred if the driver ignored a spotter's signals and drove past him. However, Mr. Linck reiterated that if the spotter is doing his job properly, he should be able to stop the driver or notify the driver that there are workers behind the truck (Tr. 249).

The Department witnesses characterized Respondent as lazy and remarked that he often slept on the job or left his post. Ms. Hawkins testified that Respondent often leaves his position, sleeps while on duty, and does not actively regulate the flow of traffic around work zones when assigned (Tr. 183). Mr. Linck also observed that Respondent regularly slept while on duty (Tr. 246). Mr. Huertas said that he spoke to Respondent “many times advising him to be careful” and had observed Respondent “nodding out on his feet with the [light] wand in his hand” (Tr. 283). Mr. Saltas testified that Respondent’s work performance was “nonexistent” and that Respondent was never doing his job. He elaborated that Respondent was either asleep or looking for bottles and cans in garbage cans or dumpsters and that workers did not want to work with him (Tr. 330, 342, 355). Several workers testified that they alerted the supervisors to Respondent’s work habits and the supervisors spoke to Respondent (Tr. 249, 330). Ms. Hawkins testified that she asked the supervisors not to assign her to work with Respondent because she did not believe it was safe to work with him (Tr. 221, 223).

Mr. Mykhaylyuk is a city research scientist for the Department’s Safety and Health unit. His duties include investigating accidents, and workplace incidents, and conducting job hazard assessments. He is also charged with developing interactive training for employees and responding to workplace complaints involving indoor air quality, exposure to chemicals, and anything related to safety and health (Tr. 364). Mr. Mykhaylyuk was informed that an accident occurred on October 22, 2019 at 1:00 a.m. on eastbound East 88th Street, Manhattan. He reported to the accident scene later that morning and determined that cameras on nearby buildings captured part of the accident. Mr. Mykhaylyuk inspected the dump truck that was involved in the accident and interviewed workers present to determine the factors that contributed to the fatal accident (Tr. 365, 373). Mr. Mykhaylyuk also reviewed the closing report issued by the NYPD for this incident which concluded that the cause of this accident was “pedestrian error.” The report stated that the truck was traveling “eastbound on East 88th Street in reverse on the milled portion of the roadway without assistance of a [spotter]” and struck and ran over a New York City DOT worker (Tr. 370; Pet. Ex. 7). The Department introduced video footage from a security camera from a building on East 88th Street. In this footage, the dump truck is depicted travelling in reverse on East 88th Street and no spotter is visible guiding the truck. Mr. Mykhaylyuk reviewed the footage and testified that there was no spotter guiding the truck on East 88th Street and that he did not see a light wand or anything illuminated that would guide the truck driver. Mr. Mykhaylyuk testified that the

absence of a spotter was a “major factor” in the accident that resulted in Mr. Calle-Abril’s death. Mr. Mykhaylyuk also testified that he was aware of the October 4 incident involving Ms. Nickey and Respondent but did not offer any conclusions regarding that complaint (Pet. Exs. 20 A-C; Tr. 385).

Respondent testified that he remembered the accident “like it was yesterday.” He was assigned to be a spotter but there were no co-workers assisting with traffic or truck crossing and there were no other spotters (Tr. 439). According to Respondent, prior to the accident, the workers started whistling, indicating to the truck driver that he can start backing up but Respondent waited until the street was clear (Tr. 442). Respondent described that he was on the left side driver’s side of the truck and made sure to look in the driver’s mirror. He was holding the light wand and confirmed that the driver was looking at him. He stood 10 to 12 feet “diagonally” to ensure that the driver could see him and that he could make sure that no one was behind the truck while it was backing up. Respondent asserted that he used his light wand and his hand to let the driver know that he could back up (Tr. 443). Respondent recounted that while he was spotting the truck, it stopped suddenly and then started backing up at a very fast pace. Respondent said he screamed for the truck to stop but the driver’s window was closed (Tr. 445). He said that he moved out of the way to avoid getting hurt but as the truck passed by, he could hear that the driver was playing music at a very high volume. Respondent said that the driver saw him. Although Respondent claimed that he was previously behind the truck, he said that he was no longer able to see if anyone was behind the truck while it was moving in reverse in the work zone. He explained that he did not follow the truck because “it would have been impossible to catch [it]” (Tr. 447).

Respondent acknowledged that he did not warn any of his fellow workers that the truck was backing up without assistance, explaining that the lighting was poor and “it was very dark so, when the truck passed me, I couldn’t see anyone to tell them.” He also asserted that the passing truck blocked his vision (Tr. 484). Respondent recalled that the beeping sound to indicate that the truck is going in reverse was not working. He also claimed that there were no reflectors on the truck (Tr. 444). Respondent explained that he did not tell any supervisor that the truck was speeding in reverse because there was no one there and it was too dark. He also offered that he was nervous and was “not in a condition to look for a supervisor.” Respondent did not warn any of his co-workers at the site about the speeding truck because it happened so fast that he did not

have enough time to call out to them (Tr. 486). Respondent stated that after the truck passed him, he walked to the corner to let another truck in (Tr. 503).

While heading toward the corner, Respondent recalled seeing Mr. Morris running and screaming and Respondent heard that Mr. Calle-Abril had been hit by the truck. Respondent testified that he was surprised by the news so he called a friend that also knew Mr. Calle-Abril and told him about the accident. He testified that he subsequently confronted the driver and asked him “what did you do?” and the driver did not respond. Respondent testified that his co-workers then began saying insulting things to him and blamed him for the accident (Tr. 449, 509).

I credit the testimony of Respondent’s co-workers over the testimony of Respondent. The testimony of the ACHRs who observed the accident was logical and presented a sequence of events that was credible and corroborated by other witnesses. Moreover, they did not have a motive to be untruthful.

Respondent, on the other hand, offered various explanations to address the Department’s evidence against him, however his explanations were unavailing. For instance, after reviewing the footage from the security cameras, Respondent explained that he was not visible in the videos because he was on the left side of the truck, which was not the side depicted in the video. He elaborated that he is always on the driver’s side of the truck when spotting “so it is not possible that a camera was able to show me. That’s the reason why I cannot even see myself in the video” (Tr. 457). However, this explanation contradicts his prior testimony where he asserted that he always stands behind the truck and is contrary to Department training which instructs spotters to be positioned behind the truck when spotting, not beside the truck. Therefore, if Respondent were in the proper position as he claimed, the camera would have captured him behind the truck, guiding it in reverse toward the paving machine.

During his testimony, Respondent stated that the truck did not have any alerts or noises signaling that it was moving in reverse and that the truck lacked reflectors. However on November 20, 2019, Respondent gave a written statement to the public employee safety and health unit of the Department of Labor (“PESH”) and did not mention that the truck did not have any alerts or noises signaling that it was moving in reverse (Resp. Ex. A). He also neglected to reference these safety deficiencies during his interview with the Advocate’s office on November 27, 2019 (Resp. Ex. 18A-N). I find that Respondent’s statements, made within six weeks of the accident, to be more

reliable than his testimony given more than one year after the accident particularly when the newly recalled information might tend to shift responsibility for the accident away from Respondent.

Respondent also denied that he left his spotting assignment to look for bottles and cans claiming that as a spotter he could not leave his position. However, Respondent admitted that he left the truck after it passed him in reverse and at a fast rate of speed and went to the corner to let another truck into the work zone. Even crediting Respondent's version of events, this conduct was negligent.

Based on the credible evidence presented, Charge One, as it pertains to this incident should be sustained.

CHARGES TWO – FIVE

The Department charged Respondent with violation of the following provisions of its Code of Conduct: Paragraph 47 - Neglecting or failing to use and maintain all appropriate safety measures and/or equipment for the protection of life and property while in performance of duty; Paragraph 2 - Engaging in conduct prejudicial to the good order and discipline of DOT; and Paragraph 1 - Engaging in conduct tending to bring the City of New York, DOT or any other City agency into disrepute. To the extent that these charges relied on the factual allegations addressed in Charge One, they are cumulative and sustained consistent with the preceding analysis. Where charges are sustained, there would be no additional penalty. See *Savello v. Frank*, 48 A.D.2d 699 (2d Dep't 1975) (petitioner should not receive two punishments for one offense when the two departmental rules cited covered identical conduct and were duplicative); *Human Resources Admin. v. Mays*, OATH Index No. 1299/11 at 2 n.1 (Mar. 16, 2011), *modified on penalty*, Comm'r Dec. (Apr. 19, 2011), *rev'd*, NYC Civ. Serv. Comm'n Item No. CD 12-8-Respondent (Jan. 31, 2012) ("This tribunal has held that if the same conduct violates multiple provisions of petitioner's executive order, such conduct will only exact a single penalty"); *Fire Dep't v. Feret*, OATH Index No. 885/00 (Mar. 10, 2000).

FINDINGS AND CONCLUSIONS

1. The Department established that during the overnight shift on October 4-5, 2019, Respondent performed his assigned duties improperly in violation of paragraph 31 of the CODE resulting in injury to a co-worker.

2. The Department established that during the overnight shift on October 21-22, 2019, Respondent performed his assigned duties improperly in violation of paragraph 31 of the CODE resulting in the death of a co-worker.
3. Charges Two through Five are cumulative charges and are sustained consistent with the analysis in Charge One.

These findings of fact are final pursuant to section 1046(e) of the New York City Charter.

Charter § 1046(e) (Lexis 2021).

RECOMMENDATION

Upon making these findings, I obtained and reviewed an abstract of respondent's personnel record for purposes of recommending an appropriate penalty. Respondent began his tenure with the NYC Department of Transportation as a Stock Worker in April 2009. He became an Assistant City Highway Repairer in June 2015. For the period of March 2015 to December 2015, Respondent received overall seasonal performance rating of "conditional." He received overall ratings of good to very good in all subsequent evaluations. Respondent has been subjected to discipline on one occasion in July 2019, where he was suspended for 10 business days for negligent operation of a city vehicle, failure to follow supervisor directives, and improper performance as the result of a vehicular accident with another DOT employee. Subsequent to the accident on October 22, 2019, Respondent served a pre-trial suspension from October 23, 2019 through November 22, 2019. Since Respondent's reinstatement, he has been on paid leave pending the outcome of this trial.

The Department now seeks to terminate Respondent's employment. The Department established that on two occasions in October 2019, Respondent failed to properly perform his duties as a spotter and that misconduct endangered the health and safety of his co-workers. The first incident resulted in injury to a co-worker. The second incident resulted in the death of Respondent's co-worker. I find the fatality to be an aggravating factor that must be considered in this penalty recommendation. I believe that termination is appropriate given the nature of the Respondent's misconduct and noting that the consequences of his persistent failure to properly perform his duties have tragically escalated to loss of life.

This tribunal has recommended termination in instances where an employee has failed to perform their duties properly and such failure resulted in a threat to the health and safety of co-workers or constituent groups. *See Dept. of Correction v. Hwee*, OATH Index No. 1185/04 (Aug. 10, 2004), *aff'd*, Civ. Serv. Comm'n Item No. CD06-34-SA (Mar. 21, 2006) (judge recommended termination where a correction officer was found to have failed to efficiently perform his duties resulting in a fatal inmate assault); *Health & Hospitals Corp. (Harlem Hospital Ctr.) v. Triana*, OATH Index No. 282/17 at 26 (May 30, 2017), *quoting*, *Health & Hospitals Corp. (North Central Bronx) v. Doxen*, OATH Index No. 1577/01 at 18 (May 4, 2001) (termination of employment reflects “the seriousness of the offenses, the risks of harm to patients and the Corporation’s obligation to protect patients from staff who fail to exercise proper standards of care”).

A Department supervisor testified that in road repair work, safety is everybody’s job. As such, the highway repairers rely on each other to perform their respective functions properly to ensure each other’s safety. The Department must be able to trust that its employees will exercise care to perform their duties properly and in compliance with instructed safety protocols to create and maintain a safe work zone. Based on Respondent’s proven misconduct, the Department has lost confidence in his ability or inclination to properly perform his duties.

Accordingly, I recommend that Respondent’s employment be terminated.

Joycelyn McGeachy-Kuls
Administrative Law Judge

October 8, 2021

SUBMITTED TO:

HENRY GUTMAN
Commissioner

APPEARANCES:

JEREMY WEINSTEIN, ESQ.
Attorney for Petitioner

AARON S. AMARAL
Attorney for Respondent



November 12, 2021

Jose Carranza-Piscoy
[REDACTED]

Dear Jose Carranza-Piscoy:

After a complete review of the record and the Report and Recommendation of the Administrative Law Judge duly designated to conduct a disciplinary hearing on the Charges and Specifications dated March 16, 2020, I find you guilty as reflected in the Report and Recommendation dated October 8, 2021, a copy of which is enclosed.

The sanction imposed upon you is termination of your permanent services as an Assistant City Highway Repairer effective **November 12, 2021**, close of business.

Under the provisions of Sections 76 of the New York Civil Service Law, you are entitled to appeal this determination by application either to the New York Civil Service Commission or to a court in accordance with the provisions of Article 78i of the Civil Service Law and Rules. If you elect to appeal the Commission, such appeal must be filed in writing within 30 days of receipt of this determination. A decision of the Commission is final and conclusive.

Additionally, your final pay will be computed in accordance with departmental regulations.

Your health insurance coverage will cease and a COBRA package will be mailed to you from NYCAPS Central to continue health coverage. Also below are websites you may want to visit and/or contact for health insurance options:

nystateofhealth: Website: <https://nystateofhealth.ny.gov> Telephone #: (855) 355-5777

NYC Resources: Website: <https://www1.nyc.gov/nyc-resources/categories.page>

NYC Care: Website: <https://www.nyccare.nyc> Telephone #: (646) 692-2273

You may also want to visit and/or contact NYCERS at (347) 643-3000 or by email at www.mynycers.org for information about your pension due to separation from City service.

Very Truly Yours,
[REDACTED]

Henry B. Gutman
Commissioner

cc: D/C J. Stroughter; Acting D/C M. DiVerniero; V. Jimenez; H. Holloway; OATH Trial Calendar, case file

**THE CITY OF NEW YORK
CIVIL SERVICE COMMISSION**

In the Matter of the Appeal of

JOSE CARRANZA-PISCOY

Appellant

-against-

DEPARTMENT OF TRANSPORTATION - DOT

Respondent

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

CSC Index No: 2021-0857

DECISION

JOSE CARRANZA-PISCOY (“Appellant”) appealed from a determination of the Department of Transportation (“DOT”) 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 December 13, 2021. Appellant’s brief was received on January 3, 2022, DOT’s brief was received on January 28, 2022, and Appellant’s reply brief was received on February 7, 2022.

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: March 9, 2022