

Taxi & Limousine Comm'n v. Urena-Santos

OATH Index No. 527/23 (Dec. 23, 2022), *adopted*, Comm'r Dec. (Jan. 19, 2023), **appended**

Inspector yelled and cursed at his supervisors publicly in one incident in May of 2022, and, a few days later, forcibly shoved a fellow officer out of his way as he aggressively rushed toward his supervisors and tried to provoke a physical fight with one of them, in an incident of workplace violence. ALJ recommended that respondent be suspended for 30 days.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
TAXI AND LIMOUSINE COMMISSION
Petitioner
- against -
LUIS URENA-SANTOS
Respondent

REPORT AND RECOMMENDATION

JOAN R. SALZMAN, *Administrative Law Judge*

This employee disciplinary proceeding was referred by the Taxi and Limousine Commission (“TLC”) pursuant to section 75 of the Civil Service Law. Petitioner charged that Luis Urena-Santos, a TLC inspector in the Safety and Emissions Division, violated rule 23 of its Employee Code of Conduct (Jan. 23, 2012), when: (1) on May 12, 2022, after hearing that his two supervisors had suspended two other officers for a previous incident that did not involve him, he approached these supervisors and, in the presence of other officers, began yelling at them and calling them “pieces of shit,” accusing them of getting employees fired; and (2) on May 16, 2022, he aggressively addressed the same two supervisors at roll call, asking them, “who are you going to fire next?,” and accusing them of being “out to screw everyone.” Instead of leaving the roll call area to do his work, respondent allegedly turned around, advanced aggressively toward both supervisors, challenging one of them to fight him physically, while screaming “you guys are pieces of shit.” Petitioner charges that respondent forcibly pushed a fellow officer, who was trying to stop him from advancing toward his supervisors, out of his way so he could reach them to argue further and provoke fisticuffs (Pet. Ex. 6).

A hearing was conducted on November 15, 2022, via Webex (due to the COVID-19 pandemic). Petitioner presented three TLC witnesses and documentary evidence. Respondent testified, denied the charges, and submitted one document in evidence. I asked counsel to submit brief lists of authorities they contend control this matter and held the record open until November 22, 2022, for that purpose. Petitioner's counsel timely submitted a summary of case law. I received nothing from respondent's counsel, and the record closed on November 22, 2022. I find that respondent engaged in misconduct as charged and recommend that he be suspended for 30 days.

BACKGROUND

Respondent has worked for TLC for almost 13 years (Tr. 46). He is a TLC officer assigned to inspect TLC licensees' vehicles in the Division of Safety and Emissions (Tr. 16). He describes himself as an auto mechanic who inspects vehicles (Tr. 45). His job includes ensuring that the emissions from the vehicles are acceptable and that the brakes work. He also checks front-end shock absorption and car safety (Tr. 46).

Chief Anthony Moran has worked about two-and-a-half years as the Chief of Lane Operations for the Woodside facility of the TLC, also in the Safety and Emissions Division. He runs the daily operation of the inspection lanes (Tr. 11) of a TLC facility where TLC licensees submit their vehicles to inspections by officers like respondent (Tr. 15). Anthony Gagliardi is the Deputy Chief of the Safety and Emissions Division of TLC with Moran (Tr. 35). Gagliardi is responsible for the supervision of the division, including all inspections of TLC-licensed vehicles such as those with medallions, those used for street hail, and for-hire-vehicles. He supervises the officers and inspectors, lieutenants, and captains who work in this division. He is a 15-year veteran of TLC (Tr. 36) and has supervised respondent for the last four to five years (Tr. 41).

May 12, 2022

At approximately 2 p.m. at the TLC's Woodside Safety and Emissions facility, respondent was in an inspection lane. Upset that two fellow officers, who happen to be brothers, had been suspended earlier that day for five days each for a "totally separate incident" in which respondent was not involved (Tr. 19),¹ respondent approached Moran and Gagliardi in an

¹ Moran testified that these officers refused an order "to do their duties" (Tr. 18).

aggressive manner, yelling at them and calling them “pieces of shit” (Pet. Exs. 1, 4). Moran and Gagliardi encouraged respondent to calm down and warned him “numerous times to knock off his behavior and go back to work” (Tr. 12), but respondent continued yelling at them for several minutes before returning to his work. The supervisors testified credibly that respondent became increasingly upset, angry, and “definitely agitated” (Tr. 12, 18-19, 36, 39). Chief Moran called his superior about the incident on May 12th, the day it occurred (Tr. 33), and documented it on May 17, 2022, within three business days thereafter (Tr. 33; Pet. Ex. 1). Likewise, Gagliardi wrote in his May 17th report that while Moran and he were walking through the lanes, respondent “came up to us. He was visibly agitated and starting yelling at us about the suspension that was served to two other officers earlier that day. He cursed at us multiple times calling us ‘Pieces of shit’ and accusing us of trying to come after people’s jobs” (Pet. Ex. 4). Moran told respondent “multiple times” not to argue on behalf of the other officers and “to stay out of it” (Pet. Ex. 4). But respondent “continued his verbal assault in the middle of the lanes, in front of other officers/inspectors, for several minutes before walking away. While he was walking away, he was still yelling and cursing at us” (Pet. Ex. 1). The supervisors’ reports are consistent with each other but not identical (Pet. Exs. 1, 4).

Moran testified that respondent “became very belligerent and disrespectful toward him and Gagliardi (Tr. 11-12). He described respondent as “a little agitated. His voice was raised. He was -- he was definitely agitated. His tone was loud” (Tr. 12). His whole “disposition was just -- he was just becoming agitated more and more” (Tr. 12). Respondent was pacing back and forth throughout the incident, coming across the lane, calling the supervisors names, and returning to his post three or four times (Tr. 12). During this display, members of the public having their cars inspected and other officers were present (Tr. 12-13).

At trial, Gagliardi corroborated Moran’s account. Gagliardi testified that respondent “seemed very upset and angry. He was raising his voice and shouting at us, calling us . . . pieces of shit. He repeated this multiple times and he was angry about the fact that two other officers were recently suspended . . . he kept calling us, you know, pieces of shit and yelling at us and saying that we’re out to get people’s jobs, that we’re trying to fire people. I told him . . . to stay out of it, you know, it’s -- don’t fight on their behalf, just do your job and let them handle their own situation” (Tr. 36). But respondent did not back down. He kept repeating the rude and expletive-laced remarks until he walked back to his position and went back to work (Tr. 36-37).

Gagliardi knew that other officers were working in the lanes near respondent and the chiefs, but he was not certain of all their names, mentioning two by name at trial (Tr. 37). He observed a couple of taxi drivers also present who were near enough to overhear the outburst (Tr. 37).

Respondent and his fellow officers are mechanics, but he stated that “the new generation” of managers “force” the officers to make arrests (Tr. 47). The officers learned the process for effectuating arrests. Respondent stated at trial that “as auto mechanic[s], we are not that great in writing or speaking out” (Tr. 48). He disagreed with requiring auto mechanics to make arrests under the title “SP” (Tr. 66), indicating some type of police power “to take [people] to prison . . . It’s not good for the city like this. That’s bad” (Tr. 66). Respondent said “we,” meaning “[e]verybody in the agency . . . every officer or every inspector” wanted to know why their two colleagues were suspended (sent home) for five days with “no explanation” (Tr. 48). Although they are called inspectors and officers, respondent regards himself and his colleagues as “really inspectors” (Tr. 47-48). Respondent wanted to know the reason for the suspensions because “everybody feel [*sic*] scared for the job now -- we want to know what’s going on” (Tr. 49-50). Based on that fear for his job, he asked Moran to give him the reason for the suspensions (Tr. 49). Respondent testified that he was afraid for his job because, he contended, without providing factual detail, this was not the first incident at the agency (Tr. 49).

Respondent denied yelling at anyone. Rather, he testified, he “was speaking to them,” meaning Gagliardi and Moran (Tr. 50). He asked them “multiple questions,” like, “what’s going on? . . . what’s happening?” (Tr. 50). According to respondent, they told him the suspension of others was “not [his] concern,” and directed him to get back to his lane (Tr. 50). He told them everyone working there was “scared,” and “that’s why we speak” (Tr. 50). He denied calling the supervisors names, and feared he “could be next” (Tr. 50). Respondent testified that the supervisors told him to “relax,” that “this got nothing to do with you” (Tr. 50-51). Respondent answered that he had been on the job a long time, adding: “What’s wrong is wrong. What you’re doing is wrong. It’s . . . not about being right. Like he was trying to like bribe me like saying, listen, just should just [*sic*] keep your mouth quiet . . . and then he said, listen, if you don’t keep your mouth quiet, I will make sure personally you will never get promoted and I will go after your pension” (Tr. 51). Respondent was “next in line to get promoted,” and attributed these comments to both Gagliardi and Moran, and explained that “he” meant both of them (Tr.

49-51). After hearing their comments, respondent stated, he was afraid of losing his pension (Tr. 51).

Respondent denied that he raised his voice on May 12th. He minimized his actions that day by claiming that he was “just concerned,” not angry or upset (Tr. 60-62, 64-65). He denied calling his supervisors “pieces of shit,” stating: “That’s a lie” (Tr. 61). He contended that he spoke to them calmly: “yes, I was calm” (Tr. 62).

May 16, 2022

A few days after the May 12th incident, on May 16th, 2022, at approximately 1:40 p.m., during the officers’ roll call at the Woodside Safety and Emissions facility, respondent engaged in a verbal altercation with Moran and Gagliardi, and physically and aggressively pushed fellow officer Ortiz out of his way because Ortiz was trying to calm him down and counsel him against approaching the chiefs (Tr. 55). Respondent expressed his belief that employees were being fired and he asked them who would be fired next, stating that the chiefs were “just out to screw everyone” (Pet. Ex. 5). At roll call, the officers assemble inside an office and get their assignments. Respondent came in and asked Moran whom he was going to fire next. Moran answered that nobody was fired. Respondent retorted that that was “a very political answer” (Tr. 16-17). With roll call completed and the officers standing up from their chairs and walking out to their positions, Moran turned to walk away, but upon hearing loud yelling and a commotion, he “turned back around” (Tr. 17, 27). Respondent had come back, and Moran testified that he was “charging towards me” and Gagliardi (Tr. 18).

When respondent “came charging in at Chief Gagliardi, he pushed Officer Ortiz back because Officer Ortiz was blocking him from trying to charge Chief Gagliardi” (Tr. 18). According to Moran, respondent “got within six inches of Chief Gagliardi” (Tr. 18).

Moran wrote a contemporaneous memorandum of the incident on May 16th (Tr. 20). In his memorandum, Moran wrote that on Monday, May 16, 2022, at approximately 1:40 p.m., during roll call, respondent

appeared to be agitated and started to lash out at me asking “who are you going to fire next?” I asked him what are you talking about no one got fired and he said answer the question answer the question over and over. I stated that no one has been fired and his reply was “yea that’s a very political answer[.]” After roll call was completed and the squads were dismissed Officer Santos started to walk out to the inspection lanes and then turned around to take a lunge at Deputy chief

Gagliardi while screaming “you guys are pieces of s..t[.]” I turned around and seen him violently push Officer H Ortiz who was trying to stop Officer Santos from advancing towards Deputy Chief Gagliardi and myself. At this time Officer Santos continued calling us names and threatening Chief Gagliardi and trying to instigate violence saying put your hands on me I dare you. Officer Santos then proceeded to his assigned job with no further incident at this time however I feel that his violent outbursts create an unsafe and hostile work environment.

(Pet. Ex. 2).

Gagliardi’s testimony confirmed the details provided by Moran. Gagliardi testified that respondent interrupted the giving of assignments to the officers; respondent “again, very angrily” stood up and was “raising his voice” as he questioned Chief Moran about who he was going to fire next. “He stated this multiple times, and Chief Moran responded that no one is getting fired. No one was threatened to get fired” (Tr. 39). Gagliardi confirmed that nobody was getting fired and advised respondent to “[j]ust leave it alone” (Tr. 39), but respondent said he did not want the deputy chief to speak or to hear from him; he wanted Moran to answer the questions. In his contemporaneous memorandum written on May 16th, Gagliardi wrote that Moran explained to respondent, in apparent reference to the two officers who had been suspended, “if you’re breaking policy, you can get fired,” though Gagliardi wrote in his report, “[f]or the record,” no one was fired or threatened with being fired (Pet. Ex. 5).

Accused of being “just out to screw everyone,” Gagliardi responded that “no one is trying to screw anyone. You’re going to screw yourself if you keep going with this” (Pet. Ex. 5). Moran and Gagliardi then gave the day’s assignments (Tr. 39). Respondent continued his argument at the conclusion of roll call. He turned around and Gagliardi saw respondent “forcibly push Ofc. H. Ortiz out of his way in order to charge at me;” Gagliardi told respondent a couple of times “to never put hands on anyone here” (Pet. Ex. 5). Respondent stated that Ortiz was in his way, and respondent “continued to get in my [Gagliardi’s] face about the two officers who were previously suspended” (Resp. Ex. 5). Gagliardi told him that “it was not his battle and do not argue on their behalf. Respondent then challenged [Gagliardi] to “go ahead and try to put hands on me,” repeating this “aggressively” several times. Gagliardi answered, “I’m not putting hands on you.” (Resp. Ex. 5). Gagliardi’s testimony was in harmony on all points with his written report (Tr. 38-40). Gagliardi testified that after he told respondent not to put hands on anyone, respondent “continued to march towards [him] in an aggressive manner,” shouting in his face that he was “only looking to screw people” (Tr. 39). Gagliardi reckoned that respondent

was “daring me to -- for me to put my hands on him” (Tr. 39). He told respondent not to put hands on anyone, affirmed that he, Gagliardi, would not put his hands on respondent, and advised him to go back and do his job. Gagliardi testified that respondent was “still very angry about the two officers who were previously suspended” (Tr. 39-40). Respondent continued to dare Gagliardi to fight him physically, but finally walked away and staff did their jobs for the day (Tr. 40).

Video Evidence

TLC produced a silent video of this incident (Pet. Ex. 3). Despite respondent’s denials that he was angry or aggressive, the nearly two-minute video shows that he did appear very agitated, upset, and angry based on his body movements and facial expressions. He identified himself in the video as the man holding an orange (Tr. 55). And notwithstanding respondent’s flat denials that he pushed Ortiz, even after being shown the video multiple times at trial, I find that there can be no doubt that respondent pushed Ortiz hard and exhibited irritation and anger in doing so (Pet. Ex. 3). His denials inspired serious doubt about the credibility of his testimony and demonstrated an obdurate refusal to take responsibility for his actions on May 16th. Respondent is clearly visible in the video pushing Ortiz hard as respondent moves quickly and aggressively toward the camera in the direction of the two chiefs. Respondent was not calm and composed. Moran explained credibly at trial that he and Gagliardi were not in the video because they were standing behind the camera as respondent addressed them (Tr. 23-24).

Respondent’s counsel attempted to shake Moran’s credibility by seeking to show that he was using inconsistent language in his memorandum and at trial in describing respondent’s movements that day. To the contrary, Moran credibly adhered on cross-examination to the language he used both in his memorandum (“lash out at me”; “turned around to take a lunge at Deputy chief Gagliardi while screaming ‘you guys are pieces of s..t.’” “violently push Officer H Ortiz”) (Pet. Ex. 2), and at trial (“charging towards me;” “charged in at Chief Gagliardi”) (Tr. 18, 23). Moran’s testimony at trial instead showed that he did not dilute the language he had used, and that his descriptions of respondent’s actions were not contradictory. Rather, his testimony was consistent with the language he had used in his memorandum that day. He explained that respondent came back through the door to the inspection lanes “into the face of Chief Gagliardi, that’s charging him, that’s coming at him” (Tr. 24). He agreed that “charging” means

“approaching someone” (Tr. 25); he stated that “lunge” means “[w]hen somebody pushes another officer out of the way to gain access to my chief, that’s what I use as lunge” (Tr. 25). On questioning about both chiefs using the words “lash” out” or “lashing out” in their written reports (Pet. Exs. 2, 5), Moran testified that he uses the word “lash” frequently, such that it is in his vocabulary (Tr. 27). He credibly denied talking with Gagliardi about what he would write in his memo (Tr. 27). I find Moran’s denial credible, given that “lash” is a commonly used word and that Moran appeared composed and unfazed by the close questioning.

Asked how respondent could “lunge” from what Moran reckoned was 10 feet between Ortiz and Gagliardi, Moran explained that lunging meant that respondent “pushed past an officer” (Tr. 25). He stated that he was using the word “approach” to mean “not in a civilized manner. When he approached my chief, he approached my chief in a belligerent manner” (Tr. 26). Moran declined to “retract” the word “lunge” on cross-examination: “He came at my officer -- at my chief. As you can see from the video, he had no -- he had no assignment or no duty to come back in that room to push past an officer to come in” (Tr. 26). Pressed further to square the word “lunge” with “approach” aggressively, Moran testified, “He approached my -- my chief in a violent manner” (Tr. 26). This effort to discredit Moran on cross-examination was unpersuasive because his testimony was clear and consistent in describing his observations of respondent’s actions: Asked on redirect examination if respondent “was approaching Gagliardi in an aggressive manner,” Moran answered, “That’s correct. Yes” (Tr. 33). Moran described respondent as “very agitated,” explaining that he pushed Ortiz out of the way before advancing in an aggressive manner (Tr. 33-34). In sum, Moran used language throughout that consistently and accurately described what the video showed, an agitated respondent moving aggressively toward his supervisors after forcibly thrusting a colleague out of his path.

Contrary to respondent’s contention that because Moran’s used the terms “lunged” and “charged” to describe respondent’s actions, Moran should be viewed as an “exaggerator” and a “liar” (Tr. 68) on the theory that “lunge” and “charge” are defined differently, I find no occasion to discredit Moran on the basis of that thin argument. “Lunge” can mean “a sudden forward rush or reach.” *Lunge Definition*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/lunge> (last visited Dec. 22, 2022). “Charge” can mean, as a transitive verb: “to rush against: attack,” or, as an intransitive verb, “to rush forward in or *as if* in assault: attack.” *Charge Definition*, MERRIAM-WEBSTER.COM, <https://www.merriam->

webster.com/dictionary/charge (last visited Dec. 22, 2022) (emphasis added). The words are not dissimilar or inconsistent.

Although there were other officers present during these incidents (Tr. 28-30, 42), neither side called them as witnesses. The other officers present, including Ortiz, did not want to be involved and refused to write statements (Tr. 29, 32). There were 16 officers in the lanes on May 12, four of them in respondent's lane (Tr. 28). On May 16th there were 12-14 officers present (Tr. 30, 43). None of the other officers wrote reports of the incidents (Tr. 42-43). Moran explained that he is not bound by Ortiz's unwillingness to pursue respondent's assault on him. Moran's duty as he saw it was to take action to protect the safety and well-being of the staff. Moran spoke with Ortiz and asked him how he felt about the incident and informed him of his right to file a complaint. Ortiz reportedly did not want any trouble with anybody because he must work with "these people" (Tr. 32). Ortiz spoke with Johnny DaSilva, his shop steward, about the incident (Tr. 42). Moran was not surprised at the reluctance of staff to come forward because "that's part of the course² around here. Because that's -- people stick together" (Tr. 30). Moran stated that he does not discipline employees frequently (Tr. 30). He supervises two deputy chiefs, who supervise three captains, who in turn supervise nine lieutenants and approximately 67 officers, such that Moran has "roughly 70, 75 people" under his supervision (Tr. 30). Asked if the working environment is comfortable and respectful, Moran answered, "For the most part, yes" (Tr. 30-31).

I found Moran to be a credible witness, who readily acknowledged that the staff might not like his style of management because, in his view, he is enforcing rules that were not enforced before his arrival at TLC, and that his leadership in that regard was "very unpopular" (Tr. 31). He testified that he would not be shocked or surprised to learn that approximately 20 employees had filed a complaint against him or were saying that they felt disrespected and threatened by him (Tr. 31). Asked if he would be surprised to learn that staff filed a complaint against him for creating a hostile work environment, he was unperturbed: "Okay . . . if policies and procedures are being enforced now that weren't before, then that's the reason because it -- it's very unpopular that I'm enforcing these rules. But as a manager, that's my job" (Tr. 31). Moran and Gagliardi corroborated each other's testimony and they made contemporaneous memoranda documenting the events at or near the time of the incidents.

² Perhaps he actually said or meant "par for the course."

Respondent explained that during roll call, “everybody speak out their concern” about “any[thing] that’s going on around us” (Tr. 52). Respondent described the fear “in the air. Like everybody is scared” about losing their jobs or suffering discipline (Tr. 53) because of the two named officers (with the initials EF and SF) who were suspended (Tr. 52). Respondent reasoned that one of those two officers did the “best job here,” and wondered “who could be next?” (Tr. 52-53). He was concerned that the supervisors “were targeting both like us” (Tr. 53). He did not articulate why officers might be targeted by supervisors, stating, “it was just a setup” (Tr. 53). With these concerns on his mind, respondent questioned Moran, who, respondent reckoned, had made the decision to suspend EF and SF. Respondent confirmed that his supervisors told him the suspension of the other officers was not his concern (Tr. 54).

Respondent denied that he lunged at Gagliardi, despite the video showing that he was moving aggressively toward him (Tr. 54-55; Pet. Ex. 3). Respondent minimized his motions as captured in the video, stating “I was pressing my concern and I was walking away to go . . . to the lanes when the Chief said -- he said oh, get back to your lane. You’re here to do the job. Like, you know, I said, listen, like everybody’s concerned. We just want to know what’s going on” (Tr. 55). Respondent minimized his action as simply “expressing [his] concern” because “they wasn’t giving us answers” (Tr. 56). Respondent also implausibly, repeatedly denied that he was upset, and countered he was, instead, merely “concerned” (Tr. 60, 62). His demeanor as shown in the videotape was that of a person who was angry and spoiling for a fight. The video evidence was more consistent with the supervisors’ testimony than that of respondent.

As for Ortiz, respondent testified that Ortiz grabbed his hand and told him, “listen, Santa, these people, they are powerful and they’re going to destroy you” (Tr. 55). Ortiz urged him to go to the lanes. Respondent denied even pushing Ortiz, while the video shows clearly that he shoved Ortiz hard and thrust him back and away from himself as respondent made a beeline for the supervisors (Tr. 55; Pet. Ex. 3). Despite the visual record of what he did, respondent testified, “I didn’t push. You see Ortiz. He went like this with the hand right here. And I grabbed the hand, I removed the hand. I never pushed him or forced him” (Tr. 55, 62). Respondent persisted in this fiction that he did not push Ortiz, even after being shown the video a second time on cross-examination. Despite the visual record, respondent stated that Ortiz grabbed his hand and respondent only “removed the hand” (Tr. 55, 63-64). Asked if he could see in the video that he pushed Ortiz hard enough that Ortiz was pushed backwards two steps,

respondent denied the undeniable, answering, “No” (Tr. 63-64). In the video, which I have viewed and replayed several times, Ortiz’s supposed grabbing of respondent’s hand is not visible because Ortiz’s back is to the camera and his hands are not in the frame (Pet. Ex. 3). However, respondent can be seen grabbing and pushing Ortiz at the latter’s midsection and right elbow, which is clearly visible on camera (Pet. Ex. 3). Respondent’s hard push of Ortiz contradicts his account of merely removing Ortiz’s hands from his own hands.

Shown the video again during cross-examination, at the point where he approached the supervisors, and asked if he was calm, respondent answered, “Yeah. Not calm. I was concerned bringing up, like, you know, what I’m saying? What’s going on?” (Tr. 64). He denied being angry because his co-worker, EF, was suspended for five days, repeating that he was merely “concerned”; “I wasn’t angry. Concerned” (Tr. 64-65). This testimony did not ring true when assessed against the video and his own testimony that he was motivated to act that day by the suspension of the two other officers. Nor was it plausible that although he was afraid for his job, he was not afraid to confront the chiefs in front of the entire staff. Respondent admitted that the working atmosphere is such that he felt comfortable expressing his concerns about “[w]hatever is going on Yes. Because it’s -- you’re speaking to everybody. Everybody’s listening” (Tr. 65). He further conceded that “the chiefs heard [his] concerns Yeah” (Tr. 65).

Respondent’s testimony defied credulity. Respondent indicated that he discussed the incident with Ortiz, who did not want to press charges against him. He described their relationship as that of co-workers and friends over almost 10 years. Ortiz has left the agency for another job (Tr. 56).

Respondent submitted a memorandum from Johnny DaSilva (Tr. 42), the union shop steward, dated October 24, 2022. Respondent signed this memorandum entitled “Formal Complaint about Anthony Moran,” along with more than a dozen other officers who apparently signed it as “individuals who have been affected or have witnessed [Moran’s] actions against us” (Resp. Ex. A). The memorandum states that as of October 21, 2022,

Chief Moran has been creating a hostile environment in Safety and Emission, and it has been witnessed by Inspector[s], Lieutenants, and Captains. This has been an on-going situation and has been complained about prior. I’ve had a meeting with both Moran and A/C Varghese about these situations. A lot of inspectors feel threatened by the harassment, hostility and disrespect from Moran. Something needs to be done about this, as it seems to have no end.

(Resp. Ex. A). The memorandum is conclusionary and provides no details in support of its bare allegations. Respondent stated that Moran has created a “harsh environment” and does not respect the officers (Tr. 57). The document is unsworn and is assigned minimal weight. I find that it demonstrates only that there is tension between labor and management in the Safety and Emissions Division of TLC and that staff have made allegations against Moran.

ANALYSIS

To prevail in this employee discipline case, petitioner must prove the charges by a preponderance of the credible evidence, defined as “‘a showing that the incident in issue was ‘more likely than not’ to have occurred as credibly described.’” *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) (citations omitted). In assessing credibility, this tribunal has considered a number of factors including “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), *adopted*, Comm’r Dec. (Feb. 17, 1998), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 98-101-A (Sept. 9, 1998). I find that petitioner has proved the charges here.

Respondent’s conduct on May 12 and 16, 2022, violated Rule 23 of the TLC Employee Code of Conduct (the “Code”), which provides, in pertinent part: “Employees shall not conduct themselves in a manner prejudicial to good order and discipline.” The term “conduct prejudicial to good order and discipline” is very specifically defined in relevant part in the Code as follows:

- (a) the use of improper language or obscene gestures toward a superior, subordinate, fellow employee, or a member of the public;
- (b) assaulting a superior, subordinate, fellow employee, or a member of the public;
- (c) any other conduct or act tending to bring discredit upon the city or the Agency

Respondent’s use of profanity, repeatedly calling his supervisors “pieces of shit,” was, without a doubt, misconduct. *See generally Dep’t of Correction v. Massie*, OATH Index No. 651/13 at 6-7 (Mar. 29, 2013), *adopted*, Comm’r Dec. (Oct. 2, 2013). Respondent argued that he was, in his counsel’s words, “overwhelmed with the reckless and arbitrary way that the chief was

suspending employees” (Tr. 8), that he was afraid for his own job, and that he was “trying to get answers and reassurance” (Tr. 8). He minimized his shoving Ortiz by denying disingenuously that he did so, and by relying on Ortiz’s election not to complain.

Moran’s and Gagliardi’s testimony, supported by their contemporaneous reports of the two incidents at or close to the time of these disputes, more credible than that of respondent, who denied or minimized his culpability in the face of videotaped proof of what he did. “This tribunal has often found that contemporaneous reports are more reliable than reports that may become tainted as a result of faulty recollection or deliberate misrepresentation.” *Dep’t of Information Technology and Telecommunications v. Arocho*, OATH Index No. 1146/18 at 7 (Oct. 17, 2018), *adopted*, Comm’r Dec. (Feb. 21, 2019), *aff’d*, NYC Civ. Serv. Comm’n Case No. 2019-0149 (Sept. 18, 2019) (citing *Dep’t of Correction v. Boyce*, OATH Index No. 789/97 at 14 (July 9, 1997), *adopted*, Comm’r Dec. (Jan. 15, 1998), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 99-75-SA (July 19, 1999) (“[c]ontemporaneousness usually evinces reliability”); and *People v. Brown*, 80 N.Y.2d 729, 733 (1993) (“a statement describing an event when or immediately after it occurs is reliable because the contemporaneity of the event observed and the hearsay statement describing it leaves no time for reflection. Thus, the likelihood of deliberate misrepresentation or faulty recollection is eliminated.”) (citations omitted)).

Respondent argued that there were no statements from witnesses other than the two chiefs (Tr. 68), but the supervisors explained that other officers declined to write up their observations, just as Ortiz, as respondent’s friend, reportedly did not want to pursue charges against him. Respondent’s counsel contended that the staff are too afraid to come forward. The testimony of two supervisors, who corroborate each other’s accounts of the two incidents, is reinforced by their written reports made at or near the time of the incidents, and by the videotape, which is undeniably unfavorable to respondent. There was no credible suggestion that the supervisors had a motive to lie. Against that evidence must be weighed respondent’s incredible denials that he was angry or even that he pushed Ortiz. On this record, petitioner’s case overall was more credible than that of respondent. I have fully considered the evidence and the contentions of both sides and find respondent liable for his angry and violent, expletive-laced outbursts in the workplace.

FINDINGS AND CONCLUSIONS

1. Petitioner proved that on May 12th, 2022, because he had heard his supervisors had suspended two other officers for a previous incident that did not involve him, respondent approached two of his supervisors and, in the presence of other officers, yelled at them that they were “pieces of shit,” accusing them, without basis, of getting employees fired.
2. Petitioner proved that on May 16th, 2022, respondent aggressively addressed the same two supervisors, asking them, “who are you going to fire next?,” and accusing them of being “out to screw everyone.” Instead of proceeding to his work, respondent turned around in anger and rushed at one supervisor, while screaming “you guys are pieces of shit.” Respondent engaged in a physical and verbal altercation with a fellow officer and forcibly pushed that officer, who was trying to stop him from advancing toward his supervisors. Respondent did advance toward them, moving aggressively, cursing and gesticulating angrily, and daring one supervisor to engage with him in a physical fight.

RECOMMENDATION

Upon making these findings, I obtained and reviewed an abstract of respondent’s work history for purposes of recommending an appropriate penalty. Respondent was appointed to TLC on May 12, 2010. In his more than 12 years at the agency, he has no disciplinary history. Petitioner seeks a penalty of 30 days’ suspension (Tr. 263). I find this request to be reasonable.

“It is a well-established principle in employment law that employees should have the benefit of progressive discipline wherever appropriate, to ensure that they have the opportunity to be apprised of the seriousness with which their employer views their misconduct and to give them a chance to correct it.” *Dep’t of Transportation v. Jackson*, OATH Index No. 299/90 at 12 (Feb. 6, 1990) (noting that sufficiently serious misconduct may warrant termination in the first instance), *adopted*, Comm’r Dec. (Mar. 20, 1990). The theory of progressive discipline is to modify employee behavior through increasing penalties for repeated, similar misconduct. *Police Dep’t v. Schaefer & McGrath*, OATH Index Nos. 1114/99 & 1169/99 at 14 (July 2, 1999), *adopted*, Comm’r Dec. (Aug. 16, 1999), *aff’d sub nom. Schaefer v. Safir*, 281 A.D.2d 163 (1st Dep’t 2001). A fair penalty must take into account the particular circumstances of the incident and individual mitigating factors, as appropriate. *Admin. for Children’s Services v. Goodman*, OATH Index Nos. 986/05 and 1082/05 at 15 (Aug. 12, 2005), *adopted*, Comm’r Dec. (Sept. 15, 2005) (respondent’s lack of a prior disciplinary record is a mitigating factor).

Respondent stressed that he has no prior disciplinary record in more than 12 years on the job (Tr. 8, 46), and that he was seeking “justice and to be heard in a work environment that he considers to be incredibly hostile and unfair” (Tr. 8). Gagliardi testified that respondent completed his assignments “[f]or the most part” and has never been suspended before (Tr. 41). Respondent sought dismissal or leniency in the penalty on the theory that Moran, who started at TLC about two years ago, has created a hostile working environment or culture (Tr. 67). But there was no credible evidence underlying that conclusory allegation (Resp. A). Respondent’s attorney conceded in closing argument, in effect, that respondent did not “use[] the best judgment here” (Tr. 67). Counsel also argued that with a spouse and four children, a suspension of even five days, a loss of a week’s salary, is significant (Tr. 68-69), and I appreciate that difficulty for respondent.

I have fully considered respondent’s prior, good record in mitigation of the misconduct shown here. However, due to the gravity of his angry and violent conduct at work, combined with his refusal to take responsibility for his actions and mendacious testimony, I find that a 30-day penalty is appropriate and already reflects the mitigating factors noted. “Penalties for on-duty altercations with co-workers vary from a ten-day suspension to termination, depending upon factors such as provocation, the extent of injuries, and the employee’s prior disciplinary record.” *Health & Hospitals Corp. (North Central Bronx Hospital) v. James*, OATH Index No. 2178/22 at 14 (Oct. 14, 2022) (collecting cases) (30-day penalty despite 18-year record with no prior discipline where respondent patient care technician deliberately initiated physical contact with and shoved a special officer who demanded her I.D., as the two struck each other aggressively).

Respondent described being afraid for his job, yet in May 2022, he aggressively confronted the chiefs on two occasions, publicly, in front of drivers who came for inspections and numerous officers, as captured on video in the second incident, and he undeniably physically assaulted a co-worker. He was not at all calm. The video shows respondent gesticulating and he was visibly upset, so much so that he pushed Ortiz hard, out of his way, en route to the bosses. His behavior, which morphed from hurling angry expletives at his supervisors to actual violence within a week, was unacceptable. That the misconduct escalated also militates for a strong penalty. If respondent does not gain control of his anger, he will be faced with possible termination of employment should he repeat the conduct shown here. His refusal to take responsibility for his violent conduct works against him because he was shown to lack the self-control that is necessary to avoid violence in the workplace. The only document respondent submitted, the complaint of staff against Moran, shows

that there are non-violent, professional means of addressing grievances in the workplace. He may file a grievance with the union if he disagrees with agency policies or his job assignments with respect to effectuating arrests. That peaceful route was open to respondent instead of publicly yelling and cursing at supervisors and pushing a colleague (Tr. 70-71). Respondent was very disrespectful to his superior officers and physically assaulted another officer.

Accordingly, I recommend that respondent be suspended for 30 days.

Joan R. Salzman
Administrative Law Judge

December 23, 2022

SUBMITTED TO:

DAVID DO
Commissioner/Chair

APPEARANCES:

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January 19, 2023

Luis Urena-Santos


Re: TLC vs. Urena-Santos, OATH Index No. 23-0527

Dear Mr. Urena-Santos:

On November 15, 2022, a trial was held, virtually via WebEx, at the Office of Administrative Trials and Hearings (“OATH”) before Administrative Law Judge Joan Salzman, concerning charges against you for violating the TLC Employee Code of Conduct. You appeared with your attorney and presented defenses to the charges alleged. After hearing witness testimonies and reviewing the evidence, Judge Salzman issued a recommendation sustaining the charges with a 30-day suspension penalty.

On December 29, 2022, copies of the recommendation and transcript were emailed and mailed to you, affording you an opportunity to respond. Also on December 29, 2022, I received comments from your attorney in response to the ALJ’s decision. I reviewed those comments and I find them unpersuasive.

I have carefully reviewed the record and agree with Judge Salzman’s recommendation. Therefore, I will implement the penalty of a 30-day suspension effective on Monday, January 30, 2023.

Very truly yours,



Sherryl Eluto
General Counsel

cc: Hon. Joan Salzman, *Administrative Law Judge, OATH*
Martha Bodhnarain, Esq., *IBT Local 237*