

Dep't of Finance v. Jimenez

OATH Index No. 3663/23 (Mar. 19, 2024), *adopted*, Comm'r Dec. (Apr. 22, 2024), **appended**

Petitioner established that respondent stole contraband from the Department's evidence storage container on two occasions. Petitioner failed to prove remaining charges of theft and facilitation. ALJ recommends the termination of respondent's employment.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF FINANCE
Petitioner
- against -
ELISSON JIMENEZ
Respondent

REPORT AND RECOMMENDATION

MICHAEL D. TURILLI, *Administrative Law Judge*

Petitioner, the Department of Finance (the "Department"), brought this employee disciplinary proceeding against respondent, Deputy Sheriff Elisson Jimenez, under section 75 of the Civil Service Law. Petitioner alleged that respondent stole or facilitated the theft of vouchered contraband from the Department's evidence storage container in the parking garage located at 30-10 Starr Avenue in Queens on 12 occasions from December 2020 to March 2021.¹

A trial was held before me on January 3, 4, and 18, 2024. The proceedings were held remotely by videoconference. Petitioner relied upon documentary, photographic, and video evidence and the testimony of two witnesses. Respondent testified on his own behalf and offered documentary and video evidence and the testimony of one witness. The parties agreed to rely upon the sworn testimony of four witnesses from prior trials in two related disciplinary matters –

¹ Petitioner withdrew the specification alleging that respondent stole or facilitated the theft of vouchered contraband from the evidence storage container on March 21, 2021 (Tr. 8; ALJ Ex. 2 at Spec. 13). Petitioner amended another specification to allege that respondent stole or facilitated the theft of vouchered contraband from the parking garage at 30-10 Starr Avenue on January 31, 2021, as opposed to from the evidence storage container inside the parking garage, as previously alleged (Tr. 9; ALJ Ex. 2 at Spec. 5).

Department of Finance v. Lo, OATH Index No. 3673/23 and *Department of Finance v. Canteen*, OATH Index No. 3664/23 – in lieu of recalling those witnesses to testify in this matter (Tr. 13).²

For the reasons set forth below, I find that petitioner proved two of the charges and recommend that respondent’s employment be terminated.

PRELIMINARY MATTER

Section 75 of the Civil Service Law provides an 18-month statute of limitations for the commencement of a disciplinary proceeding against a civil service employee. Civ. Serv. Law § 75(4) (Lexis 2024). A disciplinary proceeding is commenced by service of formal disciplinary charges on the employee. *See Dept. of Correction v. Pearson*, OATH Index No. 391/14 at 4 (Dec. 18, 2013), *aff’d*, NYC Civ. Serv. Comm’n Case No. 2014-0252 (July 10, 2014). Petitioner charged respondent with stealing or facilitating the theft of vouchered contraband from December 2020 to March 2021. The initial charges against respondent were served on May 2, 2023, more than 18 months after the alleged incidents, and were later amended on June 6, 2023 (ALJ Exs. 1, 2).

However, the 18-month statute of limitations does not apply where the “misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime.” Civ. Serv. Law § 75(4). “When an agency relies upon the crimes exception to the limitations period, it must establish by a preponderance of the evidence all of the elements of the alleged crime as defined in the Penal Law.” *Dep’t of Correction v. Lopez*, OATH Index No. 2365/18, mem. dec. at 5 (Sept. 25, 2018); *see Aronsky v. Bd. of Education*, 75 N.Y.2d 997, 1000 (1990) (“[T]he exception to the six-month Statute of Limitations in Education Law § 2590-j(7)(c) should only apply when the specific facts alleged in the charge, if proven by a preponderance of the evidence, constitute a crime under our Penal Law.”); *Health & Hospitals Corp. (Elmhurst Hospital Ctr.) v. Yusupova*, OATH Index No. 1124/16 at 2 (Mar. 30, 2016), *aff’d*, HHC Pers. Rev. Bd. Dec. No. 172/16 (Oct. 14, 2016).

Stealing contraband from the evidence storage container or intentionally facilitating the theft of such property, if proven by a preponderance of the evidence, would constitute several crimes, including petit larceny, public corruption, official misconduct, and a violation of Chapter 68 of the Charter. *See* Penal Law §§ 155.05(1), 155.25 (Lexis 2024) (“A person is guilty of petit

² The parties offered transcripts for the prior testimony of Commanding Officer Maureen Kokeas, Investigator Willy Gomez, Chief of Detectives James Grayson, and Sergeant Robert Gilliam (Resp. Exs. A, B, C, D, E).

larceny when he steals property” and “[a] person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.”); Penal Law § 195.00 (“A public servant is guilty of official misconduct when, with the intent to obtain a benefit or deprive another person of a benefit . . . [h]e commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized; or [h]e knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.”); Penal Law § 496.06 (“A person commits the crime of public corruption when: (a) (i) being a public servant he or she commits a specified offense through the use of his or her public office, or (ii) being a person acting in concert with such public servant he or she commits a specified offense, and (b) the state or any political subdivision thereof or any governmental instrumentality within the state is the owner of the property.”); Charter § 2606(c) (Lexis 2024) (“Any person who violates section twenty-six hundred four . . . of this chapter shall be guilty of a misdemeanor”); *see also* Penal Law § 20.00 (“When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.”).³

Therefore, whether the charges fall within the crimes exception depends upon whether the evidence in support of each charge was sufficient to prove that respondent engaged in criminal conduct, as discussed below. *See Dep’t of Correction v. Blanc*, OATH Index No. 2571/11 at 6 (Feb. 2, 2012), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 12-40-SA (Aug. 10, 2012); *Dep’t of Correction v. Skeete*, OATH Index No. 254/04 at 3-4 (June 3, 2004), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD05-66-SA (Sept. 14, 2005).

³ Petitioner did not cite to section 20.00 of the Penal Law in the charges. However, accessory conduct does not constitute a separate criminal offense under the Penal Law and petitioner sufficiently notified respondent that he was charged with the intentional facilitation of theft. *See People v. Wilczynski*, 97 Misc. 2d 307, 310 (Sup. Ct. N.Y. Co. 1977) (finding that because accessory conduct is not a separate crime, “the indictment need not accuse the defendant as an accessory in order to support proof of his criminal liability for conduct of others.”); *Dep’t of Sanitation v. Maurice*, OATH Index Nos. 197/09, 198/09 & 199/09, mem. dec. (Nov. 6, 2008), *aff’d*, 2010 N.Y. Misc. LEXIS 4019 (Sup. Ct. N.Y. Co. Mar. 30, 2010), *aff’d sub nom James v. Doherty*, 85 A.D.3d 640 (1st Dep’t 2011) (finding that the charges provided reasonable notice that a crime had been alleged in a disciplinary proceeding brought under the crimes exception).

ANALYSIS

Petitioner alleged that respondent stole or facilitated the theft of vouchered contraband from the evidence storage container located in the parking garage at 30-10 Starr Avenue on December 10, 16, and 22, 2020, January 30 and 31, 2021, February 5, 11, and 13, 2021, and March 4, 6, 7, and 8, 2021 (ALJ Ex. 2). Based on these specifications, petitioner charged respondent with violating six rules of its Code of Conduct, including stealing, or permitting others to misappropriate, departmental property, failing to comply with Chapter 68 of the Charter, misusing his official capacity for personal benefit, committing an unauthorized exercise of his official functions, engaging in conduct likely to bring the City into disrepute, and engaging in conduct prejudicial to good order and discipline (ALJ Exs. 2, 3). Petitioner did not specifically allege the type of contraband stolen but argued that the items had been taken from the evidence container used to store alcohol seized by the Department during the pandemic (Tr. 15-16).

Respondent denied the charges. Petitioner has the burden of proving the 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). “If the evidence is equally balanced, or if it leaves the [trier of fact] in such doubt as to be unable to decide the controversy either way, judgment must be given against the party upon whom the burden of proof rests.” *Id.*; *see Rinaldi & Sons, Inc. v. Wells Fargo Alarm Service, Inc.*, 39 N.Y.2d 191, 196 (1976).

The resolution of the charges rests in part on a determination of the credibility of the witnesses. In assessing credibility, this tribunal has considered “witness demeanor, consistency of a witness’ testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness’ testimony comports with common sense and human experience.” *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998).

Petitioner's Evidence

Petitioner principally relied upon surveillance videos of the inside of the Starr Avenue garage (Pet. Exs. 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15-A).⁴ The surveillance camera provides a birds-eye view of the area. In each of the videos, the camera angles entitled LIC-Garage-NE Ponderosa show a “U” shaped enclosure made of black metal shelving situated along the wall of a parking garage. Boxes and various equipment are stacked on the shelves. The interior of the enclosure can be accessed through a space between the garage wall and the last shelving unit on either side. The enclosure was referred to as the “man cave” or the “Ponderosa” by witnesses at trial (Resp. Ex. C at 42, 86, 156; Resp. Ex. D at 282, 302). The shelving forming the perimeter of the man cave and the boxes on the top shelves fully obstructed the camera’s view into the man cave.

Extending lengthwise along the garage wall, approximately 20 feet to the right of the man cave, is a grey metal shipping container. The container appears to be approximately 10 feet tall and 20 feet long. There is a door at the end of the container, which opens in the direction of the man cave. Tables and equipment are piled in the space between the container and the man cave, and a white column is located along the garage wall near the container door. The grey metal shipping container was identified as the evidence storage container by witnesses at trial and they noted that the key to the locks on the container door was stored behind the white column (Tr. 166-67; Resp. Ex. C at 33, 77, 167; Resp. Ex. D at 282, 313, 326).

December 10, 2020 Video

The video from December 10, 2020 begins by showing an individual, identified at trial as respondent, huddled in conversation with five other individuals near the man cave at approximately 11:00 a.m. (Pet. Ex. 4, LIC-Garage-NE Ponderosa 2 (4) & LIC-Garage-NE Ponderosa (3) at 11:00-11:07:27; Tr. 51). They all walk away from the man cave and exit the garage through a white door (Pet. Ex. 4, LIC-Garage-SE FSU/Transport Car (4) at 11:07:27-11:08:05). Respondent reenters the garage with an individual, identified at trial as Deputy Sheriff Lo, and they walk towards the evidence storage container (*Id.* at 11:10:11-11:10:27; Tr. 51). Deputy Sheriff Lo retrieves what appears to be a key from behind the white column and unlocks two padlocks on the container door (Pet. Ex. 4, LIC-Garage-NE Ponderosa 2 (4) at 11:10:27-

⁴ The surveillance videos were recorded from multiple camera angles and do not contain any audio recording.

11:10:52). Respondent is wearing an open black jacket. Respondent opens the container door and enters, followed by Deputy Sheriff Lo (*Id.* at 11:10:52-11:11:02). About one minute later, respondent exits the container and walks into the man cave (*Id.* at 11:12:16-11:12:20). Given the angle of the camera, respondent's left profile and back are visible as he walks to the man cave. Respondent's right arm swings by his side while his left arm appears to be in his jacket pocket. When the speed of the video is slowed and the image is enlarged, there appears to be a slight protrusion in the front of his jacket. Deputy Sheriff Lo closes and locks the container door and then walks off (*Id.* at 11:12:18-11:12:37). Respondent exits the man cave and walks across the garage to a parked black SUV (Pet. Ex. 4, LIC-Garage-NE Ponderosa (3) & LIC-Garage-SE FSU/Transport Car (4) at 11:12:26-11:12:45). As he walks, both of respondent's arms appear to be in his jacket pockets. The rear lights of the vehicle turn on and off as respondent approaches the vehicle, but the camera angle does not show respondent entering the vehicle. Respondent walks back from the parked vehicle to the man cave, placing his left hand into the pocket of his closed jacket along the way, and then exits the garage through the white door (Pet. Ex. 4, LIC-Garage-SE FSU/Transport Car (4) at 11:13:29-11:14:38).

December 16, 2020 Video

The video from December 16, 2020 begins by showing an individual, identified at trial as respondent, walking from a parked black SUV to the evidence storage container at approximately 2:30 a.m. (Pet. Ex. 5, LIC-Garage-NE Ponderosa (3) & LIC-Garage-NE Ponderosa 2 (4) at 2:24:10-2:24:43; Tr. 55). Respondent, who is wearing a black jacket over an orange hooded sweatshirt, removes what appears to be a key from his pocket, unlocks and opens the container door, and enters the container (Pet. Ex. 5, LIC-Garage-NE Ponderosa 2 (4) at 2:24:43-2:25:21). About 12 minutes later, respondent exits the container, closes and locks the door behind him, enters the man cave, walks to the black SUV, and drives off (Pet. Ex. 5, LIC-Garage-NE Ponderosa 2 (4) & LIC-Garage-NE Ponderosa (3) at 2:37:11-2:38:46). Given the angle of the camera, respondent's left profile and back are visible as he walks from the container to the man cave. Respondent's left arm swings by his side while his right arm appears to be tucked by his side. When the speed of the video is slowed and the image is enlarged, there appears to be a slight protrusion in the front of his jacket. As he walks to the vehicle, respondent appears to be talking on a cell phone in his right hand and his left hand is tucked by his side near the jacket pocket.

December 22, 2020 Video

The video from December 22, 2020 begins by showing two individuals, identified at trial as respondent and Deputy Sheriff Jones, walking from a parked black SUV towards the evidence storage container at approximately 1:00 a.m. (Pet. Ex. 6, LIC-Garage-NE Ponderosa 2 (4) & LIC-Garage-NE Ponderosa (3) at 1:11:06-1:11:12; Tr. 58). They are both wearing closed black jackets. Respondent removes what appears to be a key from his pocket, unlocks and opens the container door, and enters the container, followed by Deputy Sheriff Jones (Pet. Ex. 5, LIC-Garage-NE Ponderosa 2 (4) at 1:11:12-1:11:47). Over 11 minutes later, Deputy Sheriff Jones and respondent exit the container and Deputy Sheriff Jones walks to the man cave while respondent closes and locks the container door (*Id.* at 1:22:56-1:23:32). Given the angle of the camera, Deputy Sheriff Jones's left profile and back are visible as he walks from the container to the man cave. There is a large protrusion in the front of his jacket, and both of his hands are underneath the protrusion. Respondent then walks back to the man cave and enters (*Id.* at 1:23:32-1:23:49). He walks in the direction of the camera and his front profile is fully captured. The contour of a rectangular object is visible underneath the front of his jacket. Respondent and Deputy Sheriff Jones exit the man cave together and then walk to separate vehicles (Pet. Ex. 6, LIC-Garage-NE Ponderosa (3) at 1:23:58-1:24:28). As Deputy Sheriff Jones walks down the aisle of the garage and away from the camera, his left hand remains in front of him the entire time.

January 30, 2021 Video

The video from January 30, 2021 begins by showing two individuals, identified at trial as respondent and Deputy Sheriff Jones, walking near the man cave at approximately 3:30 p.m. (Pet. Ex. 7, LIC-Garage-NE Ponderosa 2 (4) at 3:33:35-3:34:54; Tr. 63-64). Respondent removes what appears to be a key from his pocket, unlocks and opens the container door, and enters the container, followed by Deputy Sheriff Jones (*Id.* at 3:34:54-3:36:17). Deputy Sheriff Jones is wearing an unzipped, black puffy jacket. About five minutes later, Deputy Sheriff Jones exits the container and walks into the man cave (*Id.* at 3:41:39-3:41:57). His black puffy jacket is now zipped up. Respondent then exits the container, walks into the man cave, and returns to the container, now holding a cellphone to his ear (*Id.* at 3:42:32-3:43:50). Deputy Sheriff Jones returns to and enters the container, and then walks back to the man cave (*Id.* at 3:44:06-3:45:06). Given the angle of the camera, Deputy Sheriff Jones's left profile and back are visible as he walks from the container

to the man cave. When the speed of the video is slowed and the image is enlarged, there appears to be a slight protrusion in the front of his jacket. Deputy Sheriff Jones's hands swing freely at his side as he walks to the man cave. Respondent exits the container, closing and locking the door behind him, and walks to the man cave (*Id.* at 3:45:13-3:45:55). As he does so, Deputy Sheriff Jones exits the man cave and no longer appears to have the protrusion in the front of his jacket.

January 31, 2021 Video

The video from January 31, 2021 begins by showing several vehicles, including a black SUV, enter the garage at approximately 2:00 a.m. (Pet. Ex. 8, LIC-Garage-NW Garage Door (3) at 1:57-2:05:53). The black SUV parks next to the man cave and an individual, identified at trial as respondent, exits the vehicle, while another SUV pulls up behind it (Pet. Ex. 8, LIC-Garage-NE Ponderosa 2 (4) at 2:05:57-2:06:17). Respondent opens the trunk of the black SUV and then immediately closes it (*Id.* at 2:06:21-2:06:34). There is a closed white box in the trunk bearing the label for Stella Artois beer. An individual exits the other SUV, walks to the evidence storage container, unlocks and opens the container door, and removes a black padded vest from underneath his jacket and shirt (*Id.* at 2:06:19-2:08:18). Respondent carries three open boxes out of the passenger cab of his vehicle and places them on a table and dolly near the evidence storage container (*Id.* at 2:06:48-2:08:37). Two of the boxes bear the label for Corona beer and all three boxes are filled with bottles. About ten closed boxes bearing what appear to be other beer labels are unloaded from the other SUV and respondent and four other individuals carry all the boxes into the evidence storage container (*Id.* at 2:09:00-2:12:23). One of the individuals, identified at trial as Deputy Sheriff Jones, has on a black padded vest underneath his open jacket (Tr. 73). Respondent reenters the black SUV, pulls into a parking spot near the man cave, and exits the vehicle carrying a black vest in his hand (Pet. Ex. 8, LIC-Garage-NE Ponderosa 2 (4) at 2:15:32-2:16:52). After approaching the container, which had just been closed and locked by another individual, respondent walks out of the camera's view in the direction of the white door (*Id.* at 2:16:12-2:18:19). Over 20 minutes later, respondent, no longer carrying the vest, walks back to the black SUV and departs the garage in the vehicle (*Id.* at 2:41:11-2:47:15).

February 5, 2021 Video

The video from February 5, 2021 begins by showing an individual, identified at trial as respondent, walking towards the evidence storage container at approximately 11:30 p.m. (Pet. Ex. 9, LIC-Garage-NE Ponderosa 2 (4) at 11:27:01-11:27:28; Tr. 75). He is wearing a dark blue fleece. Respondent retrieves a key from behind the white column and unlocks the container door (Pet. Ex. 9, LIC-Garage-NE Ponderosa 2 (4) at 11:27:28-11:27:48). He then opens and enters the container (*Id.* at 11:27:48-11:28:03). Almost three minutes later, respondent exits the container and walks to the man cave (*Id.* at 11:30:52-11:31:07). Given the angle of the camera, respondent's left profile and back are visible as he walks from the container to the man cave. Respondent's left arm is tucked by his side and his right arm swings freely. He then reenters and exits the container, closing and locking the container door behind him (*Id.* at 11:31:27-11:32:24). As he walks, both of respondent's arms swing freely at his side.

February 11, 2021 Video

The video from February 11, 2021 begins by showing three individuals, identified at trial as respondent, Deputy Sheriff Lo, and Sergeant Canteen, walking towards the evidence storage container at approximately 10:00 p.m. (Pet. Ex. 10, LIC-Garage-NE Ponderosa 2 (4) at 9:58:05-9:58:24; Tr. 78). Deputy Sheriff Lo is carrying a green jacket over his left forearm. Deputy Sheriff Lo removes a key from behind the white column and unlocks two padlocks on the container door (Pet. Ex. 10, LIC-Garage-NE Ponderosa 2 (4) at 9:58:24-9:58:39). Sergeant Canteen opens the container door and all three enter the container (*Id.* at 9:58:39-9:58:56). Over seven minutes later, respondent exits the container alone (*Id.* at 10:06:18-10:06:26). He walks in the direction of the camera and his front profile is fully captured. He is now carrying the green jacket and a black object appears to be cradled in his arms under the jacket. He walks to a black SUV parked nearby, places the jacket and object in the front seat, sits down, and closes the door behind him (Pet. Ex. 10, LIC-Garage-NE Ponderosa 2 (4) & LIC-Garage-SE Executive Parking (1) at 10:06:26-10:06:51). He exits the vehicle about 20 seconds later and returns to the container with the green jacket clenched in his left hand (*Id.* at 10:07:12-10:07:38). Approximately 20 seconds later, Deputy Sheriff Lo exits the container with the green jacket in his right hand and walks off (Pet. Ex. 10, LIC-Garage-NE Ponderosa 2 (4) 10:08:00-10:08:24). Two minutes later, Sergeant Canteen exits the container and walks into the man cave (*Id.* at 10:10:04-10:10:21). Respondent

then exits the container, walks into the man cave, goes back inside the container, and finally exits and locks the container (*Id.* at 10:11:29-10:14:45).

February 13, 2021 Video

The video from February 13, 2021 begins by showing an individual, identified at trial as respondent, walking towards the evidence storage container at approximately 8:00 p.m. (Pet. Ex. 11, LIC-Garage-NE Ponderosa 2 (4) at 7:56:12-7:56:18; Tr. 83). Respondent retrieves a key from behind the white column and unlocks the container door (Pet. Ex. 11, LIC-Garage-NE Ponderosa 2 (4) at 7:56:18-7:56:48). He then opens and enters the container (*Id.* at 7:56:48-7:56:52). Over 12 minutes later, respondent exits the container with a large blue and white cooler on wheels and closes and locks the container door behind him (*Id.* at 8:09:27-8:10:04). He pulls the cooler into the man cave (*Id.* at 8:10:04-8:10:28). Three minutes later, he exits the man cave with the cooler and leaves it near the garage wall (*Id.* at 8:13:50-8:13:58).

March 4, 2021 Video

The video from March 4, 2021 begins by showing an individual, identified at trial as Deputy Sheriff LeBlond, retrieving the key to the evidence storage container from behind the white column and unlocking the container door at approximately 11:00 p.m. (Pet. Ex. 12, LIC-Garage-NE Ponderosa 2 (4) at 11:11:45-11:12:11; Tr. 85). As Deputy Sheriff LeBlond is opening the container door, an individual, identified at trial as Sergeant Canteen, walks from the man cave to the container and they enter the container together (Pet. Ex. 12, LIC-Garage-NE Ponderosa 2 (4) at 11:12:11-11:12:31; Tr. 85). Another individual, identified at trial as respondent, exits the man cave and enters the open container (Pet. Ex. 12, LIC-Garage-NE Ponderosa 2 (4) at 11:14:01-11:14:08; Tr. 85). Respondent is wearing a dark hooded jacket. Over five minutes later, Deputy Sheriff LeBlond exits the container, returns the key to the white column, and walks into the man cave (Pet. Ex. 12, LIC-Garage-NE Ponderosa 2 (4) at 11:19:27-11:20:06). Respondent then exits the container and walks into the man cave (*Id.* at 11:20:24-11:20:35). Given the angle of the camera, respondent's left profile and back are visible as he walks from the container to the man cave. When the speed of the video is slowed and the image is enlarged, there appears to be a protrusion in the front of his jacket. Both of respondent's arms swing freely at his side as he walks to the man cave. Sergeant Canteen exits the container, closes the container door, and walks into

the man cave (*Id.* at 11:20:28-11:20:56). Sergeant Canteen then reenters the container, exits, locks the container door, and returns to the man cave (*Id.* at 11:21:14-11:23:30).

March 6, 2021 Video

The video from March 6, 2021 begins by showing an individual, identified at trial as respondent, walking towards the evidence storage container at approximately 5:00 a.m. (Pet. Ex. 13, LIC-Garage-NE Ponderosa 2 (4) at 5:05:41-5:05:48; Tr. 88). Respondent, who is wearing a closed and black hooded jacket, removes what appears to be a key from his pocket, unlocks and opens the container door, and enters the container (Pet. Ex. 13, LIC-Garage-NE Ponderosa 2 (4) at 5:05:48-5:06:26). After about three minutes, respondent exits the container, closes and locks the container door behind him, and walks into the man cave (*Id.* at 5:09:46-5:10:29). Given the angle of the camera, respondent's left profile and back are visible as he walks to the man cave. His right arm remains tucked by his side while his left arm swings freely as he walks. When the speed of the video is slowed and the image is enlarged, there appears to be a slight protrusion in the front of his jacket. He then exits the man cave, walks across the garage to a parked black SUV, and opens the passenger side door (Pet. Ex. 13, LIC-Garage-NE Ponderosa 2 (4), LIC-Garage-NE Ponderosa (3), LIC-Garage-SE FSU/Transport Car (4), & LIC-Garage-SE Lane 2 (2) at 5:10:39-5:11:04). As he walks across the garage, respondent's left profile is visible. His right arm is pressed against his stomach area while his left arm is pressed against his upper right torso and the contour of a rectangular object is visible underneath the front of his jacket. Respondent closes the passenger side door and walks off with both hands free (*Id.* at 5:11:48-5:11:58).

March 7, 2021 Video

The video from March 7, 2021 begins by showing an individual, identified at trial as Sergeant Canteen, retrieving the key to the evidence storage container from behind the white column and unlocking the container door at approximately 7:15 p.m. (Pet. Ex. 14, LIC-Garage-NE Ponderosa 2 (4) at 7:13:30-7:13:51; Tr. 91). As Sergeant Canteen opens the container door, another individual, identified at trial as respondent, walks from a black sedan parked near the man cave towards the open container and puts on and zips up a black jacket over a hooded sweatshirt (Pet. Ex. 14, LIC-Garage-NE Ponderosa 2 (4) at 7:13:51-7:14:21; Tr. 91). Respondent enters the storage container while Sergeant Canteen gets into a black SUV, parks it closer to the man cave,

exits the vehicle, and enters the man cave (Pet. Ex. 14, LIC-Garage-NE Ponderosa 2 (4) at 7:14:21-7:15:23). Respondent then exits the container and locks the container door (*Id.* at 7:15:43-7:16:20). He walks to the black sedan and drives away (*Id.* at 7:16:20-7:17:40). Respondent initially walks in the direction of the camera so that his front profile is fully captured. The contour of a rectangular object is visible underneath the front side of his jacket.

March 8, 2021 Video

The video from March 8, 2021 begins by showing three individuals, identified at trial as respondent, Deputy Sheriff Lo, and Deputy Sheriff Singh, walking towards the evidence storage container at approximately 10:30 a.m. (Pet. Ex. 15-A, LIC-Garage-NE Ponderosa 2 (4) at 10:25:40-10:26:05; Tr. 95). Respondent is wearing a denim jacket open over a light-colored shirt. Deputy Sheriff Lo retrieves the key to the evidence storage container from behind the white column and unlocks the container door (Pet. Ex. 15-A, LIC-Garage-NE Ponderosa 2 (4) at 10:26:05-10:26:14). Deputy Sheriff Singh, who has been holding a white paper in his hand, opens the container door and all three enter the container (*Id.* at 10:26:14-10:26:32). About one minute later, another individual, identified at trial as Sergeant Canteen, enters the open container (Pet. Ex. 15-A, LIC-Garage-NE Ponderosa 2 (4) at 10:27:15-10:27:24; Tr. 96). Over three minutes later, Sergeant Canteen briefly exits the container to close the door halfway (Pet. Ex. 15-A, LIC-Garage-NE Ponderosa 2 (4) at 10:30:43-10:30:48). Approximately two minutes later, another individual, identified at trial as Deputy Sheriff Jones, walks into the container (Pet. Ex. 15-A, LIC-Garage-NE Ponderosa 2 (4) at 10:32:51-10:33:07; Tr. 96). Deputy Sheriff Jones exits the container, followed by respondent and Sergeant Canteen, and respondent and Sergeant Canteen appear to be conversing with each other while standing several feet apart (Pet. Ex. 15-A, LIC-Garage-NE Ponderosa 2 (4) at 10:33:30-10:34:37). Respondent initially walks in the direction of the camera so that his front profile is fully captured, and then turns to face Sergeant Canteen with his back to the camera. As he stands outside of the container, respondent appears to have his left hand underneath an object that is completely covered by the left side of his denim jacket. Sergeant Canteen reenters the container as respondent walks to a white vehicle parked nearby in the garage, opens the passenger side rear door, bends down, closes the door, and walks away with both hands free at his side (Pet. Ex. 15-A, LIC-Garage-NE Ponderosa 2 (4) & LIC-Garage-SE FSU/Transport Car (4) at 10:34:37-10:35:47). As respondent walks to the vehicle, his left arm remains at the left

side of his jacket and his right arm swings freely at his side. According to time records maintained by the Department, respondent did not work on March 8, 2021, but rather used 10 hours of sick leave (Pet. Ex. 15-B). Sergeant Canteen approved his timesheet on March 17, 2021 (*Id.*).

Petitioner's Witnesses

Petitioner also relied upon the testimony of Maureen Kokeas, who served as the First Deputy Sheriff in 2020 and 2021 and is now the Commanding Officer of the Department's Bureau of Criminal Investigations ("BCI") (Resp. Ex. C at 28-29). She explained that the Sheriff's Office enforced various Executive and Mayoral Orders related to business closures and congregations of people during the COVID pandemic in 2020 and 2021 (*Id.* at 30-31). The Sheriff's Office conducted enforcement raids, which involved dispersing illegal congregations, closing unlicensed establishments, and seizing alcohol, tobacco, and drugs found at the locations (*Id.* at 31). The seized contraband, which was primarily alcohol, was brought back to the parking garage at 30-10 Starr Avenue and stored in the evidence container (*Id.* at 31-32). She acknowledged that the alcohol seized during the COVID enforcement raids and stored in the evidence container in the Starr Avenue garage in 2020 and 2021 was never vouchered (*Id.* at 37, 54). Some of the seized alcohol was destroyed with the assistance of the Department of Sanitation in January 2021 (*Id.* at 55).

Commanding Officer Kokeas testified that she had been inside the evidence storage container over a dozen times in 2020 and 2021, and she estimated that 95% of its contents consisted of contraband, such as seized alcohol, tobacco, weapons, and other evidence (*Id.* at 34, 39). The remaining contents included furniture, a safe, and equipment (*Id.* at 34, 40). She later clarified that she did not believe that there was any seized tobacco in the container during the pandemic because the Sheriff's Office was "not conducting [their] regular course of business," but rather targeting bars and parties in COVID enforcement raids (*Id.* at 56-57). She was not aware of any employees' personal alcohol or tobacco being stored in the evidence container (*Id.* at 59-60).

She testified that the evidence container was locked with a padlock, the key to the padlock was stored in a nearby lockbox, which required a code, and that neither respondent nor Deputy Sheriff Jones had access to the key (Tr. 35-36). She was aware that Sergeants Canteen, LeBlond, and Pineiro, as well as Deputy Sheriffs Lo and Singh, were authorized to access the key to the container, but did not recall whether she personally gave them authorization or someone else did

(Tr. 36, 41). She admitted that there were no written rules or regulations governing access to the evidence storage container (Tr. 39). She was not aware of any duplicate key for the container door but acknowledged that someone could have had a duplicate key (Tr. 38, 42).

Commanding Officer Kokeas had been in the man cave several times in 2020 and 2021, but never saw alcohol there until investigators opened the locked file cabinet in May 2021 (Resp. Ex. C at 45-48). She did not know if the alcohol found in the locked file cabinet was seized contraband or an employee's personal property (*Id.* at 48-49). Sergeant Canteen and several deputy sheriffs, including respondent and Deputy Sheriff Jones, had placed boxes on top of the shelves in the man cave on December 9, 2020 (*Id.* at 88-99). Commanding Officer Kokeas denied telling Sergeant Canteen to place the boxes there (*Id.* at 43).

Investigator Willy Gomez and Director of Vendor Integrity Anastasia Plakas testified regarding the investigation conducted by the Department of Investigation ("DOI"). In 2021, Investigator Gomez and Director Plakas, who served as a Special Investigator at the time, were assigned to the DOI unit overseeing the Department (*Id.* at 73-74, 153). DOI received several anonymous complaints in 2021, alleging that members of the Sheriff's Office were taking alcohol that had been seized during enforcement raids and drinking alcohol on the job (*Id.* at 74-75, 112, 154). Investigator Gomez was assigned to investigate the complaints on behalf of DOI and Director Plakas assisted as needed with the investigation (*Id.* at 75; Resp. Ex. D at 243).⁵ As part of the investigation, Investigator Gomez requested and reviewed the surveillance videos from the Starr Avenue garage and inspected the garage on May 19 and 21, and June 2, 2021 (Resp. Ex. C at 76-77, 123-24). Investigator Gomez and Director Plakas did not know whether the Department vouchered the contraband seized in 2020 and 2021 (*Id.* at 119-120, 128, 142; Resp. Ex. D at 198-99).

Director Plakas testified regarding her review of the surveillance videos, but never personally visited the evidence storage container or man cave in the Starr Avenue garage (Resp. Ex. D at 197, 236-37). Based on her review of the surveillance videos, she concluded that respondent removed contraband, including alcohol, from the evidence storage container (Tr. 50, 101, 128). However, Director Plakas acknowledged on cross examination that she could not say whether respondent or the other deputy sheriffs removed seized or vouchered contraband from the evidence storage container on December 10, 16, and 22, 2020, January 30, 2021, February 5, 11,

⁵ Investigator Gomez is no longer employed by DOI (Resp. Ex. C at 73).

and 13, 2021, or March 4, 6, 7, and 8, 2021, or whether there was seized or vouchered contraband in the trunk of respondent's vehicle on January 31, 2021 (Tr. 118, 123-28).

During his inspection of the Starr Avenue garage, Investigator Gomez entered the evidence storage container and took photographs (Resp. Ex. C at 76-77, 79; Pet. Ex. 2). He explained that there was a back room attached to the storage container, in which additional evidence was stored, and that together the container and back room formed an "L" shape (Resp. Ex. C at 78, 132-33). Based on his observation, Investigator Gomez estimated that 95% of the contents of the storage container were alcohol and tobacco (*Id.* at 85). The photographs from the evidence storage container and back room show boxes and bags of tobacco products and bottles and boxes of alcohol arranged on metal shelves (Pet. Ex. 2). Sheets of clear plastic were draped over some of the shelves and labels were affixed to the plastic sheets (*Id.*). Some of the labels noted an address and date, such as "2929 Atlantic 11/8," and other labels also included an itemized list of alcohol, such as "275 Liberty Ave 11/14/2020 11 Hennessy, 10 J.W. Black, 12 Tito's, 1 Casamigos, 1 Jack Daniels, 1 Ron Viejo de Caldas" (*Id.*).

Investigator Gomez inspected the man cave and took photographs (Resp. Ex. C at 86, 104; Pet. Ex. 3). He searched the refrigerator, cooler, and locked file cabinet in the man cave and found alcohol and tobacco products (Resp. Ex. C at 103, 109). The photographs from the man cave show several bottles of alcohol in the file cabinet, tobacco products such as a hookah and hookah accessories inside the cooler and file cabinet, and beer, wine, soda, seltzer, and snacks inside the refrigerator (Pet. Ex. 3). Investigator Gomez acknowledged that his investigation was unable to determine that the alcohol and tobacco products found in the man cave during the inspection were seized contraband (Resp. Ex. C at 121, 125, 139).

Respondent's Evidence

Respondent has been employed as a deputy sheriff by the Department since 2016 (Tr. 156). He was assigned to the DEA Task Force in 2019 upon the recommendation of Sheriff Fucito and was responsible for drug trafficking and money laundering investigations (Tr. 156-57). In 2020 and 2021, respondent worked simultaneously under Sergeant Pineiro on Squad 5 within BCI and on the DEA Task Force (Tr. 158-59). He was "on call 24/7" for the DEA and had been provided a black Jeep Grand Cherokee as a take-home vehicle (Tr. 194). As part of his DEA Task Force assignment, respondent utilized certain equipment, including cameras, binoculars, USB and GPS

trackers, a money counter, and tactical vest, and stored that equipment in the evidence storage container at the Starr Avenue garage (Tr. 157, 162). Sergeant Bradshaw, who left the Department in March 2020, provided him with his own key to the container so that he could store evidence collected by the DEA Task Force in the container (Tr. 160, 247). He usually stored drugs and other confiscated items in a black suitcase marked with an evidence tag and the DEA logo, and stored personal equipment and items, including personal cigars and alcohol, in another suitcase and plastic containers in the back storage room (Tr. 161-62, 171, 174-75, 178-79). In one of the photographs taken by DOI investigators, respondent identified the black suitcase with the DEA eagle logo (Pet. Ex. 2 at 20210519_181120; Tr. 174-75). In another photograph, he identified the plastic containers in the back storage room where he stored equipment (Pet. Ex. 2 at 20210602_160051; Tr. 175-76). Unlike some other deputy sheriffs, respondent did not have a locker at the Starr Avenue garage in 2020 and 2021 (Tr. 241-42, 262).

Respondent never received any training on evidence collection procedures (Tr. 162-63). He testified that there was no standard operating procedure for evidence collection at the Starr Avenue garage in 2020 and 2021 (Tr. 163). He recalled that in August 2020, Sheriff Fucito directed the deputy sheriffs to seize contraband in COVID-related raids, load it in their vehicles, and bring it to the Starr Avenue garage (Tr. 163-64). The contraband seized in these enforcement raids was not vouchered (Tr. 164). Some of the seized alcohol was poured out periodically at the Starr Avenue garage or destroyed by the Department of Sanitation in January 2021 (Tr. 198-99; Resp. Exs. G, H, I).

The evidence storage container was connected by a metal door to a back room that was much larger than the container (Tr. 167). The rooms were configured such that only 5 to 10% of the back room would be visible when standing in the container (Tr. 168). Respondent testified that the container and the back room were used to store seized alcohol and drugs, as well as equipment and PPE (Tr. 170-71, 235-36). The key used to unlock the door of the evidence storage container was kept in a nearby lockbox, which required a four-digit code to open (Tr. 172). Deputy Sheriff LeBlond provided respondent with the code to access the key in the lockbox (*Id.*).

The man cave was located adjacent to the evidence storage container and was primarily used for equipment storage (Tr. 166, 170). There were also snacks and drinks inside the man cave, and employees would have their lunch there (Tr. 170, 195, 218). Respondent never saw alcohol inside the refrigerator in the man cave (Tr. 289). He did not recall ever opening the file cabinet in

the man cave and never saw alcohol in there (Tr. 289-90). He recalled overhearing First Deputy Sheriff Kokeas speak with Sergeant Canteen in the garage on December 9, 2020, and she told him to place boxes on top of the shelves in the man cave to block the surveillance camera (Tr. 169-70).

Respondent denied that he ever removed seized or vouchered contraband from the evidence storage container (Tr. 234). Through his testimony, respondent addressed the events captured on each of the twelve surveillance videos. On December 10, 2020, respondent conducted a surveillance operation with Sergeant Pineiro (Tr. 185-86). Prior to departing the Starr Avenue garage that morning, respondent asked Deputy Sheriff Lo to open the evidence storage container (Tr. 186-87). Once inside, respondent told Deputy Sheriff Lo what items were going to be picked up that day (Tr. 187-88). Respondent then walked into the man cave to pick up batteries for his radio, placed them in his left jacket pocket, and brought them to his “go-bag” in his vehicle (Tr. 188-90, 253-54). Respondent denied that he removed contraband from the evidence storage container (Tr. 190). Upon review of the surveillance video, respondent denied that anything was under his jacket except his black hooded sweatshirt (Tr. 252). He insisted that any “bulge” under his jacket was just his “natural self,” as he weighed approximately 260 pounds at the time (Tr. 190-91, 253).

On December 16, 2020, respondent entered the evidence storage container with his own key (Tr. 192-93). Once inside, he removed confiscated items from his DEA evidence bag and set those items aside for destruction (Tr. 193). Respondent denied that he removed contraband from the evidence storage container (*Id.*). Upon review of the surveillance video, respondent denied that anything was under his jacket and attributed any “bloated profile” to being overweight (Tr. 254-56). He further denied that he was supporting anything with his right hand as he walked to his vehicle (Tr. 258).

On December 22, 2020, respondent entered the evidence storage container with his own key (Tr. 196). He and Deputy Sheriff Jones entered the container to move some items for pickup (*Id.*). Respondent retrieved his tactical vest that was stored in the container, put the vest on over his hooded sweatshirt, and put his jacket over the vest (Tr. 197-98). He described the tactical vest as an “outer carrier” that closed with Velcro and had numerous pouches and attachments in the front (*Id.*). While inside, respondent did not observe Deputy Sheriff Jones remove anything from the container (Tr. 197). Respondent denied that he removed contraband from the evidence storage container (Tr. 198). Upon review of the surveillance video, respondent noted that he was wearing

his tactical vest underneath his jacket and attributed the shape of Deputy Sheriff Jones's body to his "pot belly" (Tr. 258-59, 264-65).

On January 30, 2021, respondent entered the evidence storage container with his own key (Tr. 203). He entered the container to move some items for pickup and asked Deputy Sheriff Jones to help (*Id.*). In doing so, respondent cut his finger and he asked Deputy Sheriff Jones to retrieve first aid materials from the man cave (Tr. 204-05). While inside, respondent was with Deputy Sheriff Jones the entire time and did not observe him remove anything from the container (Tr. 206, 271). Upon review of the surveillance video, respondent denied that there was any bulge in Deputy Sheriff Jones's jacket near the stomach area as he exited the container (Tr. 271).

Respondent returned to the Starr Avenue garage from a Sheriff's Office enforcement operation on January 31, 2021 (Tr. 206-07). He parked his Jeep Grand Cherokee in front of the man cave and Sergeant Pineiro parked behind him (*Id.*). In the trunk of his Jeep, respondent had two boxes of Stella Artois beer, which had been given to him the day before by his friend, Juan Santos, at a barbershop (Tr. 208-09). During the operation, he told others not to load seized contraband into his vehicle since he had personal items in the trunk (Tr. 208). Upon arriving at the garage, he checked the trunk of the Jeep to make sure that no contraband was inside and closed the trunk without removing any items (Tr. 209-10). Respondent acknowledged that the boxes in the passenger cab of his vehicle contained alcohol that had been seized during the operation (Tr. 275).

Respondent offered the testimony of his childhood friend, Juan Santos (Tr. 141). Mr. Santos is employed as a warehouse manager by a New Jersey beer distributor, which entitles him to three cases of beer twice a month as a benefit of his employment (Tr. 143, 145). He testified that he met respondent at a barbershop in Washington Heights on January 30, 2021, at about 10:00 a.m. and gave respondent two cases of Stella Artois beer, each containing 24 bottles (Tr. 142-43). He recalled that respondent called him the night before and asked for beer for a televised boxing match he was going to watch with friends (Tr. 142, 146).

On February 5, 2021, respondent entered the evidence storage container with the lockbox key (Tr. 210). He entered the container to retrieve personal cigars and a cigar lighter from his suitcase in the back storage room (Tr. 211-13). He placed the cigars and lighter in his pocket and went to the man cave to smoke with a co-worker, as he frequently did (Tr. 211-12). Respondent produced his credit card statements, which showed over a thousand dollars spent at cigar shops

from August to December 2020 (Resp. Ex. F). Respondent denied that he removed contraband from the evidence storage container (Tr. 212-13).

On February 11, 2021, respondent entered the evidence storage container along with Deputy Sheriff Lo and Sergeant Canteen (Tr. 214). They went in the back storage room where respondent told Deputy Sheriff Lo what items had recently been seized (*Id.*). While Deputy Sheriff Lo was in the back room, respondent grabbed Deputy Sheriff Lo's jacket, which had been left on a crate near the entrance, and brought it to his vehicle (Tr. 214-16). Deputy Sheriff Lo's keys and iPad mini were in the pocket of the jacket (Tr. 215). Respondent cradled the jacket in his arms so that the keys would not jingle and make noise that Deputy Sheriff Lo would notice (*Id.*). Respondent then hid a package meant to resemble a kilogram of cocaine in the jacket and brought the jacket back to the crate inside the container (Tr. 215-16). He explained that this was a practical joke and that Deputy Sheriff Lo had jokingly locked respondent inside the container a few days earlier (Tr. 215-16, 283). Deputy Sheriff Lo discovered the gag cocaine package in his jacket and was asking around about it the following day (Tr. 286). Respondent denied that he removed contraband from the evidence storage container (Tr. 217). Upon review of the surveillance video, respondent denied that anything was under Deputy Sheriff Lo's jacket as he exited the container (Tr. 283-85).

On February 13, 2021, respondent entered the evidence storage container with the lockbox key (Tr. 217). He entered the container to retrieve some snacks and beverages that he had purchased at Costco and kept in the back storage room (Tr. 182, 217-18). Respondent produced his credit card statement showing a \$52.96 purchase from Costco on December 14, 2020 (Resp. Ex. F). He used a cooler to bring the snacks and beverages to the refrigerator in the man cave (Tr. 217-18). Respondent denied that he removed contraband from the evidence storage container (Tr. 219).

On March 4, 2021, respondent entered the evidence storage container along with Deputy Sheriff LeBlond and Sergeant Canteen (*Id.*). They entered the container to sort seized items for destruction and make room for the next operation (Tr. 219-20). Respondent denied that he removed contraband from the evidence storage container (Tr. 221). Upon review of the surveillance video, respondent denied that anything was under his jacket (Tr. 291-92).

On March 6, 2021, respondent entered the evidence storage container with his own key (Tr. 222-23). He entered the container to retrieve his tactical vest from the plastic container in the

back storage room (*Id.*). He needed the tactical vest to go out in the field and take pictures for a report on recent operations (Tr. 222). Respondent denied that he removed contraband from the evidence storage container (Tr. 223). Upon review of the surveillance video, respondent acknowledged that there was a bulge under his jacket but insisted that it was his tactical vest (Tr. 294).

Respondent asked Sergeant Canteen to open the container for him on March 7, 2021 (Tr. 223-26). He entered the container to retrieve his tactical vest and binoculars from the plastic container in the back storage room (Tr. 224, 227). While inside, he put the vest on over his hooded sweatshirt and his jacket on over the vest (Tr. 227). He then departed for a surveillance operation in his vehicle (Tr. 224, 227). Respondent denied that he removed contraband from the evidence storage container and testified that his tactical vest was under his jacket when he exited the container (Tr. 227-28).

On March 8, 2021, respondent went to the Starr Avenue garage to retrieve his DEA phone from the evidence storage container, where he had accidentally left it the day before (Tr. 229, 299-300). He was on sick leave that day, but he had an afternoon appointment scheduled as part of his DEA assignment (*Id.*). He retrieved his phone and placed it in his left pocket (Tr. 232). He recalled that other deputy sheriffs were inside the container to move items around after a recent operation (Tr. 231, 301). After speaking with Sergeant Canteen, he brought the DEA phone to his vehicle to charge its battery (Tr. 232-33). Respondent denied that he removed contraband from the evidence storage container (Tr. 233). Upon review of the surveillance video, respondent denied that there was any bulge on the left side of his jacket as he exited the container or that his left hand was supporting something under his jacket (Tr. 303, 305).

Respondent also relied upon the testimony of Chief of Detectives James Grayson and Sergeant Robert Gilliam, both of whom are retired from the Department (Resp. Ex. D at 277-78, 298). As the Chief of Detectives within BCI in 2020 and 2021, Chief Grayson directly reported to First Deputy Sheriff Kokeas, and knew respondent, who joined BCI in 2016 and was assigned to the DEA Strike Force (*Id.* at 278; Resp. Ex. L). He recalled that BCI was responsible for COVID-related enforcement raids in 2020 and 2021, and that they seized evidence such as alcohol, marijuana, and untaxed cigarettes during those raids (Resp. Ex. D at 279-80). During this “chaotic” time, Sheriff Fucito directed them to store the seized contraband at the Starr Avenue garage, but not to voucher the evidence (*Id.* at 280-81). Seized contraband was supposed to be

placed in the evidence storage container but was sometimes left unsecured in the parking garage outside of the container (*Id.* at 280, 290, 293). The evidence storage container consisted of a grey shipping container, with shelves lining both of its sides, connected by a door to another storage room (*Id.* at 282-83). The rooms were configured such that only 20% of the back room would be visible when standing in the grey container (*Id.* at 283-84).

Chief Grayson testified that vehicle equipment and PPE were stored on the shelves in the man cave in 2020 and 2021, and he recalled that a refrigerator in the man cave contained soda, water, seltzer, and beer, which were the personal property of employees (*Id.* at 284-85). Regarding the boxes stacked on top of the shelves in the man cave, he recalled that Sergeant Gilliam and Sergeant Canteen told him that First Deputy Sheriff Kokeas ordered the boxes be stacked there to block the surveillance camera (*Id.* at 285-86, 289). The boxes were still on top of the shelves when he retired in June 2021 (*Id.* at 286). He testified that Sheriff Fucito, First Deputy Sheriff Kokeas, and several undersheriffs were in the man cave from December 2020 to June 2021 and they never requested that the boxes be removed (*Id.* at 286-87, 294).

Sergeant Gilliam, who was responsible for supervising deputy sheriffs and maintaining the vehicular fleet, last worked at the Starr Avenue garage in October 2020 and retired from the Department on December 31, 2021 (*Id.* at 292, 309-10; Pet. Ex. 16). He supervised respondent since 2016 and noted that respondent was detailed to the DEA in 2019 (Resp. Ex. K). During the pandemic, Sheriff Fucito directed the deputy sheriffs to enforce social distancing and public gathering restrictions (Resp. Ex. D at 299-300). He testified that there were no evidence collection procedures utilized in the COVID enforcement, describing it as a “fluid situation,” wherein they took contraband “off the street” and stored it at the Starr Avenue garage (*Id.* at 298-99). He recalled that seized contraband would sometimes remain in trucks or outside in the garage before eventually being stored in the evidence container (*Id.* at 300). Prior to the pandemic, they had specific procedures for seizing and storing contraband, which included evidence bags, cards, and logbooks (*Id.*). However, Sergeant Gilliam testified that, at Sheriff Fucito’s direction, seized contraband was not vouchered during the pandemic and they had no way to keep track of seized items (*Id.* at 301). The evidence storage container consisted of a grey shipping container connected by a steel fire door to a second, larger room (*Id.* at 313-14). The rooms were configured in an “L” shape and only 10% of the back room would be visible when standing in the grey container (*Id.* at 316-17). Shelving lined the walls of the container and seized alcohol was stored there, along with

equipment like vests, and personal items, such as bags, clothing, and bottles (*Id.* at 314-15). The back room contained more shelving, a refrigerator, microwave, work bench, television, and various equipment (*Id.* at 317).

In 2019, Sergeant Gilliam created the man cave, which was a “U” shaped area made of shelving where equipment for the vehicular fleet and facility was stored (*Id.* at 302-03). Personal property belonging to the deputy sheriffs, including a refrigerator, couch, and clothing, were also stored there (*Id.* at 303). The area was used for lunch breaks and relaxation, and he never saw any alcoholic beverages in the area (*Id.*). During the pandemic, the man cave area was also used for work meetings, which were frequently attended by Sheriff Fucito, First Deputy Sheriff Kokeas, and Chief Grayson (*Id.* at 304-06). Even though Sergeant Gilliam was on leave from October 2020 through December 2021, he returned to the Starr Avenue garage on approximately 20 occasions from December 2020 to March 2021 (*Id.* at 311; Pet. Ex. 17). He recalled that Sergeant Canteen called him in the evening on December 9, 2020, to tell him that First Deputy Sheriff Kokeas wanted boxes placed on the shelves in the man cave and he told Sergeant Canteen to use the old computer boxes in the garage (Resp. Ex. D at 311-12).

Theft and Facilitation

Petitioner charged respondent with stealing or facilitating the theft of “vouchered contraband” from the evidence storage container in the Starr Avenue garage on December 10, 16, and 22, 2020, January 30 and 31, 2021, February 5, 11, and 13, 2021, and March 4, 6, 7, and 8, 2021 (ALJ Ex. 2 at Specs. 1-12). Petitioner argued at trial that respondent stole contraband on all twelve dates except January 30, 2021, and that respondent facilitated Deputy Sheriff Jones’s theft of contraband on December 22, 2020, and January 30, 2021 (Tr. 17-20, 321-28).

It was undisputed that the evidence container in the Starr Avenue garage stored, albeit not exclusively, the alcohol and other contraband seized by the Sheriff’s Office during their COVID enforcement raids in 2020 and 2021. It was also undisputed that the Sheriff’s Office did not voucher any of the contraband stored in the evidence container in 2020 and 2021. Petitioner was therefore unable to offer any documentary evidence of the specific contents of the evidence storage container from December 2020 to March 2021 or establish through documentary evidence that contraband was missing from the container after the charged incidents of theft. Petitioner did not

offer the testimony of any witnesses who personally observed respondent or Deputy Sheriff Jones steal contraband from the container or in possession of contraband in the man cave.

Nor did petitioner sufficiently rebut respondent's testimony that he was permitted to enter the evidence storage container for legitimate business reasons, including those related to his DEA Task Force assignment, and that he had been provided a key to the container by Sergeant Bradshaw for purposes of that assignment. It lent credence to respondent's testimony that he was able to identify his plastic containers and a suitcase bearing a DEA evidence tag in the photographs taken by DOI investigators in the back room of the evidence storage container. Although Commanding Officer Kokeas testified that respondent did not have access to the key for the evidence storage container, her testimony was conclusory and unpersuasive. She was unable to explain how certain individuals had been authorized to access the key to the container, could not recall whether she personally gave authorization to those individuals, admitted that the Department had no written rules governing access to the container, and acknowledged that someone could have had a duplicate key to the container.

Petitioner relied almost exclusively upon the surveillance videos from the Starr Avenue garage, which captured the actions of respondent and Deputy Sheriff Jones as they exited the evidence storage container, entered the adjacent man cave, or walked to parked vehicles. Petitioner argued that the videos depicted suspicious conduct indicative of theft. However, upon review of the surveillance videos, petitioner's own witness, Director Plakas, conceded that she could not testify that respondent or Deputy Sheriff Jones removed contraband from the evidence storage container. Indeed, petitioner offered no evidence of what occurred within the evidence storage container and none of the videos showed alcohol visibly in the hands of respondent or Deputy Sheriff Jones as they exited the evidence storage container. The video evidence also did not show what occurred within the man cave because boxes placed on the top shelves on December 9, 2020 obstructed the camera's view.

Petitioner sought to establish that respondent stole contraband from the evidence storage container or intentionally facilitated the theft of contraband by Deputy Sheriff Jones through circumstantial evidence. A finding of misconduct may be established in a disciplinary proceeding solely by circumstantial evidence. *Dep't of Sanitation v. O'Neill*, OATH Index No. 2632/10 at 5 (Sept. 14, 2010), *aff'd*, 91 A.D.3d 583 (1st Dep't 2012). Circumstantial evidence is defined as "direct evidence of a collateral fact, that is, of a fact other than a fact in issue, from which, either

alone or with other collateral facts, the fact in issue may be inferred.” *Prince, Richardson on Evidence* § 4-301. “A finding based entirely on circumstantial evidence may be established in a civil service disciplinary proceeding so long as the circumstantial evidence supports the conclusion that ‘the inference drawn is the only one that is fair and reasonable.’” *Dep’t of Social Services (Human Resources Admin.) v. DeFrance*, OATH Index No. 1593/20 at 8 (Sept. 28, 2020), *adopted*, Comm’r Dec. (Dec. 16, 2020), *aff’d*, NYC Civ. Serv. Comm’n Case No. 2020-0810 (Feb. 19, 2021). “[I]t is not necessary for the Department to disprove all other possible explanations or inferences in order to sustain its case.” *Dep’t of Sanitation v. Guastafeste*, OATH Index No. 658/00 at 16 (May 1, 2000), *aff’d*, 282 A.D.2d 398 (1st Dep’t 2001). However, “[i]f the probabilities are evenly balanced, no inference as to the fact in dispute may be drawn. To do so would be speculative.” *Dep’t of Education v. Fleischmann*, OATH Index No. 1528/05 at 10 (July 26, 2006).

Petitioner proved by a preponderance of the credible evidence that respondent stole contraband from the evidence storage container on February 11 and March 8, 2021. The video evidence established that on February 11, 2021, respondent removed a black object from the container, partially concealed it under Deputy Sheriff Lo’s green jacket as he exited the container, and brought it to his work vehicle parked nearby in the garage. Likewise, the video evidence established that on March 8, 2021, while respondent was out on sick leave, he removed an object from the container, completely concealed it under his denim jacket as he exited the container, and brought it to his personal vehicle parked nearby in the garage. On both occasions, respondent held a concealed object in his hand as he walked to the vehicle, and upon exiting the vehicle, his hands were either empty or no longer cradling the green jacket. This supports the conclusion that respondent carried an object from the container to his vehicle.

Respondent’s testimony regarding these two incidents was not credible. With respect to February 11, 2021, respondent testified that he removed Deputy Sheriff Lo’s green jacket from the evidence storage container for purposes of a practical joke involving a gag package of cocaine. Respondent denied that he held anything under Deputy Sheriff Lo’s jacket. Upon further review of the surveillance video, he surmised that the black object sticking out from Deputy Sheriff Lo’s jacket could be his co-worker’s tablet. This testimony was inconsistent with the video evidence. The black object under the green jacket did not appear to be the size or shape of an iPad mini, and the object appeared to be in respondent’s arms as opposed to the jacket pocket. And the manner

respondent carried the green jacket would not have been necessary to simply prevent the jingling of keys in the green jacket, as he claimed. Moreover, not only is it likely that Deputy Sheriff Lo would have noticed the gag cocaine package in his jacket pocket as he walked out of the container and through the garage, but the practical joke was uncorroborated by Deputy Sheriff Lo's testimony at his own disciplinary trial. On cross examination in the prior proceeding, Deputy Sheriff Lo was repeatedly asked about his green jacket on February 11, 2021, and he never mentioned the cocaine package or the practical joke (Resp. Ex. B at 299-302).

With respect to March 8, 2021, respondent testified that the only item he removed from the evidence storage container was his DEA phone, which he placed in his left jacket pocket. Upon review of the surveillance video, respondent denied that he was holding anything under his jacket with his left hand. Respondent's testimony was at odds with the video evidence. From the moment that respondent exited the container until he entered the vehicle, respondent's left hand remained at his side and was bent under the left side of his jacket, suggesting that he was holding an object under his jacket. Respondent would not have had to support a phone in his left jacket pocket in this manner. It also did not make sense that respondent, as the driver of the vehicle, would open the rear passenger side door if his intention was to charge the phone in his vehicle.

The only fair and reasonable inference to be drawn from this record is that respondent removed contraband from the evidence storage container on February 11 and March 8, 2011. This conclusion is supported by several facts established at trial. First, the evidence container stored, largely but not exclusively, the alcohol and other contraband seized in COVID enforcement operations in 2020 and 2021. The testimony regarding the container's contents was illustrated through the photographs taken by DOI investigators in June 2021, which showed bottles and boxes of alcohol stacked on shelves in the grey container. Although the charged incidents of theft preceded the DOI investigation by several months, hundreds of the bottles were labeled November 2020, making the photographs probative of the container's contents during the relevant period.

Second, the Department did not voucher any of the contraband seized in COVID enforcement operations and stored in the evidence container in 2020 and 2021, and respondent was fully aware that the contraband was not vouchered or otherwise marked for safekeeping. This provided an opportunity for theft as there would be no record of missing items.

Finally, and most importantly, the video evidence established that respondent made efforts to conceal the objects removed from the container. Had respondent removed work-related

equipment stored in the container, there would be no reason to conceal the items underneath a jacket. Given respondent's awareness of the video surveillance in the area, he had ample reason to conceal contraband underneath the jackets as he exited the container and walked to his vehicles. Indeed, the record reflects that respondent was personally involved in placing boxes on top of the shelves in the man cave on December 9, 2020, and understood that the purpose was to block the view of the surveillance camera (Tr. 170; Resp. Ex. C at 88-99; Resp. Ex. D at 353).

As strenuously argued by respondent, petitioner did not establish what the concealed objects specifically were and did not prove that any of the contraband was vouchered, as alleged. Nonetheless, petitioner proved the essential elements of the charged misconduct — that respondent stole contraband from the Department's evidence storage container on February 11 and March 8, 2021. The specific type of contraband stolen is unknown because petitioner did not voucher the contraband and respondent concealed the items as he removed them from the container. Respondent entered an area filled with unvouchered contraband, knew the area was under video surveillance, and concealed items removed from the area. Based on the totality of the circumstantial evidence, petitioner established that the concealed objects removed by respondent from the evidence storage container on these two dates were more likely than not contraband. *See Dep't of Education v. Robles*, OATH Index No. 2275/09 at 1, 12 (Oct. 19, 2009), *adopted*, Chancellor's Dec. (Nov. 16, 2009) (finding that a custodian engineer stole an unknown "liquid substance in 55-gallon drums" from a public school, but that "the circumstantial evidence was insufficient proof that [he] stole heating oil"); *Dep't of Transportation v. Mascia*, OATH Index No. 403/85 at 9-13 (May 30, 1986) (finding circumstantial evidence, which included "a clearly discernible bulge in his pants pocket which resembled the shape of a roll of tokens," sufficient to prove that respondent stole a roll of tokens from his supervisor's desk drawer).

In contrast, petitioner failed to prove by a preponderance of the credible evidence that respondent stole contraband from the evidence storage container or the Starr Avenue garage on the other nine occasions. The video evidence relied upon by petitioner was inconclusive and equivocal with respect to these charges. Specifically, I was not convinced that respondent had an object concealed underneath his outerwear as he exited the evidence storage container on December 10 and 16, 2020, February 5, 2021, or March 4, 2021. The video evidence established that respondent exited the evidence storage container and walked to man cave on February 5, 2021. No object was discernible underneath respondent's fleece on the video. On December 10 and 16,

2020, as well as March 4, 2021, the video evidence revealed what appeared to be a protrusion in the front of respondent's jacket as he exited the evidence storage container and walked to the man cave. However, the protrusion was barely visible even when the speed of the video was slowed and the image was enlarged. Given the lack of clear video evidence in support of these four charges, little can be reasonably inferred from respondent's arm tucked by his side as he walked, as argued by petitioner. While it could be indicative of carrying or supporting a concealed object, it is also possible that respondent simply walked with his hand in his jacket pocket. Indeed, respondent's left hand appeared to be in his jacket pocket as he exited the container and walked to his vehicle on December 10, 2020, but was also in his pocket as he returned from the vehicle. Moreover, on March 4, 2021, both of respondent's arms swung freely at his side as he walked from the container to the man cave, which would seem incompatible with concealing contraband under a jacket.

I was also not persuaded that the object underneath respondent's jacket as he exited the evidence storage container on December 22, 2020, March 6, 2021, and March 7, 2021 was more likely contraband than a tactical vest. It was undisputed that respondent exited the evidence storage container on these three occasions with something under his jacket. The video evidence showed a rectangular object under the front of respondent's jacket. Respondent testified that he was wearing a tactical vest over a sweatshirt and under a jacket, and that he kept the tactical vest in the plastic containers in the back storage room along with other work-related equipment.

As an initial matter, I credited respondent's testimony that he stored his work-related equipment, including tactical vest, in the evidence container. As set forth above, his testimony was corroborated by some of the photographs taken by DOI investigators in May and June 2021. Respondent also provided unrebutted testimony that he did not have a locker at Starr Avenue. Moreover, the video evidence showed respondent removing a black vest from his vehicle after an enforcement operation on January 31, 2021, and carrying it to the locked evidence container, suggesting that he intended to store the vest in the container that night.

Respondent did not provide an image of his tactical vest, but he described it as an outer carrier with numerous pouches and attachments on the front that closed with Velcro. This description appeared to be consistent with the black vest carried by respondent on January 31, 2021. The black vest had boxy padding on both the front and the back and open flaps on the side and appeared similar to the black boxy vests worn by Deputy Sheriff Jones and Sergeant Pineiro

underneath their jackets that same night. The parties did not elicit any testimony regarding whether the black vest used by respondent on January 31, 2021 was the same tactical vest that he claimed to wear on December 22, 2020, March 6, 2021, and March 7, 2021.

Given the credible testimony that respondent stored his tactical vest and other equipment inside the evidence storage container, it is plausible that respondent removed and wore a tactical vest underneath his jacket on these three occasions. Even when the speed of the video was slowed and the image was enlarged, the video evidence was inconclusive on whether the rectangular contours underneath respondent's jacket was contraband or a tactical vest. Nor did the video evidence show that respondent consistently used a hand to support the object underneath his jacket, which would likely be required for contraband but unnecessary for a tactical vest. For example, on December 22, 2020, respondent used both hands to close and lock the container door. On March 7, 2021, respondent again used both hands to close and lock the container door and had both hands free as he opened the car door. On March 6, 2021, respondent used his right hand to close and lock the container door and then his left hand swung freely at his side immediately thereafter as he walked back to the man cave.

Based on her experience as a peace officer, Director Plakas opined that the video evidence was inconsistent with respondent wearing a bulletproof vest (Tr. 99-101). She noted that a bulletproof vest would have a bulky rectangular shape in both the front and the back due to the "plate on either side of you to protect you from getting shot" (Tr. 100). I afforded this testimony little weight since it was unclear whether she based her opinion on the same type of vest used by respondent. Director Plakas offered an opinion regarding a bulletproof vest, but respondent testified that he wore a tactical vest and petitioner did not elicit any testimony regarding the difference.

With respect to January 31, 2021, it was undisputed that respondent entered the Starr Avenue garage after an enforcement operation with a box of Stella Artois beer in the trunk of his work vehicle and later departed the garage with the beer still in the trunk. Petitioner did not offer any evidence that the box of Stella Artois beer had been seized during the enforcement operation or placed into respondent's vehicle during the operation. Instead, petitioner argued that the Stella Artois beer must have been contraband seized during the operation along with the other boxes of alcohol in the vehicles and that respondent accidentally opened the trunk upon arriving at the garage. However, this was not the only fair and reasonable inference to be drawn from the record.

Although two of the boxes removed from the passenger cab of respondent's vehicle bore a beer label and the ten boxes removed from the other vehicle also bore beer labels, it is notable that none of those boxes of contraband had the Stella Artois label. Given the known surveillance cameras in the area and the nearby presence of his supervisor and co-workers, it is more likely that respondent would not have opened the trunk once parked in the garage if he intended to steal contraband concealed in his trunk. Moreover, both respondent and his childhood friend, who worked for a beer distributor, testified that the case of Stella Artois was given to him the day before the enforcement operation. Although it showed extremely poor judgment as a law enforcement officer for respondent to keep beer in the trunk of his work vehicle as he went on an operation to seize alcohol, respondent provided a plausible and corroborated explanation for the Stella Artois beer in his trunk. On this record, petitioner failed to establish that the Stella Artois beer was contraband seized during the enforcement operation and stolen from the Starr Avenue garage by respondent on January 31, 2021.

With respect to February 13, 2021, it was undisputed that respondent removed a cooler from the evidence storage container and brought it to the man cave. The video evidence did not establish the contents of the cooler, as the cooler remained closed the entire time. In support of the inference that the cooler contained contraband, petitioner argued that the photographs taken during the DOI investigation showed the same cooler with a hookah inside (Tr. 326). However, given the three intervening months between the charged incident and the DOI investigation, the record does not support the inference that respondent removed the hookah from the evidence storage container using the cooler on February 13, 2021. Moreover, respondent provided a plausible explanation of the cooler's contents, namely that he stored snacks and beverages in the container alongside other work-related equipment and used the cooler to transport those items to the refrigerator. Witnesses at trial as well as photographs taken by DOI investigators confirmed that the refrigerator was used to store snacks as well as non-alcoholic beverages. Even when coupled with respondent's awareness of the surveillance camera in the area, it would be far too speculative to find that he removed contraband from the container using the cooler on February 13, 2021. *See Health & Hospitals Corp. (North Central Bronx Hospital) v. Friday*, OATH Index No. 1055/21 at 7 (May 5, 2022) (dismissing charge that respondent stole hospital supplies where video evidence showed him walking out of the hospital with a shoulder bag, but there was no proof of what was in the bag and there was no inventory documenting the stolen items).

Petitioner also failed to prove by a preponderance of the credible evidence that respondent intentionally facilitated the theft of contraband from the evidence storage container on December 22, 2020, or January 30, 2021. Petitioner argued that respondent purposely facilitated the theft of contraband on these dates by unlocking and opening the evidence container for Deputy Sheriff Jones to steal contraband (Tr. 323-24).

The video evidence established that respondent unlocked and opened the evidence storage container on December 22, 2020. Respondent and Deputy Sheriff Jones entered the container together and were both inside for over 11 minutes. They exited the container around the same time and later exited the man cave together, before walking to their separate vehicles. The video evidence established that Deputy Sheriff Jones removed an object from the container, concealed it under his jacket, and cradled it with his hands as he walked. The protrusion in his jacket and the placement of his hands was not consistent with a pot belly, as respondent contended, and the same pot belly was not apparent when Deputy Sheriff Jones entered the container. Moreover, the record reflects that Deputy Sheriff Jones was aware of the surveillance cameras in the area, as less than two weeks earlier he had assisted with placing boxes on top of the shelves in the man cave to block the camera's view (Resp. Ex. C at 89-99; Resp. Ex. D at 353).

Even assuming the object concealed by Deputy Sheriff Jones was contraband from the evidence storage container, the video evidence relied upon by petitioner, without more, is insufficient to establish that respondent had the requisite knowledge or intent for facilitation under the charged crimes. *See Fleischmann*, OATH 1528/05 at 10 (finding circumstantial evidence insufficient to establish that respondent had the requisite knowledge or intent for the charged criminal conduct in a disciplinary proceeding brought under the crimes exception); *Transit Authority v. Wilson*, OATH Index No. 1004/93 at 10 (July 15, 1993) (finding that the evidence was insufficient to establish that respondent knew his subordinate was stealing items by placing them in a private car). It cannot be reasonably inferred from the video evidence that respondent knew that Deputy Sheriff Jones intended to steal contraband when respondent opened the container door and entered with Deputy Sheriff Jones. Moreover, considering the size and shape of the storage area, the video evidence did not establish that respondent observed Deputy Sheriff Jones take an object and place it under his jacket while inside the container. The grey shipping container and the larger back storage room formed an "L" shape and very little of the back room was visible from the container. As set forth above, it is plausible that respondent was in the back storage room

retrieving and donning his tactical vest while they were inside the container. Given their proximity upon departing the man cave, respondent may have noticed a suspicious bulge under Deputy Sheriff Jones's jacket. However, this fact alone is insufficient to reasonably support the inference that respondent opened the door over 11 minutes earlier with the intent to facilitate Deputy Sheriff Jones's illegitimate actions inside the container.

The video evidence was also inconclusive and equivocal regarding whether Deputy Sheriff Jones removed an object from the container and concealed it under his jacket on January 30, 2021. The video evidence showed that respondent unlocked and opened the evidence storage container, and that respondent and Deputy Sheriff Jones entered the container together and were both inside for about five minutes. Twice within a few minutes, Deputy Sheriff Jones exited the container with his puffy jacket closed. No object was discernible underneath the jacket on the video when he first exited. When he exited for the second time, the video evidence revealed what appeared to be a protrusion in the front of his jacket. Due to the puffy jacket worn by Deputy Sheriff Jones, the protrusion was only visible when the speed of the video was slowed and the image was enlarged. Both arms swung freely at his side as Deputy Sheriff Jones walked from the container to the man cave, which would seem incompatible with concealing contraband under a jacket. Given the lack of clear video in support of the charge, little can be reasonably inferred from the fact that Deputy Sheriff Jones's jacket was open when he first entered the container and closed when he exited, as argued by petitioner. The video evidence relied upon by petitioner, without more, is insufficient to establish that respondent intentionally facilitated the theft of contraband by opening the door of the evidence storage container on January 30, 2021.

In sum, petitioner failed to prove that respondent stole or intentionally facilitated the theft of contraband from the evidence storage container on 10 occasions from December 2020 to March 2021, but proved by a preponderance of the credible evidence that respondent stole contraband from the evidence storage container on February 11 and March 8, 2021. Accordingly, the charges are sustained in part.

FINDINGS AND CONCLUSIONS

1. Petitioner proved that respondent stole contraband from the evidence storage container in the parking garage located at 30-10 Starr Avenue on February 11 and March 8, 2021.

2. Petitioner failed to prove that respondent stole contraband from the evidence storage container or from the parking garage located at 30-10 Starr Avenue on December 10, 16, and 22, 2020, January 31, 2021, February 5 and 13, 2021, or March 4, 6, and 7, 2021.
3. Petitioner failed to prove that respondent intentionally facilitated the theft of contraband from the evidence storage container in the parking garage located at 30-10 Starr Avenue on December 22, 2020, or January 30, 2021.

RECOMMENDATION

Upon making these findings, I obtained and reviewed respondent's personnel abstract. Respondent has been employed by petitioner as a deputy sheriff since 2016 and has no prior disciplinary history. Petitioner seeks the termination of respondent's employment as a penalty for the proven charges (Tr. 330). This is appropriate.

"Ordinarily, the only appropriate penalty for an employee who steals from a co-worker or her employer is termination, without regard to the value of the items stolen." *Human Resources Admin. v. Williams*, OATH Index No. 226/02 at 29-30 (Mar. 7, 2002) (finding termination to be appropriate for theft of a spiral notebook and an answering machine belonging to the agency); *see Dep't of Citywide Admin. Services v. DeBellis*, OATH Index No. 1228/18 at 3 (Jan. 26, 2018) (recommending maintenance worker's termination where "respondent entered a secure area of the facility to steal City equipment," consisting of two radios); *Yusupova*, OATH 1124/16 at 7-8 (recommending patient care associate's termination for ordering medical tests for herself without authorization and without paying for them); *Dep't of Sanitation v. Centeno*, OATH Index No. 857/11 at 20-22 (June 6, 2011), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-92-SA (Nov. 30, 2011) (recommending termination of sanitation worker who stole cleaning supplies from his employer); *Robles*, OATH 2275/09 at 19-20 (recommending custodian engineer's termination for stealing a liquid substance in 55-gallon drums from public school); *Health & Hospitals Corp. (Kings Co. Hospital Ctr.) v. George*, OATH Index No. 829/04 at 9-10 (May 17, 2004) (recommending termination of dietary aide for stealing candy and hospital supplies); *Health & Hospitals Corp. (Kings County Hospital Ctr.) v. Colter*, OATH Index No. 196/98 at 9-10 (Oct. 20, 1997) (recommending termination of hospital employee who stole a turkey and attempted to steal two cases of dish soap from the hospital); *Dep't of Transportation v. Delprete*, OATH Index No. 506/95 at 11 (Feb. 17, 1995) (recommending termination of supervisor who stole cobblestones

belonging to the agency); *Mascia*, OATH 403/85 at 23-24 (recommending termination of office aide who stole a \$28.50 roll of tokens from supervisor’s desk drawer); *cf. Health & Hospitals Corp. (Bellevue Hospital Ctr.) v. Sanchez*, OATH Index No. 1052/08 at 15-17 (Apr. 25, 2008) (finding the termination of a medical waste technician who engaged in the theft of a motor compressor to be excessive where he “appear[ed] merely to be hoarding used items and discarded junk in his locker”).

Petitioner established that respondent stole contraband from the evidence storage container on two occasions in early 2021. Theft in the workplace “reflects a lack of moral integrity” and is “a fundamental breach of the necessary trust that must exist . . . between an employer and employee.” *Williams*, OATH 226/02 at 30. Respondent’s conduct is particularly egregious given that he is entrusted with significant law enforcement responsibilities as a deputy sheriff. *See Dep’t of Finance v. Smyth*, OATH Index No. 1285/11 at 5 (Mar. 9, 2011) (recommending termination of deputy sheriff for stealing \$13,266 of union funds). I did not find that respondent’s misconduct was mitigated by the Department’s failure to voucher the contraband to safeguard the property or to use it as evidence in any legal proceeding, or the Department’s ultimate destruction of some of the contraband.

I have fully considered respondent’s clean record over his 8-year career with the Department and the character letters submitted on his behalf by Chief Grayson and Sergeant Gilliam. Despite the lack of prior discipline, termination of respondent’s employment is appropriate based on the egregiousness of his misconduct and his demonstrated lack of integrity.

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

Michael D. Turilli
Administrative Law Judge

March 19, 2024

SUBMITTED TO:

PRESTON NIBLACK
Commissioner

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April 22, 2024

Elisson Jimenez
[REDACTED]
[REDACTED]

Re: Notice of Determination Pursuant to Section 75 of New York State Civil Service Law

Dear Mr. Jimenez:

I have reviewed Judge Michael D. Turilli's Report and Recommendation, and the record of the administrative hearing held on January 3, 4, and 18, 2024 regarding the Notice and Statement of Superseding Charges dated June 6, 2023.

Based upon that review, I hereby adopt the findings of fact and penalty in the Report and Recommendation. Therefore, the penalty imposed upon you for your misconduct is termination.

Under the provisions of Section 76 of the New York State Civil Service Law, you are entitled to appeal from this determination by application either to the New York City Civil Service Commission or to a court in accordance with provisions of Article 78 of the Civil Practice Law and Rules. If you elect to appeal to the Commission, such appeal must be filed in writing within 20 days of receipt of this determination

Sincerely,

[REDACTED]

Preston Niblack
Commissioner
NYC Department of Finance

cc: Ari Lieberman