

Fire Dep't v. Siciliano

OATH Index No. 657/23 (Jan. 6, 2023)

Petitioner failed to prove that paramedic stole money from a patient.
Dismissal of charge recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
FIRE DEPARTMENT OF THE CITY OF NEW YORK
Petitioner
- against -
THOMAS SICILIANO
Respondent

REPORT AND RECOMMENDATION

CHRISTINE STECURA, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, the Fire Department of the City of New York (“petitioner” or the “Department”), pursuant to section 75 of the Civil Service Law. Petitioner alleges that respondent Thomas Siciliano (“respondent”), a Paramedic, took money that did not belong to him from a patient without the patient’s consent in violation of sections 4.1.3, 4.2.47, and 4.2.48 of the Department’s Emergency Medical Services (“EMS”) Operating Guide Procedures section 101-01 – General Regulations (“General Regulations”) (Pet. Exs. 1 (Amended Charges), 2 (General Regulations)).

At trial, held by videoconference due to the Covid-19 pandemic, petitioner presented the testimony of two witnesses, as well as documentary evidence. Respondent testified on his own behalf and presented documentary evidence.

For the reasons below, I find that petitioner did not prove the charge and I recommend the charge be dismissed.

ANALYSIS

Respondent has been employed by petitioner since May 2006 (Pet. Ex. 5). He is assigned to Station 23 located in Staten Island (the “Station”) (Tr. 134). Respondent’s duties as a Paramedic include performing patient assessments, obtaining medical histories, taking vital signs,

cleaning and restocking ambulances, completing paperwork, providing emergency treatment in accordance with Department protocol, and driving ambulances (Tr. 131-34). Petitioner alleged that on December 27, 2020, while responding to an emergency call, respondent took U.S. currency that was not his, off a patient's table without the patient's consent in violation of the Department's rules, regulations, procedures, and protocols (Pet. Exs. 1, 2; Tr. 7). Petitioner also alleged that respondent violated the General Regulations by engaging in criminal activity while on duty (Pet. Exs. 1, 2). It further alleged that this conduct was prejudicial to the good order, efficiency, and the discipline of the Department (*Id.*). Respondent denied the charge.

Petitioner has the burden of proving the charge 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).

In assessing credibility, relevant considerations include demeanor, consistency of testimony, supporting evidence, witness motivation, bias or prejudice, and whether the testimony comports with common sense and human experience. *See, e.g., Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998). Except where noted, I found that each of the witnesses made a good faith effort to recall the events as they perceived and recalled them.

Petitioner's Evidence

The Department presented the testimony of EMS Lieutenant Shawn Smith, respondent's partner at the time of the alleged incident, and L.B., the ex-wife of the patient, T.B., who was the subject of the emergency call during which the alleged incident took place.

Smith testified that on December 27, 2020, he and respondent were assigned as partners during a 7 a.m. to 7 p.m. shift (Tr. 62-64).¹ Respondent was not Smith's regular partner, but they

¹ In December 2020, Smith was a Paramedic and was promoted to Lieutenant in February 2022 (Tr. 56).

had been partners temporarily before, for a month in March 2018 or 2019 (Tr. 64-65). Smith described his relationship with respondent as “reasonably cordial,” but “[n]ot particularly friendly” (Tr. 65). That day, Smith was the “tech,” responsible for patient care, and respondent was the driver, responsible for driving, cleaning up, and compiling the patient’s information (Tr. 70-71). At the beginning of the shift, Smith and respondent got coffee and then waited for an assignment in the ambulance in a parking lot (Tr. 66). Smith read the paper and respondent took a nap (Tr. 66). Just after 9 a.m., they were called to assist a patient described as having difficulty breathing, a fever and cough, which was the description the Department was using as code for patients who were or were likely Covid positive (Tr. 67, 71-72). When they arrived at the apartment building, a woman, L.B., met them outside to bring them to the patient (Tr. 69).

Smith further testified that he and respondent entered the apartment’s living room where the patient was sitting on a couch (Tr. 72). To the left of the patient was a table that was approximately two and a half feet high (Tr. 78-79). Smith immediately went to the patient to ask him about his symptoms and take his vital signs and an electrocardiogram (Tr. 73). He described the patient’s mental state as “alert and oriented” and he had no difficulty communicating (Tr. 73, 106). Smith stated that at some point he was kneeling in front of the patient. Respondent was to Smith’s right and slightly behind Smith, and L.B. was also to Smith’s right but a little behind respondent (Tr. 77). There was nothing obstructing Smith’s view of respondent (Tr. 81). Respondent had the patient’s medications and was “jotting things down” (Tr. 77-78). Smith observed that as respondent finished with a medication, he placed them on the first shelf of the table, below the tabletop, which Smith found “really strange” (Tr. 78-79). Smith described the table as “very unique,” with several levels of shelves, and a lamp on top beside an ash tray and cigarettes (Tr. 78-79). When asked, Smith did not recall there being a folder or napkin holder on the table (Tr. 108).

While Smith watched respondent, he noticed there was U.S. currency on the first shelf below the top of the table where respondent was putting the medications (Tr. 80). Smith said the money “caught [his] eye” because “on this job, you don’t want to be responsible for other people’s money” (Tr. 80). He remembered that there were other items on the same shelf, and that the money was on something, maybe a box of cards or a paper bag, but he could not recall what else was on the shelf (Tr. 108). He thought it “seemed kind of extra” of respondent to be putting the medications on the same shelf as the money, instead of just putting them on top of the table (Tr.

81, 107). After placing the third medication on the shelf, respondent “rested his hand on the currency and then took it off and then put it back on, took the currency, turned around and left the room” (Tr. 81). In that moment, the patient was looking at Smith, but Smith did not know what L.B. was doing (Tr. 81). When respondent returned, Smith and respondent convinced the patient to go to the hospital and they eventually left the apartment (Tr. 82-84).

Smith further testified that after he and respondent put the patient in the ambulance, Smith sat in the back with the patient and respondent went to the driver’s seat (Tr. 85-86). Smith stated that respondent reached into the back seat of the ambulance front and reached into his personal bag and he heard a zipper at some point (Tr. 86-87). Once they reached the hospital and transferred the patient, Smith went to the emergency room waiting area and called the Station and told Lieutenant David Rodinsky that he saw respondent take money from a patient (Tr. 89-90). Rodinsky told him that he would contact the chief on duty to figure out the next steps (Tr. 90). Smith then went to the restroom and returned to the ambulance where respondent was waiting in the driver’s seat (Tr. 90). Respondent asked him if he had an online payment system called PayPal because he was having issues with his account and he wanted to send him \$60 as a test (Tr. 91). Smith refused, respondent asked again, and Smith responded, “absolutely not” (Tr. 91).

Smith testified that shortly thereafter the ambulance’s computer assigned them as “out administrative” and they returned to the Station after respondent called in (Tr. 92-93). Smith thought that their order to return might be connected to his call to Rodinsky (Tr. 93). As they drove, Smith and respondent talked about how this was likely a random drug test (Tr. 94). Smith testified he felt rattled after seeing respondent take the money and was concerned that he might seem strange or that respondent suspected he saw him take the money, so he told him he was worried that the CBD gummies he took would show up on the test (Tr. 94). As they approached the Station, respondent stopped the ambulance halfway into the Station’s parking lot telling Smith he had to get his identification (Tr. 94-95). Smith reminded respondent that he had his wallet in the morning at Dunkin Donuts, to which respondent replied that he does not keep his identification in his wallet (Tr. 95). Smith did not watch respondent to see what he was doing but he was gone for five to ten minutes (Tr. 95).

Once respondent returned, they drove to the Station and went to Rodinsky’s office (Tr. 95). Respondent asked Rodinsky what was going on, but Rodinsky seemed frustrated and told him to stop asking him (Tr. 95-96). Smith and Rodinsky were texting each other (Tr. 96). Rodinsky

asked Smith to write a statement but Smith was uncomfortable with writing a statement in front of respondent so Smith suggested that he write it at another station, and Rodinsky agreed (Tr. 96). While still at the Station, respondent asked Smith to break a 20-dollar bill which Smith thought was odd and he refused (Tr. 96-97). Rodinsky eventually told Smith and respondent they were done for the day and that they could leave the Station if they had sick or annual leave to use (Tr. 98). Respondent did not have any leave time so he stayed (Tr. 98). Smith ultimately wrote his statement in a parking lot and then delivered it to the Station (Tr. 97, 115). Smith later gave statements to investigators from the Department's Bureau of Investigations and Trials and the Department of Investigation ("DOI") (Tr. 99-100). Smith did not work with respondent again but received a couple of text messages from him saying that he hoped no one made a complaint against them (Tr. 100).

On cross-examination, Smith stated he was wearing a face mask but not goggles or protective eyewear during the call (Tr. 103-04). He maintained that he told the DOI investigator that respondent had asked him to break a 20-dollar bill at the Station and that respondent stopped the ambulance at his car on the way back to the Station but agreed that was not reflected in the January 2022 DOI closing memorandum (Tr. 111, 114; Resp. Ex. B). He stated he was sure that he told DOI respondent asked to send him \$60 via PayPal as a test but after being shown a copy of the DOI closing memorandum (Resp. Ex. B), that states he told DOI respondent asked to send him \$20 via PayPal, he stated he must have been mistaken about the \$60 amount (Tr. 111). On redirect, Smith was shown his December 27, 2020 statement (Pet. Ex. 6) in which he wrote \$60, and stated he was never given an opportunity to review the DOI closing memorandum for accuracy (Tr. 120-21).

Smith maintained that he did not actually take CBD gummies but only told respondent that because he was nervous (Tr. 113-14). He did not observe respondent write a statement nor did he overhear anyone ask respondent to write one (Tr. 116-17).

Petitioner also presented a copy of Smith's December 27, 2020 statement on form 1086 sent to Lieutenant Rodinsky (Pet. Ex. 6). The statement generally corroborated Smith's testimony including his observation that the cash was "folded in half on the shelf below the top of the table, multiple bills with what looked like a \$20 on top, about 5-10 bills in total," as well as his testimony that respondent left the living room after taking the patient's money, and asked Smith if he could send him \$60 via PayPal as a test and break a 20-dollar bill at the Station (*Id.*).

L.B. testified regarding her recollection of the events. L.B. remained close to and on good terms with her ex-husband, T.B. (Tr. 19). He passed away in July 2021 (Tr. 34). In December 2020, T.B. was 69 years old and in the end stages of renal failure (Tr. 20). He had lung issues and had trouble with breathing and walking (Tr. 21). L.B. provided nursing care and transportation for T.B. (Tr. 21). She had previously worked as a hospital medical assistant for 29 years (Tr. 32-33).

On December 27, 2020, T.B. was having difficulty breathing and refused to go to dialysis (Tr. 22). L.B. testified that she called 911 and an ambulance responded within 15 minutes (Tr. 22). She waited outside and led two paramedics into the apartment (Tr. 23). One paramedic immediately began taking T.B.'s vitals and an echocardiogram, and the other paramedic asked her for T.B.'s prescriptions and medical paperwork (Tr. 23-24, 33). T.B. was sitting on a couch and on the left was a large lamp table (Tr. 24, 26). The lamp table had shelves divided into cubicles where medicine and other items were stored in linen cubes (Tr. 26). Each linen cube filled the entire space of a cubicle shelf (Tr. 42). T.B. also kept a folder in a clear plastic napkin holder on the table in front of the lamp where he stored his lottery tickets and the money he used to purchase lottery tickets (Tr. 26-27, 42, 49). The lottery tickets were in the folder and the money was kept behind the folder in the napkin holder (Tr. 43, 48). T.B. kept his wallet "[v]ery close to him" on top of the table (Tr. 52). He did not keep money below the top shelf (Tr. 52). Any money he kept on the lamp table would have been visible to someone standing next to the lamp table (Tr. 52).

L.B. testified that the first paramedic was kneeling in front of T.B. while he attended to him, about two feet away from her, while the second paramedic was beside her on her right-hand side, just inches away (Tr. 27-28, 50). The lamp table was inches away from the second paramedic to his right (Tr. 51). The second paramedic was recording T.B.'s medications and insurance information (Tr. 29). She gave the second paramedic the insurance information from T.B.'s wallet which was on top of the lamp table (Tr. 29). She also handed him the medication which was stored in a linen box under the first shelf of the lamp table (Tr. 30, 44). She recalled having a conversation with the second paramedic about Italian restaurants on Staten Island (Tr. 30). She saw the second paramedic place the medications on top of the table, where the lamp was (Tr. 30). The paramedics were in the apartment for between 45 minutes and an hour before they transferred T.B. to the hospital (Tr. 34). Neither paramedic left the living room while they were there (Tr. 43).

L.B. went to the hospital separately after they left (Tr. 35). She testified that while the paramedics were in the apartment her eyes were focused on her ex-husband and the paramedic who was working on him, but she could also see the second paramedic and the napkin holder with the folder (Tr. 35, 44). She did not know if there was any money in the napkin holder that day, but she did not notice anything missing upon her return from the hospital (Tr. 35, 44). L.B. did not observe that either paramedic seemed nervous during their visit and they appeared to follow proper protocol (Tr. 45). T.B. was lucid and able to speak while the paramedics were in the apartment, as well as when he returned from the hospital three days later (Tr. 46). Upon his return, T.B. was weak but able to move around the apartment using a walker (Tr. 53).

L.B. testified that she was interviewed by the Department a day or two after December 27 and she told them that she had no complaints and the paramedics had worked efficiently (Tr. 36-37). Investigators had asked to speak to T.B. but they never spoke to him (Tr. 36). She was later interviewed by DOI (Tr. 37-38). She clarified that respondent stood close to her “elbow to elbow,” and did not sit (Tr. 40-41).

L.B. stated that she lived with T.B. until he died, and he continued to play lottery after he got out of the hospital until May 2021 when they moved to Florida (Tr. 47-48). T.B. never mentioned that any money was missing from the apartment after he returned from the hospital (Tr. 49).

Respondent’s Evidence

Respondent testified that he joined the Department in May 2006 as an Emergency Medical Technician and was promoted to a Paramedic in February 2011 (Tr. 130-31). In December 2020, respondent’s work schedule had changed to accommodate his father’s illness and Smith was not respondent’s usual partner (Tr. 133). Respondent knew Smith from when they were temporarily partnered together for a month in 2018 and from other times they worked together (Tr. 135).

On December 27, 2020, respondent and Smith got a call for a patient that was indicated to potentially have Covid-19 (Tr. 140). The patient’s ex-wife was outside the apartment building and flagged them down (Tr. 141).

Respondent recalled that in December 2020 he was taking various precautions during the pandemic including “constantly sanitizing [his] hands and washing [his] hands” (Tr. 139). During the December 27 call, respondent wore a N95 mask and gloves (Tr. 141). Smith wore goggles,

gloves and a respirator mask issued by the Department that resembled a house painter's mask (Tr. 141-42, 192).

Inside the apartment, the patient was sitting on a couch (Tr. 142). Respondent observed that the patient was alert, oriented and able to speak (Tr. 146). Respondent immediately asked L.B. for the patient's insurance cards, identification, and medications (Tr. 143). L.B. handed him the patient's medications from a cloth box that she retrieved from a cubicle under a table (Tr. 143, 189). Respondent went through the medications one by one and wrote them down and inputted them into an electronic tablet (Tr. 143-45). The patient had about 15 medications, but he was only taking three or four (Tr. 144-45). After he finished recording them, respondent slid the box back into one of the table's cubicles as directed by L.B. (Tr. 144-46). He recalled that the table had a lamp on top but did not remember if there was anything else on top (Tr. 144). He testified that he was not over by the table for too long but spent more time speaking with L.B. (Tr. 144). After he put the medication box away, he spoke to L.B. about Florida (Tr. 147). Then he, Smith, and L.B. tried to convince the patient to go to the hospital which he was reluctant to do (Tr. 147-48, 186).

Respondent stated that he never left the room where the patient, L.B., and Smith were (Tr. 146). He also denied brushing his hand over any money or taking anything from the apartment (Tr. 146). The patient did not say anything about there being money in the apartment and neither the patient, L.B., or Smith said anything to respondent about respondent taking anything from the apartment (Tr. 146-47). Respondent testified that the patient would have been able to see him from where he was sitting while respondent was speaking with his ex-wife (Tr. 207).

Respondent and Smith eventually put the patient inside the ambulance to take him to the hospital (Tr. 148). Respondent got into the front of the ambulance, took off his gloves, got his bag from behind him, and unzipped it to retrieve his hand sanitizer to sanitize his hands before he touched the steering wheel, as he does after every call (Tr. 148-49). Respondent recalled that the patient told him at the apartment that he had tested positive for Covid three weeks prior (Tr. 150). They reached the hospital and transferred the patient (Tr. 150). Then respondent cleaned the stretcher, replaced the oxygen mask, and went to wash his hands and face (Tr. 150). He did not recall where Smith was but thought he might have gone to the restroom or was speaking with the triage nurse (Tr. 151).

Respondent testified that after he and Smith returned to the ambulance he asked Smith if he could send him \$60 via PayPal as a test (Tr. 152). Respondent explained that he had no money

in his debit account and was trying to transfer money he had in his PayPal account to his debit account but kept getting an error message (Tr. 152-53). Smith said no and respondent called PayPal to request that a hold be released on his account so he could transfer money from PayPal to his debit account which he was ultimately able to do (Tr. 152-57). Respondent denied he was trying to cover up any theft of money by asking Smith if he could send him a PayPal transfer (Tr. 157).

Shortly thereafter, respondent and Smith were notified by a dispatch message that they were put out of service (Tr. 157). He called Rodinsky for further information who told him to come back to the Station (Tr. 157-58). Respondent testified that it was unusual to be put out of service in the middle of the shift and that he and Smith discussed that it was likely they were chosen for random drug testing (Tr. 158). On the way back to the Station, he stopped the ambulance at his car so he could get his work identification, union card and credentials (Tr. 158-59). After losing his wallet on multiple occasions and having to pay out of pocket for reissued work identification, respondent's practice was to keep his work cards in a separate wallet (Tr. 159). He admitted he forgot to carry his work credentials on December 27 while on duty (Tr. 205-06). Once back at the Station, he sat with Smith, Rodinsky, and Chief Ortiz (Tr. 159-60). Respondent thought he was going to be given a drug test but never actually received one (Tr. 160). Ortiz later told respondent and Smith that they were restricted for reasons unknown (Tr. 160). Rodinsky told them they could leave for the day if they had leave time, but since respondent did not have any leave balance, he stayed in an ambulance until the end of the shift (Tr. 160-61). Respondent denied that he asked Smith to break a twenty-dollar bill while they were at the Station and stated he was not carrying cash that day (Tr. 160).

Respondent testified that he was never asked any questions regarding the call by anyone at the Department or DOI (Tr. 160-69). He further stated that he was never asked to or provided an opportunity to make a statement (Tr. 166). He was not made aware of DOI's investigation until his Step 1 hearing in June 2022 (Tr. 168-69). Following the December 27, 2020 incident, he has been restricted from duty (Tr. 163). He testified that as a result of being placed on administrative restriction, he has not been able to work overtime and has endured significant financial and personal consequences, including the ability to visit with his child, eviction from his apartment, and losing his car (Tr. 164-65).

On cross-examination, respondent agreed that he had a friendly relationship with Smith and had no problem working with him (Tr. 176). He testified he purchased a coffee at Dunkin Donuts using his Dunkin Donuts phone app prior to their call (Tr. 180-81). Respondent also clarified that L.B. handed him each individual medication that her ex-husband was taking and after he wrote down each medication, he handed it back to L.B., and she put it back in the cloth box (Tr. 189-90). He could not recall if L.B. put the cloth box down on the table or held it in her hand while she was doing this (Tr. 190).

In addition to his testimony, respondent offered documentary evidence. A DOI closing memorandum, dated January 3, 2022, regarding this incident was sent from a deputy inspector general to file (Resp. Ex. B). Respondent obtained this memorandum through a Freedom of Information Law request but was not asked to participate in DOI's investigation (Tr. 169). According to this memorandum, L.B. told DOI that she did not see any money on the table or see anyone take anything from the table (Resp. Ex. B). DOI concluded that it could not substantiate the allegation that respondent stole money from T.B. and it closed its case (*Id.*).

Respondent offered a character letter dated June 29, 2022, written by Division Chief Patrick Flynn on his behalf (Resp. Ex. A). The letter states in pertinent part:

I have had the opportunity to work with and supervise [respondent] when I was the Captain . . . in 2015 . . . [Respondent] is an excellent paramedic and extremely reliable. We did encounter some bumps along the way. . . [h]owever, . . . [respondent] was always honest and forthright with me and always straight to the point. At no time did he ever skirt the issues at hand or bend the truth . . . [Respondent's] honesty was always one characteristic that I appreciated the most.

(*Id.*).

A January 7, 2021 email entitled "[respondent] patient" was sent from Bridget Alvarez (FDNY) to Carlos Velez (FDNY) and Joseph T. Palazzolo (FDNY), copying Justin Boyle (FDNY), and then forwarded by Boyle to Stanislav Skarbo (FDNY) (Resp. Ex. D). It states in pertinent part:

Today . . . Investigator Karic and I entered the home of [T.B.] . . . We were greeted by [L.B.] his ex-wife. We introduced ourselves and explain[ed] to her there was a confrontation with the crew that responded here for her ex-husband on 12/26/20. We asked if he would be able to answer a few questions. She said that he was really sick and would not be able to answer anything. She said she was the one who called the ambulance and was here the whole time. We asked her if she had any issues or ill thoughts, feelings

or concerns about the ambulance crew that came to the home. She said “no, none at all.” She even remembered their first names. We asked if there was any arguments between the crew members. She said “no.” She explain[ed] that one guy was with [her] ex-husband and the other guy was looking at his medicine. At this time I saw his medication on the table with the shelves underneath. I asked her if these were his medications and that they were here on this table at that time. She said “yes that’s where they were.” . . . We asked again if she had any complaints or concerns about anything that happened that day. She said “no.” She had nothing but nice things to say about the crew and no complaints were discussed.

(*Id.*).

A June 3, 2022 email from “support@paypal.com” to “My Email” states in pertinent part:

A contact was made to us on dec. 27th 2020 about the transaction and a ticket was created to trace the transaction on dec. 27 2020 to verify the withdrawal went through correctly. The transfer was made in the amount of \$63.28 to the card . . .

(Resp. Ex. E).

In addition, respondent submitted a prehospital care report summary for December 27, 2020 (Resp. Ex. C).

Petitioner failed to substantiate its allegation that respondent took money from the patient.

The Department contends that petitioner’s alleged theft of the patient’s money constitutes the crime of petit larceny and engaging in such a crime while on duty violates the General Regulations (Pet. Exs. 1, 2, 3). While this tribunal does not have jurisdiction to determine whether a crime has been committed under the Penal Law, it can decide whether respondent engaged in misconduct by referring to the Penal Law for guidance. *See Dep’t of Education v. Robles*, OATH Index No. 2275/09 at 13 (Oct. 19, 2009), *adopted*, Chancellor’s Dec. (Nov. 16, 2009). In this administrative proceeding, petitioner must prove by a preponderance of evidence all elements of the crime alleged. *See Dep’t of Correction v. Battle*, OATH Index No. 1052/02, at 7-8 (Nov. 12, 2002) (citing *Aronsky v. Bd. of Education*, 75 N.Y.2d 997, 1000 (1990)).

Under the New York Penal Law, a person “is guilty of petit larceny when he steals property.” Penal Law §155.25. To prove the charge of petit larceny, petitioner must establish: (1) the patient’s ownership of the property in question, (2) a taking of that property, (3) that the taking was without the patient’s consent, (4) that it was done by respondent, and (5) that it was done with

the intent to deprive the patient of the property or to appropriate the same to respondent or a third person. *People v. Shurn*, 69 A.D.2d 64, 65 (2d Dep't 1979); Penal Law §§ 155.25, 155.05.

Smith testified that he saw respondent put his hand over and take money from a shelf below the tabletop. Respondent denied he took money from the patient. The question is whether Smith's testimony that respondent took the patient's money should be given greater weight than respondent's denial that he took any money. While I did not find Smith to be biased or motivated to fabricate the incident, he may have been honestly mistaken about what he saw. Respondent also testified credibly regarding the incident and presented a letter from a former supervisor attesting to his good character (Resp. Ex. A).

Petitioner argued that certain actions taken by respondent made it more likely than not that he took the patient's money. First, Smith testified that respondent left the living room after taking the patient's money. However, this was undermined by L.B.'s testimony that neither paramedic left the living room while they were in the apartment. Second, Smith testified that once he and respondent left the apartment and were in the ambulance, respondent went into his personal bag. Respondent admitted he went into his bag to retrieve his hand sanitizer to clean his hands after the call. I found this explanation credible given that it was a pandemic, and they were with a patient who had recently tested positive for Covid-19. Third, Smith testified that respondent asked him if he could send him \$60 as a test using PayPal. Respondent admitted this and explained he was having difficulty transferring money from his PayPal account that day. The e-mail from PayPal (Resp. Ex. E) supported respondent's testimony that he contacted PayPal in connection with a withdrawal of \$63 from his PayPal account on December 27, 2020.

Fourth, Smith testified that respondent told him he forgot his wallet in his car and stopped the ambulance to go inside his car on the way back to the Station. Respondent credibly explained that he needed to retrieve his work credentials, which he admitted he failed to have with him while on duty, because he kept them separate from his wallet after losing his wallet multiple times. He further explained he used a Dunkin Donuts phone app to purchase his coffee prior to the call. Fifth, Smith testified that respondent asked him to break a 20-dollar bill at the station. Given that Smith's testimony was corroborated by his contemporaneous witness statement (Pet. Ex. 6), I think it is more likely than not that respondent did ask Smith to break the 20-dollar bill. In any case, even if respondent did ask Smith to break a 20-dollar bill, it does not mean that he stole the patient's money.

Additionally, respondent testified that Smith was wearing protective eyewear during the call. Smith's statement did not include any details regarding whether he was wearing protective eyewear but, in any case, I did not find this detail relevant to my findings.

Petitioner has the burden of proof, and its case relies on Smith's testimony that he saw respondent take the money. I found it troubling that Smith's testimony regarding where he said respondent took the money from was inconsistent with L.B.'s testimony of where her ex-husband kept the money. According to Smith, respondent took the money from the first shelf below the tabletop, but L.B. testified that her ex-husband did not keep money below the tabletop and would have kept the money in a napkin holder placed on the tabletop. I am not persuaded by petitioner's argument that the location of the money when it was taken was "a minor inconsistency" (Tr. 214). In fact, it is central to petitioner's story, and the discrepancy undermines petitioner's version of the events.

Petitioner argued that because L.B. testified that her ex-husband kept money on the table, and Smith and L.B. were focused on the patient and not watching him, respondent had the "opportunity" to take the money, and therefore it is more likely than not that he took the money (Tr. 213). But just because the patient often kept money on the table, it does not necessarily mean that respondent took the patient's money from the table.

Rather than support petitioner's version of events, I found that L.B.'s testimony undermined it. L.B. was a persuasive witness without motive to lie. There was no evidence that L.B. or T.B. saw respondent take any money and L.B. credibly testified that she never noticed any money was missing, and her ex-husband, who was lucid and continued to play the lottery after he returned from the hospital, never told her he was missing any money. In fact, L.B. could not recall if there was even any money on the table while the paramedics were in the apartment on December 27, 2020. Her testimony at trial was consistent with her contemporaneous statements to Department investigators over a week after the call in which she stated she did not have any complaints or concerns about the ambulance crew that responded to her call on December 27, 2020 (Resp. Ex. D), as well as statements she made to DOI that she neither saw money on the table or anyone take anything (Resp. Ex. B).

As such, petitioner has not proven by a preponderance of the credible evidence that respondent took money that belonged to the patient without the patient's consent in violation of the Department's rules and regulations. *See e.g. Fire Dep't v. Muller*, OATH Index No. 1090/17 (May 1, 2019), *adopted*, Comm'r Dec. (June 20, 2019) (petitioner did not prove that respondent failed to render appropriate patient care and made false statements); *Fire Dep't v. Best*, OATH Index No. 1506/04 (Sept. 2, 2004) (petitioner failed to prove drug use charge). Thus, the charge is not sustained.

FINDING AND CONCLUSION

Petitioner failed to prove that respondent improperly took money from a patient without the patient's consent in violation of its rules.

RECOMMENDATION

Accordingly, I recommend the charge against respondent be dismissed.

Christine Stecura
Administrative Law Judge

January 6, 2023

SUBMITTED TO:

LAURA KAVANAGH
Commissioner

APPEARANCES:

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