Brooklyn Community Board 13 v. Greenberg

OATH Index No. 1574/22 (Dec. 5, 2022)

Petitioner sought to remove a community board member from his position for intentionally making false statements on his application to join the board. Petitioner did not establish the charged misconduct. Dismissal of charges recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
BROOKLYN COMMUNITY BOARD 13
Petitioner
- against -
RONALD GREENBERG
Respondent

REPORT AND RECOMMENDATION

JONATHAN FOGEL, *Administrative Law Judge*

This proceeding was referred by Brooklyn Community Board 13 ("Board") pursuant to a resolution adopted on October 27, 2021 (ALJ Ex. 2).[1] *See* Charter § 1150(2) (Lexis 2022). Petitioner alleges that respondent Ronald Greenberg, a Board member, committed misconduct by intentionally misstating material facts, and engaging in deception or fraud, on his application to join the Board. Specifically, petitioner alleges respondent falsely stated that he served as a member of a committee of the Board, and that he was Corresponding Secretary of the 60th Precinct Community Council ("Council") from 2010 to present (ALJ Ex. 1). Petitioner seeks respondent's removal from the Board (ALJ Ex. 2).

[1] The resolution did not cite a Board rule authorizing this tribunal to hear this matter. At trial, the parties did not contest jurisdiction. I find jurisdiction proper pursuant to Mayoral Executive Order No. 32 of 1979, which provides that this tribunal "may conduct such trials upon the written request and delegation of the head of any City Agency." *See* Mayoral Exec. Order No. 32 (July 25, 1979). A community board is a "City Agency," which is defined in the NYC Charter as a ". . . board or commission . . . the expenses of which are paid in whole or in part from the city treasury." *See* Charter §§ 1150(2); 2800(f), (g). The Department of Citywide Administrative Services represented petitioner at the trial.

At a five-day trial concluding in July 2022, held remotely via videoconference, petitioner relied on documentary evidence and called seven witnesses. Respondent presented documentary evidence, called two witnesses, and testified on his own behalf.

For the reasons set forth below, I find that petitioner failed to establish the charges and recommend that they be dismissed.

MOTION TO DISMISS

Respondent moved to dismiss the charges on two grounds: first, that the Board's by-laws do not authorize removing respondent from the Board for the charged misconduct; and second, that respondent cannot be removed because the charged misconduct pre-dates respondent's membership on the Board (Resp. Br. at 3). For the following reasons, respondent's motion is denied.

Section 2800(b) of the New York City Charter ("Charter") allows a community board to remove an appointed member "for cause." *See* Charter § 2800(b) (Lexis 2022) ("An appointed member may be removed from a community board for cause, which shall include substantial nonattendance at board or committee meetings over a period of six months . . ."). Notwithstanding the broad language of section 2800(b) of the Charter, respondent argues the Board's by-laws limit the Board's authority to remove a member "for cause" to seven reasons, none of which include making a false statement on an application to join the Board (Resp. Br. at 2-3; Pet. Ex. 1).

The Board's by-laws provide that "a member will be removed from the Board for cause" and provide the following list:

1. Three consecutive unexcused absences, or more than 25 percent non-consecutive unexcused absences or lateness's in one year, unless notification has been received by the Board office prior to the scheduled meeting(s), or at the discretion of the Chair of the Board.
2. Failure to adhere to these by-laws and their provisions.
3. Failure to declare a conflict of interest;
4. Soliciting, receiving, or accepting any remuneration, exchange for a vote and/or favorable or unfavorable disposition on any item under consideration by the Board;
5. Any form of Board representation not authorized by the Chair or the full Board in violation of Section 1(a) above;

6. Felony conviction during term of service on the Board;
7. A consistent pattern of behavior unbecoming a Board member.

(Pet. Ex. 1 at 5, Article IV, Section 1).

The list does not contain an "and" before the last item. Respondent contends the seven reasons provided in the by-laws comprise the exclusive basis upon which to remove a member (Resp. Br. at 6).

Respondent relies on *Alabi v. Community Board No. 2 of Brooklyn*, 17 A.D.3d 459 (2nd Dep't 2005), where the Second Department found that a community board erroneously removed its district manager by a vote of the majority of the community board members present, in violation of its by-laws, which permit removal of the district manager only by a majority of the entire membership of the Board. *See Id.* at 459-60. Although the by-laws also contained a more general provision permitting the Board to take action by a majority of those present, the Court held that the more specific provision controlled. The Court also noted that the specific provision requiring removal by a majority of the entire Board conflicts with the general provision in the Charter permitting the Board to take action by a majority of those present, but held that the Board has authority to adopt its own by-laws, and that respondent had not argued that the Board lacked authority to impose a requirement for the removal of the district manager that is greater than that required for other actions. *Id*. at 460. Respondent argues that the Board is similarly bound by its by-law's more restrictive rules for removing a member (Tr. 884-85).

Petitioner counters that the by-laws do not limit any of the Board's authority granted to it by the Charter. The by-law's first two sentences provide:

> The By-Laws for the Brooklyn Borough President's Community Boards shall conform to all New York City Charter provisions pertaining thereto. Nothing in these By-Laws shall be construed as to change, modify, or amend the New York City Charter.

(Pet. Ex. 1 at 1).

Petitioner asserts that interpreting the by-laws to prevent the Board from exercising its power under the Charter to remove a member "for cause" would conflict with the by-law's provision that prohibits construction of the by-laws in a manner that would "change, modify, or amend" the Charter (Pet. Br. at 4-5). Moreover, respondent's argument would prevent the Board

from removing a member for serious misconduct, such as a conviction for a crime of dishonesty, that would be clear grounds for removing other public officers (Pet. Br. at 4, 6).

Respondent's motion to dismiss is denied. Article IV, section 1 of the by-laws, read in isolation, appears to indicate that the basis for removal is limited to seven discrete types of misconduct. However, this section must be read together with the prefatory language to the by-laws, which states that "nothing" in the by-laws is to be construed "as to change, modify, or amend the New York City Charter." The Charter permits a community board to remove a member "for cause, which shall include" substantial non-attendance at meetings. This language is not exclusive and vests broad authority in a community board to remove one of its members. Respondent's narrow construction of Article IV, section 1 of the by-laws would "change, modify, or amend" the Charter, which the by-laws prohibit, and would impermissibly constrict the right of the community board to remove one of its members for cases of serious misconduct not specified in Article IV, section 1 of its by-laws, including lying on an application.

Respondent's reliance on *Alabi* is misplaced. The Court held that the community board had discretion to adopt its own by-laws. However, it does not appear that the by-laws in that case contained an express provision stating that they were not to be construed to change, amend, or modify the Charter. This provision, present in this case, is controlling.

Respondent also argued the charges should be dismissed because the allegation that he gave false information on his application predated his membership on the Board (Tr. 913-14). This argument is unavailing. The Board's power to remove members "for cause" under the Charter does not specify any time frame for when the misconduct must be committed. *See* Charter § 2800(b). It does not require the misconduct warranting removal to have occurred during a member's service on the Board. Moreover, even assuming that the misconduct must occur during Board membership, respondent's motion should be denied. This tribunal has held that lying on an employment application as part of the employment process, is misconduct. *See Office of the Comptroller v. Gonzalez*, OATH Index No. 1883/17 at 13-15 (Apr. 13, 2018). The application forms the initial basis for consideration of the employee for the position sought and becomes part of the employee's personnel record. Respondent's application to join the Board should be considered part of his membership. Respondent provided no authority to the contrary.

In sum, respondent's motion to dismiss the charges is denied.

ANALYSIS

The charges stem from respondent's appointment to Brooklyn Community Board 13 in May 2021. On February 12, 2021, respondent submitted his application for Board membership to the Brooklyn Borough President's Office (Pet. Ex. 19). In response to a question about whether he was currently serving, or had previously served, as a member of a committee of the Board, respondent wrote "YES Public Safety, Parks, Environment and Sanitation, and Education, Library, and Youth Services Committees" (*Id*).[2] Under "Community Activities," respondent wrote that he served as "Corresponding Secretary/Member" of the 60th Precinct Community Council from "2010 to present" (*Id*.). Respondent's application contained an affirmation that all of the information on the application was true to the best of his knowledge (Tr. 270-71; Pet. Ex. 18).

Petitioner charges respondent with misconduct unbecoming a community board member for making intentional misstatements of material fact on his Board application (Charge 1), and for engaging in deception or fraud on the application (Charge 2) (ALJ Ex. 1). Petitioner alleges that respondent falsely stated that he served as a member of a Board committee. Petitioner further alleges that respondent falsely stated he served as Corresponding Secretary of the 60th Precinct Community Council from 2010 to present. Respondent denied the charges, asserting the information on his application was true.

Statement Concerning Membership on a Board Committee (Charge 1, Specification 1; Charge 2, Specification 1)

Respondent attended Board committee meetings prior to his appointment in May 2021 (Tr. 158). At issue was whether respondent was also a member of those committees. The parties introduced minutes from 12 of the Board committee meetings between December 2008 and January 2011.[3] The minutes divide attendees into board members, community members, and

[2] Section 2800(i) of the Charter provides that "Each community board may create committees on matters relating to its duties and responsibilities. It may include on such committees persons with a residence or significant interest in the community who are not members of the board, but each such committee shall have a member of the board as its chairperson."

[3] The 12 committee meeting minutes introduced were three Public Safety ("PS") meetings (December 2008, February 2009, January 2011), seven Education, Library, and Youth ("ELY") meetings (January 2009, February 2009, March 2009, April 2009, May 2009, November 2010, January 2011), one Health, Aging, and Social Service ("HAS") meeting (December 2008), and one Parks and Recreation ("PR") meeting (January 2011) (Pet. Exs. 7-12; Resp. Exs. B-E, J, K). Petitioner also introduced minutes from a November 2014 Environment and Sanitation meeting and an August 2016 Education and Library meeting (Pet. Exs. 16, 17). However, I did not consider the minutes from the 2014 and

guests. They distinguish community members that are "present" and "absent," and also reflect which community members are excused (Tr. 479-81). Seven of the 12 minutes introduced into evidence state that respondent was a "community member" of those committees.[4] Two sets of minutes list him as a guest, and three do not mention him at all.[5] Petitioner argues that a "community member" is not the same as being a member of a committee. Petitioner also argues that respondent was mistakenly listed as a community member, based in part on the remaining five sets of minutes that did not list respondent as a community member.

Five of the 12 committee meeting minutes that were introduced have a corresponding sign-in sheet. The sign-in sheets for the January 2009 ELY meeting and February 2009 PS meeting have a pre-printed list of community members that does not include respondent's name (Resp. Exs. G, L). The minutes for those meetings, however, list respondent as a "community member" (Resp. Exs. C, D). Respondent manually wrote in his name under the pre-printed list of community members on both sign-in sheets (*Id*.). On the February 2009 PS sign-in sheet, respondent also wrote "Add my name please - thank you" (Resp. Ex. L). The sign-in sheet and the minutes for the February 2009 ELY meeting do not list respondent (Pet. Ex. 7). At the April 2009 ELY meeting, respondent signed in on the sign-in sheet as a guest (Pet. Ex. 9). The January 2011 ELY meeting, the fifth meeting with a sign-in sheet, has a pre-printed list of "committee members" that includes respondent (Pet. Ex. 11). Respondent did not sign his name on the sign-in sheet (*Id*.). The minutes for that meeting state he is part of the "community members absent" (*Id*.).

Petitioner and respondent presented a total of four witnesses to testify about whether respondent was a "community member" of a committee. The witnesses were current or former members of the Board: Eddie Mark, Marion Cleaver, Charles Reichenthal, and Lucy Mujica-Diaz. They had different views as to whether respondent previously served as a committee member. Ms.

2016 meetings, as those meetings occurred after an apparent 2011 change in the Board's by-laws which excluded members of the public from serving on committees (Pet. Ex. 4 at 6; Tr. 559).

[4] Respondent is listed as a community member at the following seven meetings: December 2008 PS, December 2008 HAS, January 2009 ELY, February 2009 PS, November 2010 ELY, January 2011 ELY, and January 2011 PR (Pet. Ex. 11; Resp. Exs. B-E, J, K).

[5] Respondent is listed as a guest at the April 2009 and May 2009 ELY meetings (Pet. Exs. 8, 9). Respondent was not listed on the minutes of the February 2009 and March 2009 ELY meetings, and the January 2011 PS meeting (Pet. Exs. 7, 10, 12).

Cleaver, and Mr. Reichenthal believed he was considered a committee member. Mr. Mark and Ms. Mujica-Diaz said he was not.

Mr. Mark, who chaired the Board from 2010 through 2014, and is its current District Manager,[6] testified that respondent was never a member of a Board committee (Tr. 156-57). Non-board members could serve as committee members "usually" after being appointed by the Chair or District Manager (Tr. 133, 135). Mr. Mark did not appoint respondent to a committee while he was Chair (Tr. 117-18, 133, 135). He did not believe the District Manager, Charles Reichenthal, appointed respondent either, because Mr. Reichenthal did not tell Mr. Mark that he did so (Tr. 135, 153). The process for appointing non-board members to committees was not in writing until 2021, when the Board added a provision to its by-laws about appointment of "public [committee] members" (Tr. 124-25; Pet. Ex. 1 at 1, Article 2, section (1)(d); Resp. Ex. F).

However, Mr. Mark also said that non-board members who served on a committee would be listed in the minutes as "community members" (Tr. 170, 178). After reviewing minutes where respondent was listed as a "community member" for certain committees, as well as a pre-printed sign-in sheet listing respondent as a committee member at one meeting, Mr. Mark did not know why that happened (Tr. 155, 167, 169-70). He believed the minutes were mistaken, because no "public committee members" were appointed between 2010 and 2014 (Tr. 150). He also thought respondent was incorrectly listed as a community member at the January 2009 ELY and January 2011 ELY meetings, because ELY meetings between February 2009 and May 2009 omitted respondent or listed him as a guest (Tr. 148-49, 189-90). The minutes did not mistakenly list other persons as community members, however, and Mr. Mark acknowledged it was "possible" that respondent was not mistakenly listed either (Tr. 169-71, 173). He never spoke with respondent about wanting to serve on a committee (Tr. 157).

Marion Cleaver, who chaired the Board from 2006 through 2010, had a different account of how non-board members joined a committee at that time. According to Ms. Cleaver, members of the public with an interest in a committee could become members of that committee (Tr. 486, 501). They did not need to be appointed (Tr. 464, 501-03). Ms. Cleaver served on a committee without being appointed before becoming a Board member (Tr. 446-47, 501-02). Allowing interested members of the public to serve on committees was "tradition," and not written into the by-laws (Tr. 486).

[6] The Chair is a volunteer position with oversight over the District Manager, who is a paid city employee (Tr. 119).

Like Mr. Mark, Ms. Cleaver said that "community members" were non-board members serving as members of committees (Tr. 478, 483, 494-95). She did not believe respondent was a community member, and thought he was a guest (Tr. 467, 488). However, after reviewing minutes of committee meetings listing respondent as a "community member," Ms. Cleaver thought the Board considered respondent a member of those committees (Tr. 483, 496). The minutes also listed other people as community members whom Ms. Cleaver considered committee members (Tr. 478, 483, 486-87, 494-95). She considered community members to be members of the public who were "very interested in what transpired," as opposed to guests who were "just there" (Tr. 466, 483). Committee members who did not attend several meetings and were not "excused" would no longer be members of that committee (Tr. 481).

Ms. Cleaver did not appoint respondent to a committee as a "public member" (Tr. 457). She did not see respondent at a committee meeting, but she did not attend every meeting (Tr. 461-62, 488). However, she attended at least one committee meeting where respondent was listed in the minutes in attendance as a community member (Tr. 503-04; Resp. Ex. C).

Consistent with Ms. Cleaver's testimony, Charles Reichenthal testified that non-board members were not appointed to join committees, but could volunteer to serve on a committee and were considered committee members (Tr. 726, 749). Mr. Reichenthal, who served as the Board's District Manager for 22 years until 2017, testified that he prepared the committee meeting minutes, and the people he listed as "community members" were members of the public who "definitely" were part of those committees (Tr. 698, 722, 749). That included respondent (Tr. 710). Mr. Reichenthal noted that respondent was listed as a committee member on a pre-printed sign-in sheet from the January 2011 ELY meeting (Tr. 704-07; Pet. Ex. 11). Other people on the sign-in sheet were committee members, so Mr. Reichenthal believed respondent was too (Tr. 707-08, 737). Respondent was marked absent at that meeting (Pet. Ex. 11). Mr. Reichenthal said that absences were noted for committee members because they could be removed for being absent too often (Tr. 707-08).

At the beginning of the year, the Board asked members from the community to submit forms if they had interest in serving on a committee (Tr. 711, 727). If a person signed up to be a committee member, he was "on as a committee member" because "we wanted as much inclusion as possible" (Tr. 711-12, 726). These "community members" were members of those committees (Tr. 700-01). He did not appoint respondent as a "public committee member" (Pet. Ex. 24). Mr.

Reichenthal distinguished community members from guests, who merely attended a meeting to voice their opinion (Tr. 723).

Mr. Reichenthal's testimony about respondent serving on a committee was somewhat inconsistent with an affidavit he signed on May 6, 2022 (Pet. Ex. 24). In the affidavit, Mr. Reichenthal stated that respondent only attended "one or two committee meetings," which were open to all community residents (*Id*.). He did not state that respondent ever served as a member of a committee (*Id*.).

Mr. Reichenthal admitted that respondent may have been mistakenly listed as a community member for at least at some meetings (Tr. 736). For example, the sign-in sheets for the January 2009 ELY and February 2009 PS meetings raised a "red flag" because they did not list respondent among the pre-printed list of community members (Tr. 730, 735; Resp. Exs. G, L). However, respondent signed his name there anyway. The January 2009 ELY minutes contained an error, incorrectly listing "Roz," a guest, as a community member, suggesting respondent may have been incorrectly listed on the minutes as a community member (Tr. 731-34). Subsequent ELY meetings in 2009 did not mention respondent or list him as a guest, also suggesting that respondent was incorrectly listed as a community member at the January 2009 ELY meeting (Tr. 736-37, 739, 741-42; Pet. Exs. 7-10).

Lucia Mujica-Diaz, who served as a Board member since 2011 and is its current Chair, said as far she knew, respondent was never a member of a committee (Tr. 377-78, 391, 408, 434). There were no opportunities for non-board members to serve on committees when Ms. Mujica-Diaz joined the board in 2011 (Tr. 409). Ms. Mujica-Diaz also questioned whether respondent served on a committee as a non-board member, because current by-laws require their appointment to a committee (Tr. 411). Those listed on the minutes as "community members" were people from the community who frequently attended meetings, not members of those committees (Tr. 434). Respondent was not a "public member," which would have required being appointed (Tr. 427, 432, 434).

Petitioner also called Sarana Purcell, previously the Director of External Boards at the Borough President's office, who testified about respondent's persistence in seeking appointment to the Board after unsuccessful applications in 2019 and 2020. Ms. Purcell was responsible for processing applications to join community boards (Tr. 213-14). Respondent made several phone calls, sent an "excessive" number of e-mails, and appeared at Ms. Purcell's office after an

unsuccessful application to become a Board member in 2019 (Tr. 230-31, 236-39, 242-47). The visit to Ms. Purcell's office was an "uneasy experience," because respondent got in her "personal space" and needed to have information repeated to him "about five times" (Tr. 239-40). Respondent also sent letters and e-mails after an unsuccessful 2020 application to join the Board (Tr. 259-64). After respondent's 2021 appointment to the Board, Ms. Purcell received e-mails from Mr. Mark and Ms. Mujica-Diaz informing her that respondent never served on a Board committee, and had harassed other Board members (Tr. 298-99, 310, 315, 334).

Respondent maintained he previously served on Board committees (Tr. 525-26, 560). The Board's Chair or District Manager put him on a committee (Tr. 526). He could not recall having a conversation with Mr. Mark or Mr. Reichenthal about being appointed, or filling out a form to join a committee (Tr. 753-54). However, Barbara Santonas, the Board's secretary, told him he was a "community member" (Tr. 526, 752-53). Respondent came to understand "community member" as synonymous with committee member based on his conversation with Ms. Santonas, in addition to seeing his name in the minutes as a community member and committee member (Tr. 539, 756, 764). He signed his name as a committee member on "multiple documents" between 2009 and 2011 (Tr. 756). Respondent also maintained that "at least a dozen" other sets of minutes listed him as a committee member, but he did not receive them after making a FOIL request (Tr. 540-41, 757, 766).

When confronted with minutes from ELY meetings in 2009 that did not list him as a community member, respondent said he was mistakenly omitted (Tr. 759-65). He wrote in his name under a list of pre-printed community members on the sign-in sheet for the January 2009 ELY meeting because he was on that committee (Tr. 538, 759-60; Resp. Ex. G). Respondent said it "could be an explanation" that he signed in as a guest at the April 2009 ELY meeting, three months later, "by accident" (Tr. 765; Pet. Ex. 9). He also signed his name under a list of pre-printed community members on the sign-in sheet for the February 2009 PS meeting, requesting to "add my name," because he believed he was a committee member (Tr. 538; Resp. Ex. L). Respondent was listed as a guest in committee meetings after January 2011, because the by-laws were amended to only allow Board members to serve on committees (Tr. 559; Pet. Ex. 4 at 6).

Ms. Santonas, who testified as a rebuttal witness, said she "absolutely" did not say anything to give respondent the impression that he was a committee member (Tr. 838-39). She did not recall whether respondent asked her if he was a community member, and did not have a

conversation with him about the meaning of "community member" (Tr. 836, 867). She said she would "not [have] been able to make that call" because adding people to committees was "not in my purview" and other people "above me" would have told respondent if he served on a committee (Tr. 836, 838-39). It was her understanding, however, that community members were not committee members (Tr. 846, 866). They were persons who lived in the community and often came to meetings (Tr. 846). Respondent writing his name on sign-in sheets under the pre-printed list of community members raised a "flag" for Ms. Santonas, since that is not how someone would be added to a committee (Tr. 864-65).

Petitioner has the burden of proving these charges by a preponderance of the credible evidence. *See Dep't of Correction v. Hall*, OATH Index No. 400/08 at 2 (Oct. 18, 2007), *adopted*, Comm'r Dec. (Nov. 2, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 08-33-SA (May 30, 2008). Preponderance has been defined as "the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence." *Prince, Richardson on Evidence* § 3-206 (Lexis 2008); *see also Rinaldi & Sons, Inc. v. Wells Fargo Alarm Service, Inc.*, 39 N.Y.2d 191, 196 (1976).

In assessing credibility, relevant considerations include demeanor, consistency of testimony, supporting evidence, witness motivation, bias, or prejudice, and whether the testimony comports with common sense and human experience. *See*, *e.g., 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).

For the most part, I found the witnesses credible, and that they made a good faith effort to recall information as they perceived it. However, I did not find respondent to be a credible witness. Respondent was defensive and resistant to answering questions during cross examination (Tr. 644, 652-53, 768). Several times he attempted to talk over myself and petitioner's counsel, despite repeatedly being told not to do so (Tr. 532, 536, 545-47, 623-24, 651-53, 788-89, 800-01). He gave answers on cross examination that were not credible, such as when he said he signed in as a guest at the April 2009 ELY meeting "by accident," that he similarly failed to clarify on his application that he only served as Corresponding Secretary in 2010 "by accident," and that he saw no distinction between saying he was "formerly corresponding secretary" and "corresponding secretary and member" of the Council (Tr. 573, 632, 765). Nevertheless, petitioner failed to prove

respondent made an intentional misstatement of fact on his application when he wrote that he served on several committees.

Petitioner asserted that respondent was not a committee member because he was never appointed. This was mistaken. Section 2800(i) of the Charter states that a community board "may include on such committees persons with a residence or significant interest in the community who are not members of the board." *See* Charter § 2800(i). The Charter does not require non-board members to be appointed to committees.

Petitioner correctly noted that the Board's current by-laws have a provision for non-board members, referred to in the by-laws as "public members," to join a committee by appointment (Pet. Ex. 1). That provision, however, did not take effect until 2021, long after the period that respondent claims he was a committee member (Tr. 124-25, 559). Although Mr. Mark said committee members were "usually" appointed while he was Chair, Ms. Cleaver and Mr. Reichenthal testified that non-board members served on committees without being appointed. Expressing an interest in serving was sufficient. Their testimony was consistent with the language of the Charter, which allows persons with "significant interest" in the community to join committees. It was also consistent with the by-laws in effect as of 2007, which contain no provision for appointing non-board members to committees (Pet. Ex. 5). Accordingly, petitioner did not persuade me that respondent had to be appointed as a "public member" in order to serve on a committee.

Petitioner failed to prove that respondent did not serve as a member of a Board committee. Seven of 12 committee meeting minutes between 2008 and 2011 that were produced at trial list respondent as a "community member." Petitioner argued that "community members" were not committee members. Petitioner's witnesses, however, testified to the contrary. Mr. Mark and Ms. Cleaver, who chaired the Board during that time period, said that community members were committee members. District Manager Reichenthal, who testified for respondent, prepared the minutes, and said the people he listed as community members were committee members. They also said that other people listed on the minutes as "community members" were members of those committees.

The minutes corroborate the testimony that community members were members of committees. For example, the minutes distinguish between community members and "guests." That distinction suggests that community members possessed a status within the committee that

went beyond mere attendance. The minutes also reflect whether community members were present, absent, or excused from the meeting (Tr. 408-12, 479-80). Mr. Reichenthal and Ms. Cleaver said that attendance was important for committee members, because a member could be removed after a certain number of absences (Tr. 481). Petitioner did not offer any explanation for why the minutes would mark a non-member absent or excused from a meeting. Finally, on the January 2011 ELY meeting sign-in sheet, respondent was listed as a "committee member" (Pet. Ex. 11). Another person on that list had her name crossed out by hand because it appeared there in error, since she had passed away. No correction was made for respondent.

Ms. Mujica-Diaz's and Ms. Santonas's position that community members were not committee members was not persuasive. Ms. Mujica-Diaz referred to her view as an "impression" (Tr. 427). She believed members of the public had to be appointed to committees to serve on them, but the by-laws did not require that until 2021 (Tr. 434; Pet. Exs. 1-5). Ms. Santonas said assigning people to committees was not within her purview. Moreover, the committee meeting minutes do not support Ms. Mujica-Diaz's and Ms. Santonas's belief about the status of community members.

Petitioner did raise serious questions about whether respondent served as a committee member. Mr. Reichenthal attended every committee meeting, but said in his affidavit that he only recalled seeing respondent at one or two meetings (Pet. Ex. 24; Tr. 698). Ms. Cleaver did not recall seeing respondent at any committee meetings (Tr. 461-62). Mr. Mark only remembered seeing him "in the background" at committee meetings (Tr. 157). Respondent did not remember filling out a form to join a committee, which Mr. Reichenthal described was protocol for non-board members to serve. Moreover, Mr. Reichenthal and Mr. Mark said the minutes appear to erroneously list respondent as a community member for at least the January 2009 ELY meeting, as it would be unusual for respondent to have been a committee member in January 2009 and then a guest three months later. Mr. Reichenthal also thought that respondent was erroneously listed as a community member at the February 2009 PS meeting, since respondent did not appear on the sign-in sheet's pre-printed list of community members.

Despite these concerns, the parties introduced seven sets of Board committee meeting minutes listing respondent as a community member. Petitioner did not persuade me that all seven sets of minutes were mistaken. In addition, petitioner failed to meet its burden, as the current and former Board members who testified could not agree on whether respondent was a committee member.

In sum, the credible evidence failed to establish specification one. Accordingly, charge 1, specification 1, and charge 2, specification 1, is not sustained.

Statement Concerning Serving as Corresponding Secretary of the 60th Precinct Community Council (Charge 1, Specification 2; Charge 2, Specification 2)

As noted, respondent wrote on his application that he served as "Corresponding Secretary/Member" of the 60th Precinct Community Council from "2010 to present" (Pet. Ex. 19). Petitioner alleges that respondent intentionally misstated serving as the Council's Corresponding Secretary (Pet. Ex. 19). Even if he served in that role, petitioner alleges that respondent falsely stated that he served from "2010 to present." Respondent maintained that the Council's President appointed him to the executive board position of Assistant Secretary in 2010, and that the Council's by-laws elevated him to the position of Corresponding Secretary during the two months he served. He also said he did not misrepresent the time period on his application.

The 60th Precinct Community Council holds monthly meetings to encourage the community to get involved with the police department in that neighborhood (Tr. 16). It has an executive board that must have a minimum of five members: President, Vice President, Treasurer, Sergeant-at-Arms, and Recording Secretary (Tr. 75-77; Pet. Ex. 6). The executive board may also include two additional members: Corresponding Secretary and Assistant Secretary (Tr. 77; Pet. Ex. 6). The Council's current by-laws, in effect since at least 2011, provide that a vacancy in an executive board position will be filled by election (Pet. Ex. 6). Respondent introduced what he claimed is an earlier version of the Council's by-laws (Resp. Ex. A; Tr. 542-43). The by-laws respondent produced provide the following procedure in the event of a vacancy:

> If a board seat becomes vacant during the term of office, all board members will move up to the position directly above their current position. If all members of the board have been moved up and there are still vacancies that need to be filled, the President will select a member in good standing to fill the vacancy.
>
> (Resp. Ex. A at 8).

Sam Shpelfogel, who served on the Council's executive board for 14 years and is its current treasurer, testified that respondent never held a position on the Council's executive board (Tr. 18, 20-21). Respondent could not have been appointed to the executive board because board members are elected, not appointed (Tr. 18-19). Judd Fischler, who respondent testified was the President

who appointed him to the executive board, did not tell Mr. Shpelfogel about appointing respondent (Tr. 39). Mr. Shpelfogel believed Mr. Fischler would have told him (Tr. 39). He did not know how respondent could be appointed without "being voted into it" or without "the full knowledge of the community" (Tr. 22). Respondent was also never elected to the executive board (Tr. 21). On cross examination, Mr. Shpelfogel admitted he did not know if an earlier version of the by-laws allowed the President to fill vacancies by appointment (Tr. 37-38).

Steven Frohlich, who was a Council member since 2003, and on its executive board since 2011, agreed that respondent never held a position on the executive board (Tr. 52-53, 75-76). He did not recall respondent being appointed to the executive board by Mr. Fischler or anyone else (Tr. 75). Mr. Fischler never told Mr. Frohlich that he appointed respondent to an executive role (Tr. 55). Mr. Frohlich acknowledged, however, that Mr. Fischler may not have told Mr. Frohlich about appointing respondent, since Mr. Fischler "was the president," and did what he "wanted to do" (Tr. 82). Mr. Frohlich never appointed anyone to the Council's executive board (Tr. 77-78).

Mr. Frohlich did not know if the Council's current by-laws, which provide for elections to fill vacancies to the executive board, had a different procedure for filling vacancies in 2010, when respondent claims to have been appointed (Tr. 64, 68-70). Mr. Frohlich believed the by-laws were in effect since at least 2011, and a Department chief told him that the by-laws had been the same for "20 years" (Tr. 61-62, 70). He thought vacant positions were filled by election in 2010, as they are now, but he was not sure (Tr. 68-69). He did not have a copy of the by-laws in effect in 2010 (Tr. 64, 69-70).

Before 2013, only five officers held positions on the executive board (Tr. 55, 76-77, 90). Even though the Council had positions for seven officers, the positions of Corresponding Secretary and Assistant Secretary were unfilled (Tr. 76, 111). As a result, the Police Department's Community Affairs officers took the Council meeting's monthly minutes in 2010 (Tr. 78). Respondent "pushed" for the Council to go with a seven-person board, nominated himself for the Corresponding Secretary and Assistant Secretary positions, and unsuccessfully ran for office to fill them (Tr. 77, 104, 110-12).

Mr. Mark and Ms. Mujica-Diaz were members of the Council. They did not recall respondent serving on the executive board or being appointed to it (Tr. 158-59, 388, 391). Mr. Mark recalled executive board vacancies being filled only by election, not appointment (Tr. 161). Ms. Mujica-Diaz received a letter from Deputy Inspector James King, commander of the 60th

Precinct, stating that respondent "has never been elected to or served on the 60th Precinct Community Council Board" and "was never elected to the position of Corresponding Secretary" (Pet. Ex. 23; Tr. 393-94).

Petitioner also introduced an e-mail that respondent sent to Ms. Purcell after his appointment to Community Board 13 (Pet. Ex. 22). In the e-mail, respondent said he made a "minor error" on his application about the time period where he served as Corresponding Secretary (*Id*.). Respondent said he did not serve as Corresponding Secretary for the entire period from 2010 to present (*Id*.). He requested that Ms. Purcell correct his application to "add in parenthesis" that he served in that role in 2010 (*Id*.). He wrote that if Ms. Purcell were unable to make the correction and another individual "makes a FOIL request," then his e-mail would show that he attempted to correct the "unintentional error" (*Id*.). Ms. Purcell said she felt that respondent had misrepresented the years he served as Corresponding Secretary on the application (Tr. 277). Had she known about this "big error" earlier, she would have brought it to the attention of the Deputy Borough President, which would have impacted the decision on respondent's appointment (Tr. 276, 278-79, 342). However, Ms. Purcell did not recommend that respondent be removed from the Board after learning of the issue (Tr. 293).

Respondent claimed that he did not make any misrepresentations on his Board application because he served as Corresponding Secretary of the Council (Tr. 560). Mr. Fischler, the Council's President, initially appointed him to fill the vacant position of Assistant Secretary on October 19, 2010 (Tr. 550). The appointment took place immediately after the Council's October monthly meeting (Tr. 643). Respondent just asked Mr. Fischler to appoint him, and Mr. Fischler verbally appointed him (Tr. 596). Respondent believed he was appointed as Assistant Secretary, and received by-laws from the Police Department stating that the President may appoint any member to a vacant position (Tr. 551; Resp. Ex. A).

According to respondent, he took the minutes of the November 9, 2010, Council meeting in an official capacity as Assistant Secretary (Tr. 551-52, 556).[7] The minutes that respondent introduced into evidence, which petitioner alleged were only respondent's personal notes, are typed, and detail what happened at the November meeting (Resp. Ex. I). The minutes also state that Mr. Fischler appointed respondent as Assistant Secretary on October 19, 2010 (*Id*.).

[7] There was testimony at trial that official records of the Council from 2010 were destroyed during Hurricane Sandy (Tr. 316, 392).

Respondent signed the minutes, identifying himself as "Assistant Secretary" (*Id*.). Respondent had several copies of the minutes and gave at least one to Mr. Fischler at the December 2010 monthly meeting (Tr. 555, 644). Respondent's term ended in December 2010 (Tr. 594). Respondent did not know who served as Assistant Secretary before he did (Tr. 657). He did not request that the next President reappoint him to the executive board (Tr. 595-96).

Respondent said he served as "Corresponding Secretary" on the Board application because he believed, according to the by-laws, that he automatically moved up to that position (Tr. 550-51). The version of the Council's by-laws that respondent introduced elevate executive board members one rank if an executive board seat becomes vacant during a term of office (Tr. 550-51; Resp. Ex. A). Since the "Corresponding Secretary" position was one rank higher than the Assistant Secretary, and vacant when respondent served as Assistant Secretary, respondent believed he became Corresponding Secretary (Tr. 550-51, 770; Resp. Ex. A). Respondent served as Corresponding Secretary for "at least one" meeting (Tr. 594). He did not know when he became Corresponding Secretary (Tr. 594). However, respondent wrote in the minutes that the Corresponding Secretary position was "vacant" (Resp. Ex. I). He identified himself as "Assistant Secretary" in the minutes he prepared because the two positions are "identical" and "interchangeable" (Tr. 769).

In addressing petitioner's allegation that he misrepresented how long he served on the executive board, respondent said that his application truthfully conveyed serving either as Corresponding Secretary or a member between 2010 and the present (Tr. 632). He did not intend to convey that his time as Corresponding Secretary referred to 2010 to present (Tr. 633). He wrote a "slash" between "Corresponding Secretary" and "Member" ("Corresponding Secretary/Member"), which was accurate because "the slash means or" (Tr. 601; Pet. Ex. 19). Respondent's e-mail to the Brooklyn Borough President's office characterized the time frame he served as a "minor error" (Pet. Ex. 22). At trial, respondent said the time frame was only "debatable as an error" (Tr. 631). He e-mailed to correct his application "for clarity," as it was "open to interpretation" (Tr. 630, 632). Respondent also said the failure to clarify that he only served in 2010 on his application was done "by accident" (Tr. 632). He sent the e-mail to correct his application because the community board chair "has hostility toward me" and might obtain the application using a FOIL request (Tr. 632).

In a previous application to become a Board member in 2019, respondent wrote that he was "formerly" corresponding secretary, but did not write it that way in 2020 or 2021 (Tr. 635-36; Pet. Exs. 19, 20, 21). There are "various ways of writing it" and it "came out slightly different each time" (Tr. 636). Respondent said that anyone reading what he wrote would read a true statement that he believed was "perfectly reasonable" (Tr. 601). It would also depend on "how they read it" (Tr. 573). Respondent made an error on an earlier application to become a community board member in writing that his service with the Council began in 2012 (Tr. 634).

Joseph Packer, a former aide to Councilman Recchia, said that Mr. Fischler gave him the November 2010 minutes that respondent prepared (Tr. 667-68). Mr. Packer attended the Council's monthly meetings on behalf of the Councilman (Tr. 665, 671). He received the minutes from Mr. Fischler at the December 2010 meeting, and remembered respondent's name on the minutes (Tr. 668, 677). He did not know who prepared them (Tr. 667). Mr. Packer said he remembered these minutes because he "used to always ask" Mr. Fischler for a copy of the minutes (Tr. 668, 675). The Council usually waived the minutes, but this is the "one time" he got them in 12 years, so it was "noticeable" (Tr. 668, 674-75, 681). He also remembered these minutes because they coincided with an election held at the November 2010 meeting, resulting in a new president being elected (Tr. 669). The minutes were to be filed in the Councilman's office (Tr. 667). On cross examination, Mr. Packer admitted never seeing Mr. Fischler appoint respondent to the executive board (Tr. 672-73). Mr. Packer also did not know why the minutes failed to acknowledge his attendance at that meeting, since he does a "cop of the month" presentation "every month" (Tr. 683). He thought there might have been a few meetings where he did not present the award (Tr. 683). There were no announcements made at a Council meeting about respondent being appointed to the executive board (Tr. 692).

It was unclear if the by-laws that respondent introduced authorized him to be appointed in the manner he described. The by-laws authorize the President to fill a vacancy if "all board members" have "moved up" to a position directly above their current position (Resp. Ex. A at 8). Yet there was no testimony that any board members "moved up" prior to the purported appointment.

Additionally, although respondent asserted that Mr. Fischler appointed him to the Council's executive board, Mr. Fischler did not communicate the appointment to the Council's executive board or general membership, as Mr. Shpelfogel and Mr. Frolich testified. Further,

respondent offered no explanation for why Mr. Fischler would appoint him to an executive role, or why the appointment only lasted two months.

Petitioner failed to meet its burden, however, to sustain the charge that respondent intentionally misstated material facts. The November 2010 minutes that respondent prepared include his note that he was appointed as Assistant Secretary on October 19, 2010. Respondent's contemporaneous statement appears to reflect his belief about that appointment, even if that belief was mistaken. The minutes also suggest respondent wrote them in an official capacity, as they do not appear as if they were prepared solely for personal use (Resp. Ex. I). They are typed, rather than handwritten, are titled "60th precinct Community Council Regular Meeting," dated, take attendance of the officers present, and include specific information about the meeting. These details indicate they were prepared in a manner for other people to read them.

Mr. Packer corroborated respondent's contention that the minutes were prepared in an official capacity, stating that he received them from Mr. Fischler in 2010 (Tr. 668). Mr. Packer credibly testified that Mr. Fischler gave the minutes to him because Mr. Packer wanted them for the Councilman's records. It was unusual that Mr. Packer remembered minutes from 12 years earlier. However, I credited Mr. Packer's testimony that they were memorable because he ordinarily did not receive minutes from the Council's meetings, and they coincided with an election for the Council's President. Mr. Packer's testimony supported respondent's argument that Mr. Fischler viewed the minutes respondent prepared as official correspondence, lending credence to respondent's contention that Mr. Fischler told respondent he was appointing him to the position of Assistant Secretary.

The by-laws that petitioner and respondent both introduced provide that if there is a vacancy on the executive board, members move up a rank to the next highest position (Pet. Ex. 6 at 17; Resp. Ex. A at 8). The Corresponding Secretary position is one rank higher than Assistant Secretary, and the Corresponding Secretary position was not filled in 2010 (Pet. Ex. 6 at 17; Resp. Ex. A at 8; Tr. at 77). Although respondent stated the Corresponding Secretary role was "vacant" in the minutes he prepared, the by-laws provide a basis for him to have believed that he "moved up" to the Corresponding Secretary role at some point after he said he was appointed as Assistant Secretary. Accordingly, petitioner failed to prove that respondent made an intentional misstatement or engaged in deception by stating that he served as Corresponding Secretary.

Petitioner also failed to prove respondent made an intentional misstatement of a material fact in writing that he was "Corresponding Secretary/Member" from "2010 to present." Respondent's wording was imprecise but neither false nor deceptive. The slash between "Corresponding Secretary" and "Member" is reasonably interpreted as meaning "either/or," indicating that respondent served in at least one of those two roles between 2010 and the present. Accordingly, petitioner failed to prove that respondent's statement was false or that he engaged in deception.

In sum, petitioner failed to prove specification two. The charge is not sustained.

FINDINGS AND CONCLUSIONS

1. Petitioner failed to prove respondent made an intentional misstatement of a material fact on his Community Board application in stating that he had been a member of a committee of Community Board 13.

2. Petitioner failed to prove respondent engaged in deception on his Community Board application in stating that he had been a member of a committee of Community Board 13.

3. Petitioner failed to prove respondent made an intentional misstatement of a material fact on his Community Board application in stating that he served as Corresponding Secretary/Member of the 60th Precinct Community Council from 2010 to present.

4. Petitioner failed to prove respondent engaged in deception on his Community Board application in stating that he served as Corresponding Secretary/Member of the 60th Precinct Community Council from 2010 to present.

RECOMMENDATION

I recommend the charges against respondent be dismissed.

Jonathan Fogel
Administrative Law Judge

December 5, 2022

SUBMITTED TO:

BROOKLYN COMMUNITY BOARD 13
LUCIA MUJICA-DIAZ
Chair

APPEARANCES:

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Counsel for Respondent