Dep't of Citywide Administrative Services v. Velez

OATH Index No. 55/23 (Jan. 9, 2023), *adopted*, Comm'r Dec. (Mar. 6, 2023), **appended**, *aff'd*, NYC Civ. Serv. Comm'n Case No. 2023-0121 (May 30, 2023), **appended**

Respondent steamfitter was discourteous to his supervisor on two occasions and uttered an insult based on race or national origin to express his dissatisfaction with the supervisor's management of the workplace. ALJ recommended that respondent be suspended for 15 days.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES
Petitioner
- against -
FELIX VELEZ, JR.
Respondent

REPORT AND RECOMMENDATION

JOAN R. SALZMAN, *Administrative Law Judge*

This employee disciplinary proceeding was referred by the Department of Citywide Administrative Services ("DCAS" or "the Department" or "petitioner") pursuant to section 75 of the Civil Service Law. Petitioner charged that on May 10, 2021, respondent, a steamfitter in the agency's Division of Facilities Management in the Bronx, was discourteous and inconsiderate, and conducted himself in a manner that reflected unfavorably upon himself, upon DCAS, and upon the City of New York, when he stated to his supervisor, Senior Stationary Engineer Marco Palao,"What would you know about work?" (Charges, ALJ Ex. 1); and did so again on May 17, 2021, when he stated to Palao, "That's what happens when you give a Latino some power," and thereby violated applicable law and the City's Equal Employment Opportunity ("EEO") Policy (Pet. Ex. 1), disrupted good order and discipline, and undermined the efficiency, orderly operations, and morale of the workplace (ALJ Ex. 1). The agency asserts that these comments tend to bring shame, discredit, and disrespect upon the City (ALJ Ex. 1).

A hearing was conducted on October 21 and November 16, 2022, via WebEx (due to the COVID-19 pandemic). Petitioner presented three witnesses and documentary evidence. Respondent testified, denied the charges, and submitted one document in evidence. Respondent contended that his comments were misunderstood and were innocent. He sought dismissal of the charges or a lesser penalty than the 15-day suspension the Department requested. He argued that his remarks were, in the words of his attorney, "innocent shop talk" between respondent and his partner, Anthony Rivelli (Tr. 8), not aimed at Palao. Respondent denied having any malicious intention to insult Palao or even that he was referring to Palao. Instead, respondent argued, he was making reference to a previous supervisor. For the reasons set forth below, these arguments were unpersuasive. I find that respondent engaged in misconduct as charged with the exception of one portion of the charges noted below, and recommend that he be suspended for 15 days.

BACKGROUND

Respondent has worked for the Department for approximately 14 years, and has been a steamfitter for about 20 years (Tr. 51). The statements attributed to respondent were not disputed at trial, though respondent offered that he himself is Latino and did not intend to insult his supervisor, who is also Latino (Tr. 18, 33). It is undisputed that respondent's remarks were made in an active worksite with other workers in attendance. Senior Stationary Engineer Palao is a 13-year veteran of DCAS, and has held his supervisory title for eight of those years (Tr. 35). He supervises facilities, the boiler room, operations, and projects, including work at the Bronx County Courthouse (Tr. 36).

The Incident of May 10, 2021

On May 10, 2021, respondent was assigned to an energy conservation project at the Bronx County Supreme Court building under the supervision of Palao (Pet. Ex. 2 at 2). The job required overtime (Pet. Ex. 2 at 2), and respondent worked overtime on this job about every third day, as steamfitters were rotated for overtime on the project (Tr. 43). Respondent complained to Palao that he was getting less overtime than the oilers and engineers and he wanted more overtime (Tr. 43-44, 52-53). Respondent testified that although the changing of the traps was "100 percent steam fitter's work," oilers and engineers got "a piece of it as well" (Tr. 53). Seeing respondent and other workers "sitting around," Palao asked respondent what duties he

was performing that day and directed him to complete his assigned work (Pet. Ex. 2 at 2; Tr. 38). Respondent answered, "What would you know about work?," and walked away from Palao (Pet. Ex. 2 at 2-3; Tr. 38). At trial, Palao recalled the remark as "what would I know about hard work" (Tr. 38). Palao replied, "I know a lot, that's why I am a Senior Stationary Engineer," and noted the conversation in his logbook (Pet. Ex. 2 at 3; Tr. 39). Palao "was insulted by" respondent's remark and "thought it was very disrespectful" (Tr. 39).

Contrary to Palao's account, respondent explained this incident as light-hearted. Respondent recalled that Palao "walked in [to the break room] and he said, 'Hey, are you guys working or hardly working?'"[1] -- a comment "that's been said for the past hundred years" (Tr. 58-59). Respondent then, in his view, "jokingly" told Palao, "'Hey, what would you know about work?' I admit I said it, but there was never in a derogatory way" (Tr. 59, 61). Respondent noted that Palao "was under a lot of stress during that project" (Tr. 59). Respondent testified that he regrets making that remark, which he now describes as "I guess insensitive" (Tr. 59-60).

Respondent did not recall Palao responding to the comment about hard work at all, or Palao specifically responding that he knew a lot about work and that was why he was a senior stationary engineer (Tr. 61). But respondent did recall that Palao did not laugh or smile in response to the comment. Respondent stated that Palao was smiling and laughing at his own remark about "hardly working" (Tr. 61-62). As Palao's testimony was completed and respondent testified last at trial, Palao was not asked to address respondent's theory that the conversation was a joke. Palao did, however, make clear throughout his testimony that he did not regard any of respondent's comments at issue in this case as the least bit amusing in any way.

The Incident of May 17, 2021

A week later, on May 17, 2021, respondent's job was changing steam traps on radiators in the courthouse, as part of the same project to replace all the steam traps in that building (Tr. 33, 36). The project was done annually to save energy, and was to require overtime of engineers, oilers, high-pressure plant tenders, and steamfitters over several months (Tr. 36-37, 52). Palao again spoke with respondent at the site, noticed respondent was not working, and asked him what he was working on. Respondent stated that he could not do the work because he did not have the

[1] Perhaps respondent was referring in his testimony to a familiar quip or play on words, "Are you guys working hard or hardly working?"

parts. Palao walked up to the storage area where spare steam trap materials were kept and took a trap similar to the one needed and handed it to respondent, who indicated that he would rather check at his shop for the right part to avoid changing any piping (Pet. Ex. 2 at 3). Palao agreed to respondent's obtaining the correct part another day, but to keep the work moving, then instructed respondent to continue to the next radiator (Tr. 39, 56). Palao reported in his May 24, 2021 complaint report of the incident that respondent showed no interest in working (Pet. Ex. 2). At this point, the crew was one hour into the overtime with four hours left on the shift. When Palao went to check on the other staff in another part of the room, he heard respondent say, "That's what happens when you give a Latino some power" (Pet. Ex. 2 at 3; Tr. 39-40). Palao then stated, "It's not about being Latino, it's about getting the work done" (Pet. Ex. 2 at 3). Palao told DCAS Diversity and EEO Officer Belinda French in her EEO investigative interview of him, following his complaint against respondent based on this remark, that steamfitter helper Rivelli, stationary engineer Joseph Crowley, and high-pressure plant tender Albert Hutchinson were present at the time respondent made this remark (Pet. Ex. 2 at 3). Palao testified credibly at trial that he understood the comment to be directed at him because "I was the only other Hispanic or Latino in the room" (Tr. 42).

Palao complained to Energy Manager Victor Amatrudo about the limited progress on the project because of respondent's behavior. Amatrudo in turn spoke to respondent's supervisor, Kevin Ward, and pulled respondent off this project for a time (Pet. Ex. 2 at 3). Ward reported in the EEO investigation that respondent appeared to be surprised and claimed he did not know what he did to be removed from the courthouse project. Ward advised him to "let it go," and told respondent that he would be assigned to overtime in other buildings (Pet. Ex. 2 at 3). Crowley and Rivelli informed Palao that respondent was asking for Palao's personal cell phone number, but they did not provide it to him (Pet. Ex. 2 at 3). Respondent made multiple calls to the boiler room on May 19th, and Palao eventually picked up the phone that afternoon. Respondent insisted that he and Palao should speak about the matter, but Palao advised him to speak with Ward (Pet. Ex. 2 at 3).

Palao testified credibly that he was deeply and personally offended by respondent's "Latino" remark. In his May 24, 2021 complaint about the May 17th incident, Palao wrote: "I heard Felix say the most derogatory comment I have ever heard in my 12 years in this agency" (Pet. Ex. 2). He believed the comment about giving "a Latino some power" referred to him,

particularly after respondent had asked him, "What would you know about work?," only a week before this incident. That comment, too, was offensive to Palao, who wrote that he "calmly said to [respondent] on May 10, 2021, 'I have worked hard all of my life. Therefore, I'm a chief engineer'" (Pet. Ex. 2). Palao has no association with respondent outside work (Tr. 42). Since the May 17, 2021 incident, the two men have not spoken with each other (Tr. 48). Palao wrote in his complaint of May 24, 2021, that: respondent called a number of times and reached day engineer Isaac Frempong, who told respondent that Palao was unavailable to speak at that time, and that the phone rang a few more times and the caller hung up as soon as Frempong answered. Palao wrote that "[t]his was unusual for the plant" (Pet. Ex. 2). Palao wrote in his complaint that he answered the phone at 12:30 p.m., and respondent asked if Palao "had a moment to discuss the incident that happened on May 17th. He sounded defensive and insisted that we spoke about it. I said to him, 'Felix, I have spoken to your supervisor about this matter. You know exactly what you said and did. I am very busy today with the chiller project. If you have any questions, please speak to your supervisor and have him reach out to me'" (Pet. Ex. 2).

As a result of Palao's complaint, the agency conducted an EEO investigation, which substantiated the allegations that respondent made the alleged remarks. DCAS Diversity and EEO Officer Belinda French, who has held that title for more than nine years (Tr. 11), authored the "EEO Complaint Final Investigative Report," dated August 16, 2021, in evidence (Pet. Ex. 2; Tr. 14-15). In her report, French substantiated the charge of "discrimination based on race" (Pet. Ex. 2 at 5), and found that respondent made the two remarks quoted above, "What would you know about work," and "That's what happens when you give a Latino some power" (Pet. Ex. 2; Tr. 15). In her investigative interview of respondent, he claimed that he did not recall making that remark about giving "a Latino power," but stated that if he did, it was not directed toward Palao (Pet. Ex. 2 at 4; Tr. 15-16).

French wrote and testified at trial that another witness, Joseph Crowley, corroborated Palao's account of the statement about Latinos (Tr. 15-16, 20; Pet. Ex. 2 at 4). Crowley, who has worked for DCAS for approximately three-and-a half years as a stationary engineer and another three-and-a-half years before that as a high-pressure plant attendant (Tr. 29), testified consistently at trial that he heard respondent "making a comment regarding Marco's race when given or when dictated work to do. That comment was something along the lines of that's what happens when you give a Latino power" (Tr. 31). Crowley recalled responding, "Something

along the lines of he's the chief, he has the power, he just wants the work done . . ." (Tr. 31). According to Crowley, respondent was neither yelling the comment nor speaking in an angry tone (Tr. 33-34). Crowley reported to French in the investigation that he heard respondent make the remark about Latinos, that Palao was present on May 17th and was pushing the steamfitters to continue working, although they were saying they lacked the parts or that the job was complicated. Crowley's statements to French in the EEO investigation were consistent with his trial testimony (Pet. Ex. 2 at 4). Hutchinson told French he did not hear the remark because he was on the other side of the room (Pet. Ex. 2 at 4).

Rivelli was working with respondent on May 17, 2021 (Tr. 50). In his interview by French, Rivelli stated that he could not recall respondent's alleged remark, but confirmed that respondent did ask him for Palao's personal cell phone number. Rivelli had known respondent for a long time and respondent knew he would have Palao's cell number. Claiming that he did not ask respondent why he wanted Palao's number and that respondent did not say why, Rivelli declined to give respondent Palao's cell number, but gave him instead the number to the boiler room (Pet. Ex. 2 at 4).

Respondent told French in the investigation that the traps Palao obtained were not the right ones and that respondent "just moved on to the following set of traps" (Pet. Ex. 2 at 4). He learned the next day that he was removed from the courthouse job. He tried to call Palao, who avoided his calls. When he finally reached Palao, the latter told him to speak with his supervisor, meaning Ward (Pet. Ex. 2 at 4). Respondent's assertion to French during the EEO interview that he could not recall making the remark was not consistent with his multiple, insistent efforts to call Palao, suggesting that respondent had some inkling that he had done something that might have upset Palao, and respondent's statement that "if he did" make the offending remark, it was not directed at Palao, was unconvincing because it was less than straightforward. After about two weeks, respondent returned to the jobsite, but he has not been on the jobsite with Palao because the project was completed and Palao no longer supervises him there (Tr. 47-48).

Respondent and Palao disagreed about the work assignment in that respondent complained that he did not have the necessary material to complete the assignment (Tr. 18; Pet. Ex. 2 at 2). Respondent was not charged with insubordination or refusing to perform his work (ALJ Ex. 1; Tr. 19, 44, 53-54). It is undisputed that respondent has no history of making racially motivated comments in the workplace prior to this incident (Tr. 19-21, 44, 55). Asked on cross-

examination if she believed, after conducting this investigation, that respondent "has hostility towards Latinos," French answered, "No" (Tr. 22).

At trial, more than a year after the events, respondent admitted making the alleged comment about a Latino being given power, but claimed, implausibly, that he "never meant it towards Mr. Palao" (Tr. 56). Respondent claimed that he had a previous supervisor who "was Latino," and that it was "an ongoing joke," saying "that's what happens when you give Latinos a little bit of power" (Tr. 56). He admitted saying it "all the time" because the previous supervisor, Luis Gomez, and respondent "were the Latino supervisors and it was just a little ongoing joke between us and the guys. You know, like -- like a shop talk kind of thing. And if I would say it for, say, to one of my coworkers, they knew exactly what I was talking about. But unfortunately, I said it, Mr. Palao heard it and he thought it was directed towards him, which was not the case at all" (Tr. 57). Respondent testified that he no longer makes this remark (Tr. 57). He asserted that he intended no disrespect: "Absolutely not" (Tr. 57). He also testified that he regrets having made the remark, that Palao had mentored him previously by advising him about an engineering exam respondent was contemplating, and that the two men had attended agency retirement parties together (Tr. 58). Respondent stated that he tried to call Palao two days later "to figure out what was wrong or to try to smooth things over and he quickly disregarded me" (Tr. 58). Respondent claimed he only wanted to know why he was barred from the courthouse project and that he did not know "what incident occurred" to cause that (Tr. 65-66).

Respondent's account that he was only having a private conversation with Rivelli, having nothing to do with Palao within a half hour or an hour of Palao speaking to him about doing his duties (Tr. 64), was less credible than Palao's testimony that the remark was directed at him, as the only other Latino in the room at the time. Respondent's explanation that he was harking back to his work with Gomez (Tr. 64-65) defied common sense. His explanation simply did not ring true.

Respondent was unable to explain at trial why, closer to the time of the incident, he told the EEO officer that he did not recall making the comment about giving a Latino power, but at trial remembered it (Tr. 63). He could not recall at trial whether Rivelli smiled or laughed at this comment on May 17th (Tr. 63). Significantly, respondent did not tell French, during the EEO interview, that he was joking or engaging in shop talk, and the stark discrepancy between his

EEO interview and his trial testimony strained credulity. Rivelli and Crowley also said nothing about joking or shop talk in their EEO interviews shortly after the incident.

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.

I find that respondent's disrespectful conduct in front of other workers on May 10, 2021, violated paragraphs 12 and 13 of the DCAS Code of Conduct, prohibiting conduct that reflects unfavorably upon the employee, DCAS, and the City, disrupts good order and discipline, and is inconsiderate and discourteous to other employees. *See generally Health & Hospitals Corp. (Harlem Hospital Ctr.) v. Stephens*, OATH Index No. 2053/20 at 15 (Apr. 21, 2021), *adopted*, CEO Dec. (May 18, 2021) ("The substance and tone of respondent's emails, which she sent [to] several managers, improperly undermined [her supervisor's] authority" by stating that the supervisor did not know applicable policies; "[t]hat was discourteous."). Here, respondent's effort more than a year after the events to reframe and minimize his insolent remark as harmless or joking banter was uncorroborated. None of the other witnesses regarded respondent's comment as a joke.

In addition, respondent's conduct on May 17, 2021, violated the same provisions of the DCAS Code of Conduct, as well as paragraph 2 of the Code, which requires employees to comply with the Citywide EEO Policy. That Policy prohibits discrimination based on "actual or perceived race . . . [or] national origin." EEO Policy ¶ I (Pet. Ex. 1). Even a single utterance of a racial insult in the workplace has resulted in a finding of misconduct, even if used in reference to the same ethnic or racial group to which the respondent belongs. *See, e.g., Dep't of Sanitation v. Lugo*, OATH Index No. 1634/05 at 6 (Nov. 17, 2005), *adopted*, Comm'r Dec. (Nov. 24, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD06-65-SA (July 10, 2006). As petitioner did

not point to any particular federal, state, city or local law concerning respondent's employment that respondent allegedly violated, and the point was not litigated at trial, the portion of the charges alleging violation of DCAS Code of Conduct paragraph 1 is not sustained.

I found Palao's complaint report, which he wrote within a week of the May 17th incident, and which was entirely consistent with his trial testimony, more reliable than respondent's trial testimony denying that he directed his remarks about race or national origin at Palao, the only other person of Latino origin present at the jobsite on May 17, 2021. Moreover, respondent's trial testimony was at odds with his own contemporaneous statements to the EEO Officer. As he contradicted himself, the credibility of his shifting accounts diminished. "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) ("Contemporaneousness 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)).

I find that respondent committed the misconduct charged with the one exception noted.

FINDINGS AND CONCLUSIONS

1. Petitioner proved that on May 10, 2021, respondent was inconsiderate and discourteous to his supervisor, conducted himself in a manner that reflected unfavorably upon himself, upon DCAS, and upon the City, and disrupted good order and discipline, when he stated to his supervisor, "What would you know about work," in violation of the DCAS Code of Conduct ¶¶ 12 and 13.

2. Petitioner proved that on May 17, 2021, respondent was inconsiderate and discourteous to his supervisor, conducted himself in a manner that reflected unfavorably upon himself, upon DCAS, and upon the City, and disrupted good order and discipline, when he stated, "That's what happens when you give a Latino some power," in violation of the

Citywide EEO Policy, and the DCAS Code of Conduct ¶¶ 2, 12, and 13, in that he directed an insult against his supervisor based on race or national origin. That portion of the charges alleging violation of the DCAS Code of Conduct ¶ 1 (additional law violations) is not sustained.

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 as a steamfitter's helper at DCAS on October 27, 2008. On August 19, 2013, the agency promoted him to steamfitter. Respondent has one prior disciplinary matter that he settled in January 2018 in a published, three-way disposition with DCAS and the New York City Conflicts of Interest Board ("COIB" or the "Board"), *Matter of Felix Velez*, COIB Case No. 2017-647, DCAS Case No. 2017-0053 (Jan. 29, 2018). In that case, respondent admitted that he drove a DCAS vehicle to New Jersey for a personal overnight trip on March 3 and 4, 2017, and used a DCAS-issued E-ZPass to pay a $14.10 toll when he drove back into the City, in violation of Chapter 68 of the City Charter (the conflicts of interest law) and the Board's rules, as well as in violation of at least one provision of the DCAS Code of Conduct he has violated as proven in the instant case: Paragraph 12 (conduct that reflects poorly on the employee and the City and otherwise disrupts good order and discipline). In the joint settlement with the Board and DCAS, respondent agreed to serve a two-workday suspension, valued at approximately $770, for his personal use of the DCAS vehicle and City E-ZPass. Here, petitioner seeks a penalty of 15 days' suspension (Tr. 75). I find this request to be appropriate.

"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*, 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 & 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 submitted a letter dated May 19, 2022, from David A. Owens IV, Senior Stationary Engineer at DCAS, in support of his character and work record (Resp. Ex. A). Owens wrote that he has known respondent for several years when respondent worked in a building under Owens' supervision and on "many complicated and difficult projects" with Owens. Owens "found Felix to be very professional, excellent at his trade and always willing to go above and beyond to get the job done. He always volunteered for the most complex tasks. A lot of the time these jobs were in very confined or hard to access areas. He was always very friendly and agreeable and seemed to get along well with al[l] of his coworkers" (Resp. Ex. A).

I have fully considered this character reference and respondent's prior employment record in partial mitigation of the misconduct shown here, but note that he has previously admitted misconduct that violated City law, reflected poorly on him and on the City, and disrupted good order and discipline, in violation of one provision he violated here, albeit by different means (conflict of interest). The previous disciplinary penalty is not for precisely the same type of misconduct shown here, and I do not augment the penalty in light of the prior case, but note only that his record is not pristine. I also note that it is undisputed that in a long career at DCAS, he has no history of showing racial animus at work.

Given the seriousness of the misconduct proved, including disrespect towards a supervisor and an anti-Latino remark made publicly (in the presence of co-workers) in the workplace, I find that a penalty of less than 15 days' suspension would be insufficient based on the evidence adduced here. Respondent was less than forthright about his conduct, first denying in his EEO interview any recollection of having made the anti-Latino remark, and then denying to this day that it was directed at Palao. Although he expressed remorse once he admitted at trial having made the offensive remark, respondent's regret was carefully circumscribed and his acceptance of responsibility incomplete. He attempted to minimize his misconduct by testifying under oath that he was only joking and that he was not referring to Palao when he made the offensive comment, even though Palao was the only other Latino present and the two men had been discussing a disagreement about the work immediately before the incident. Respondent allowed his disagreements with management and his frustration and resentment of Palao's

authority, as well as perceived limitations on his overtime hours compared to those granted to others, and his objection to the equipment provided for changing the disputed steam trap, to impel him to disparage his supervisor, who, understandably, was very insulted by respondent's hurtful remarks. Respondent's insensitive comments implied strongly that Palao was not deserving of his role in management, and undermined both his achievements and his authority by introducing Palao's race or national origin into a public discussion. This was utterly inappropriate, even if one were to accept for the sake of argument that the remark was merely foolish and meant at least partially in jest -- a proposition I do not accept as a viable defense.

For EEO violations, this tribunal has recommended penalties ranging from 10 days' suspension without pay to termination or demotion. *Dep't of Environmental Protection v. Kanvin*, OATH Index No. 62/22 at 7 (Feb. 4, 2022), *adopted*, Comm'r Dec. (July 20, 2022) (15-day suspension for threatening retaliation against colleagues who complained of his racially offensive social media post). A similar range of penalties applies in cases of disrespectful conduct towards a supervisor. *See generally Human Resources Admin. v. Wong*, OATH Index No. 316/15 at 13-14 (Dec. 1, 2014), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2015-0836 (Nov. 4, 2015) (10-day suspension for rudeness to supervisor). The two offensive remarks are thematically connected such that two separate penalties are not warranted here.

That respondent and Palao are both Latino does not diminish the importance of keeping the workplace free of discriminatory remarks based on race, ethnicity or national origin.[2] Even self-deprecating, flippant remarks are offensive and violative of EEO policy. Respondent's remarks here were no joking matter. *Cf. Dep't of Sanitation v. Lugo*, OATH Index No. 1634/05 at 7 (Nov. 17, 2005), *adopted*, Comm'r Dec. (Nov. 24, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD06-65-SA (July 10, 2006) (10-day suspension, instead of 15 days sought by agency, imposed on respondent who was himself half Black and half Hispanic and uttered the term "nigger" or "nigga" in an agency facility in the presence of other employees; defense that he was joking in a socially acceptable way with another sanitation worker, his long-time partner, was rejected but absence of racial animus was considered in mitigation of penalty). In *Lugo*, the

[2] The federal courts have sometimes described anti-Hispanic comments in the employment context as discrimination based on race, ethnicity and/or national origin. *See, e.g., Tenecora v. Ba-Kal Rest. Corp.*, 2021 U.S. Dist. LEXIS 24066 at *4, *10 & nn. 2, 7 (E.D.NY. Feb. 8, 2021) ("The term 'race' is used as shorthand for 'race, ethnicity and/or national origin'"). "[A] claim of discrimination based on Hispanic ethnicity or lack thereof may *also* be cognizable under the rubric of national-origin discrimination, depending on the particular facts of each case." *Village of Freeport v. Barrella*, 814 F.3d 594, 600-07 (2d Cir. 2016) (emphasis in original). *See Barrella* for a thorough historical and legal analysis of Hispanicity in relation to anti-discrimination laws.

agency sought a 15-day penalty, but the respondent had a "minimal" disciplinary record and wrongly understood his comments to be acceptable vernacular in reference to himself and others. I find a 10-day penalty inadequate here because respondent in this matter has not taken responsibility for his conduct and dissembled even at trial about the intended target of his offensive remarks. Although he denied any discriminatory animus, he could not plausibly deny that he was contemptuous of his supervisor, and his use of Palao's Latino origin in his insult to express that hostility was unacceptable workplace behavior.

As in *Lugo*, I recommend that respondent be sent for EEO training. Respondent's refusal to accept full responsibility and the half-truths in his trial testimony work against him here. He was terribly disrespectful and hostile towards his supervisor in a manner that violated both law and policy that require the workplace to be free of discriminatory animus.

Accordingly, I recommend that respondent be suspended for 15 days and be given EEO training.

Joan R. Salzman
Administrative Law Judge

January 9, 2023

SUBMITTED TO:

DAWN M. PINNOCK
Commissioner

APPEARANCES:

BRANDON SMITH, ESQ.
Attorney for Petitioner

ETHAN FELDER, ESQ.
Attorney for Respondent

NYC DCAS
Citywide Administrative Services

Dawn M. Pinnock
Commissioner

March 6, 2023

Mr. Felix Velez, Jr.
[redacted]

Re: Department of Citywide Administrative Services v. Velez,
OATH Index No. 055/23

Dear Mr. Velez:

In accord with due process, you were legally served with a Statement of Charges dated March 23, 2022. On April 26, 2022, you appeared for an Informal Conference.

On September 13, 2022, a Section 75 Conference was held before the Honorable Kara J. Miller, an Administrative Law Judge at the Office of Administrative Trials and Hearings (OATH). On October 21, 2022, and November 16, 2022, a Section 75 Hearing was held before the Honorable Joan Salzman at OATH.

I reviewed all of the documents in the disciplinary case, including the recommendation of the Hearing Officer and the recommendation of the Administrative Law Judge. I have adopted the recommendation of the Administrative Law Judge, as they pertain to the guilty findings in OATH Index No. 055/23 since they have been established and are borne out by substantial, legal, and competent evidence.

Therefore, pursuant to the powers delegated to my office, I am adopting a penalty of fifteen (15) days suspension and mandatory EEO training. Please be advised that in accord with Section 76 of the Civil Service Law, you have twenty (20) days to appeal this decision to the City Civil Service Commission or four (4) months to the Supreme Court of the State of New York, which appeal is made pursuant to Article 78 of the Civil Practice Law and Rules.

Sincerely,

[redacted]

Dawn M. Pinnock
Commissioner

c: Brandon Smith-DCAS
Joan Salzman-OATH

THE CITY OF NEW YORK
CIVIL SERVICE COMMISSION

In the Matter of the Appeal of

FELIX VELEZ, JR.
Appellant

-against-

DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES
Respondent

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

CSC Index No: 2023-0121

DECISION

FELXI VELEZ, JR. ("Appellant") appealed from a determination of the Department of Citywide Administrative Services ("DCAS") finding Appellant guilty of incompetency and/or misconduct and imposing a penalty of 15 days' suspension following disciplinary proceedings conducted pursuant to Civil Service Law Section 75.

The Civil Service Commission ("Commission") requested written arguments from the parties on March 31, 2023. Appellant's brief was received on April 14, 2023. DCAS's brief was received on April 27, 2023.

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

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

SO ORDERED.

Dated: May 30, 2023