

THE CITY OF NEW YORK
OFFICE OF ADMINISTRATIVE TRIALS
AND HEARINGS

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In the Matter of :

NEW YORK CITY TRANSIT AUTHORITY, :

Petitioner, : Index No.
794/91

- against - : REPORT AND
RECOMMENDATION

EARLY DUGGER, :

Respondent. :

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P R E S E N T: RAY FLEISCHHACKER
Administrative Law Judge

T O: CARMEN SUARDY
Vice-President, Labor Relations
New York City Transit Authority

A P P E A R A N C E S: LEONARD POSTIGLIONE, Esq.
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This is an employee disciplinary proceeding referred by the Transit Authority pursuant to section 75 of the New York State Civil Service Law. Early Dugger, a Supervisor Level II, is charged with the theft of Authority funds on January 3, 1991.¹ After a hearing conducted before this tribunal on March 1 and March 18, 1991, I find the respondent not guilty and I recommend that the charges be dismissed.

SUMMARY AND ANALYSIS

Dennis Ryan, Assistant Director for Labor Relations, testified that after receiving an allegation from a supervisor that Mr. Dugger might have been stealing monies from non-registering fare boxes ("box"), he directed an investigation/integrity check of the respondent (Tr. 28-29, 37). He had two other level 2 supervisors, Betancourt and Muhammad, place a known amount of tokens and change in a box at Bowling Green Station and they were directed to observe the box until they confirmed that the respondent came on duty (Tr. 30-31, 38, 40, 54). Those supervisors have conducted investigations for about two and one-half years, but only began reporting to him four months ago (Tr. 36). He trusts their integrity based on past performance (Tr. 69).

¹ At the commencement of the hearing, without objection, the Authority amended its charge to correct the claimed date of occurrence (Tr. 4).

Mr. Ryan explained that a non-registering fare box is used when turnstiles are out of order or during high passenger volume periods. The box, unlike a turnstile, does not contain a reader which registers fares. When a token booth clerk puts a box in use, he is to notify the station command and the subdivision/field office (Tr. 30-31; *see also* Betancourt-Tr. 80). Tokens and coins can only be loaded into a box one at a time (Tr. 45-46). A box is opened with a key. There are two keys for each box; one is kept at the field office, and the other is itself kept locked up. Only a supervisor is authorized to open a box. When one needs emptying, the desk supervisor will inform the road supervisor to pick up the key (Tr. 31-32).² For the January 3 undercover operation, he turned one key over to Mr. Muhammad; the other key should have been at the subdivision office (Tr. 33-34). He signed out for the key; he did not obtain a receipt from Mr. Muhammad (Tr. 43-44).

According to Mr. Ryan, after a supervisor empties a box, he places the contents in a revenue bag, completes a remittance form (including his name, location and number of booth and box number), which he also puts in the bag, and then seals the bag with both the booth punch (which has the booth number on it) and his personal punch (which has his pass number on it) (Tr. 33).

The witness testified that he was not present when the revenue bag in question was opened, but he was present for approximately twenty-five minutes on January 4 when Mr. Dugger was interviewed at the Labor Relations Office of the Stations Department (Tr. 34-35).

² Mr. Betancourt confirmed that supervisors cannot take it upon themselves to empty boxes but must be directed to do so by the field office, and they do not carry around keys capable of opening boxes but must pick one up at the office (Tr. 80-81).

Mr. Ryan testified that Messrs. Muhammad and Betancourt loaded the box at 0400 hours and watched it until 1600-1630 hours, but were not both there the entire time; the respondent emptied it at 1900 hours. A clerk came on duty at 0600 hours (Tr. 54-55). One thousand one hundred and fifty-three dollars in tokens and change were loaded by the investigators. That would take about forty minutes. One thousand tokens would weigh eight pounds and eight ounces (Tr. 34, 36, 47). The purpose of watching the box was to make sure it was not put in operation (Tr. 38-39, 53). During the three hours that the box was not under observation, a clerk was on duty. During that time, the clerk was responsible for preventing tampering (Tr. 64-66). Mr. Ryan did not know if the box was used during that time (Tr. 42).

According to Mr. Ryan, no surveillance techniques, such as videotaping, were used in the investigation (Tr. 53). The respondent, after emptying the box, deposited the revenue bag in another booth that had a safe. Neither clerks nor supervisors can open the safe, only collection agents from the revenue office. Only the Transit police may search an employee. One could have called a collection agent to open the safe in the presence of a supervisor, and if a shortage was discovered, call in the police. This was not done. Instead, a collection agent delivered the bag to the revenue room to be counted (Tr. 60, 67-71).

Mr. Ryan was asked the following question: Do you know whether or not Mr. Betancourt took the key and emptied out the box and stole the money himself? The witness replied that he did not (Tr. 53-54). He conceded that even while both investigators were at the scene, one could have stolen the money while the other was in the bathroom (Tr. 55-56). No person has come forward to say they saw Mr. Dugger take the money (Tr. 57).

Eric Betancourt testified that he has been an Authority employee for twenty years and holds a job title of Supervisor, Level 2. For three months he has worked as an investigator for

Labor Relations, essentially investigating passenger complaints. His prior assignment of five years was also as an investigator in a different department (Tr. 72-73).

According to Mr. Betancourt, he was assigned by Mr. Ryan to participate in an integrity check at the Bowling Green Station because there was a complaint about a scam between Mr. Dugger and a clerk, Spruell (Tr. 73-74). On January 2, 1991, he and Mr. Muhammad met with Mr. Ryan and were instructed to go to the 14th Street Manhattan East field office to pick up a certain amount of currency and tokens from the general superintendent, Mr. Cannizzo, which they were to count. That afternoon, they went to the office and were given a package by Mr. Lombardi, Mr. Cannizzo's assistant. They received but did not sign for 990 tokens, \$2.90 in dimes, \$2.00 in nickels, \$10.00 in quarters, and twenty pennies or a total of \$1153.60. After they counted the money, Mr. Betancourt took it home. They were also given a key which Mr. Muhammad took home (Tr. 75-76, 109-10).

The next morning, as planned, he and Mr. Muhammad met at the Bowling Green Station at 4:30 a.m. As instructed and using the key Mr. Ryan had given them, they emptied all monies from the non-registering box, over 1000 tokens, and placed it in a revenue bag which Mr. Muhammad delivered to Mr. Ryan at around 10:00 a.m. They then deposited the \$1153.60 into the box, which they counted as they put in. Because the tokens and coins had to be loaded one at a time, it took about one-half hour (Tr. 77-79, 113-14, 125).

Mr. Betancourt stated that the box is right in front of the token booth. However, no employees saw them load the box because the station does not open until 6:00 a.m. (Tr. 78-79). At approximately 5:15 or 5:20, he departed while Mr. Muhammad, who retained the key, remained. He returned a little before 10:00 and spoke with Mr. Muhammad who had to return the key and the monies emptied earlier. He does not know what Mr. Muhammad did with the

bag of tokens during the five hours he was away. When he came back, Mr. Muhammad was on the northbound side near the token booth, speaking with a TA police officer who knew nothing about the investigation. There was a bench about ten feet from the booth from which one could view the box without being seen from the booth. As instructed, he then kept the box under surveillance until after 4:00 p.m. During that time, he saw no one tamper with the box and it was not in use. He did not go to the bathroom or take a break. He was moving around, mingling with the crowds. Mr. Muhammad, who was just passing by, came back to the station for five or ten minutes in the early afternoon (Tr. 81-82, 89, 116-17, 120-23, 126-28). The investigators had placed the latch on top of the box and Mr. Muhammad had placed a sticker on top of the coin deposit (Tr. 83). A little after 4:00 p.m., as instructed, he called Mr. Cannizzo to confirm whether or not Mr. Dugger had reported for work. Mr. Cannizzo said that he had and that Mr. Betancourt could leave, because if Mr. Dugger knew him it could blow the whole operation (Tr. 84-85).

Mr. Betancourt conceded that he and the clerk who came on duty sometime before 2:00 p.m., Christopher Spruell, knew each other prior to January 3 (Tr. 88). Mr. Spruell did not see him because he kept away at the other side of the platform. However, Mr. Dugger would have gotten off the southbound train where he was mostly stationed, and he did not want to take the chance of being seen by the respondent (Tr. 89-91). Mr. Betancourt further conceded that he did not know if the box was tampered with between 1600 and 1900 hours. During that time it was the clerk's job to observe the box, but the clerk too was under suspicion (Tr. 91-92).

Mr. Betancourt identified Respondent Exhibit A as a copy of his timecard, and Respondent Exhibit B as a complaint he wrote against the respondent (Tr. 93-95). On his timecard he noted that he began work at 4:00 a.m. and ended at 16:00 hours, but that he worked

eight hours. Because he did a split shift, i.e., went home to take care of personal business and then came back on duty, he actually worked eight hours. Split shifts are supposed to be recorded on the time card; he did not do so, but did record it in his reports (Tr. 96-100, 105-06).

Mr. Betancourt was also questioned about the statement in his report (Respondent Exhibit B) that, "During the time of deposit to 16:00 hrs., said box was under constant observation by Supv. Muhammed and myself." (Tr. 101-02). In Respondent Exhibit C, another report, he made the identical statement. He meant that either he or Mr. Muhammad had the box under constant surveillance (Tr. 102-05, 133). It would not have been prudent to have two people there in terms of being discovered. Mr. Ryan coordinated the investigation with TA detectives (Tr. 108, 131).

Mr. Betancourt conceded that Mr. Muhammad could have taken the money while he was not there, but he did not believe that was the case. He described Mr. Muhammad, who he has known for years, as an honest man with deep religious convictions (Tr. 131-32).

Taalib Abdullah Muhammad testified that he has been employed by the Authority since 1981 and is a Supervisor, Level 2. He is assigned to the Station Department and performs special assignments, including investigating passenger complaints and integrity checks (Tr. 139-40). He and Mr. Betancourt have been partners for five years; they were assigned to Labor Relations in December 1990 (Tr. 141).

Mr. Muhammad confirmed his partner's testimony about the assignment they received on January 2, 1991 from Mr. Ryan and how they placed it in operation the following day (Tr. 141-47). He agreed that the name of Spruell, a railroad clerk, had been implicated in the possible misappropriation of funds at the Bowling Green Station (Tr. 142), that the investigators did not

sign for the money or the key they received, and that Mr. Betancourt took the money home on January 2 (Tr. 143, 158-60; *see also* Tr. 152-56).

Mr. Muhammad testified that he kept the monies emptied from the fare box in his little carrier bag during his observation (Tr. 145). He recalled that Mr. Betancourt left close to 6:00 a.m. and returned a few minutes before 10:00 a.m. (Tr. 146-47). During those hours, he watched the box from the northbound platform side, most of the time in a chair and out of view of the clerk, blending in with the homeless and people going to work. The clerk came on duty at around 6:30 a.m. During his period of observation, the box was not in operation. The investigators had placed a sticker on it, to prevent money from being deposited, and at the time he was relieved by Mr. Betancourt, they inspected the box and observed that the sticker was still intact (Tr. 147-50, 176-77, 186-87). According to the witness, Mr. Spruell does not know him (Tr. 180).

About the time that he was relieved, he introduced himself and his partner to an inquisitive police officer as supervisors doing a traffic control observation. Thereafter, he and Mr. Betancourt spoke for five or ten minutes and then he departed. He went directly to the Labor Relations office where he turned in the monies and the key to the box (Tr. 150-51). He returned to the Bowling Green Station around 2:00 p.m., spoke with Mr. Betancourt for a few minutes, saw that the box was still secure and then went home (Tr. 151, 194).

Mr. Muhammad identified Respondent Exhibit D as a copy of his time card (Tr. 164-65). For January 3, he listed his work hours as 0400 to 1600 hours, and noted that he worked eight hours (Tr. 166-67). He does not work normal hours and does not get paid for working more than eight hours. The witness identified Respondent Exhibit E as a copy of his report of the investigation. The last sentence states that the box was "under constant observation by myself

and Mr. Betancourt from 0400 to 1600 hours" (Tr. 168-69, 197-98). He meant that either of them had the box under constant observation, not both. According to Mr. Muhammad, he and Mr. Betancourt did not write their reports together (Tr. 171, 198).

Mr. Muhammad acknowledged that his car has Kentucky license plates and he has a Kentucky drivers license. He has continually resided in New York since 1981, but has property in Kentucky and lived there from 1974 to 1977 and from 1980 to 1981 (Tr. 173-75).

Mr. Muhammad did not know why the box was not under observation between 4:00 p.m., when Mr. Betancourt left, and 7:00 p.m., when Mr. Dugger arrived. He assumed Mr. Dugger was supposed to get to the station right after Mr. Betancourt left. He does not know why things occurred differently. However, no funds could have been taken out of the box except by someone who had a key (Tr. 180-83, 190). In his experience, supervisors never had to sign for keys (Tr. 183-85).

John McMahon testified that he has been employed by the Authority for nine years, is a Supervisor, Level 2 and is assigned to the Station Department, Labor Relations (Tr. 204). On January 4, 1991, he and his partner Supervisor, Level 2 Dennis Cherry, pursuant to Mr. Ryan's assignment, were notified by the Revenue Department to appear for purposes of witnessing and verifying the opening of the bag turned in by Mr. Dugger on January 3 for the Bowling Green booth (Tr. 205-06).

According to Mr. McMahon, when he and Mr. Cherry arrived they met up with two Transit police detectives, then entered the counting room where Jackie Jones, the coordinator, had the bag. They verified that the tags and seals on the unopened bag were those of Mr. Dugger. The revenue bag was double-bagged which is common when there is a hole, to prevent leakage. It is usually sealed toward the middle of the bag. There are two seals, a booth seal and a

personal punch seal, which are made of lead and bear certain numbers on them. Mr. McMahon displayed the particular bags and seals involved in this case. One seal contains the respondent's number, 237790, while the other has the booth number, R200A (Tr. 206-09).

Mr. McMahon testified that he was present when the bag was opened by the cashier, as was Mr. Cherry and the police detectives, and that it was routinely videotaped (Tr. 210-11, 238).

The contents were dumped on a counter which automatically sorts the different coins and issues a register slip/receipt totalling the various denominations (Tr. 211-14; Petitioner Exhibit 3). The bag also contained a remittance report (Petitioner Exhibit 2), which lists the supervisor's name and the number of the box that was emptied. No monetary amount is given because, as per procedure, the supervisor does not count it but merely dumps it into the bag (Tr. 212-13).

According to the witness, \$550.23 was recovered from the bag (Tr. 213). The amounts shown on the receipt were transferred to a remittance report prepared by Ms. Jones, who converted the total coins to dollar amounts (Tr. 214-17). Mr. McMahon was not familiar with the counting machine, when it was last inspected or repaired, or if it ever makes mistakes. No one recounted by hand. After the count, Mr. Dugger, who happened to be in the building, was summoned to the Labor Relations office, where he and Mr. Cherry spoke with him in Mr. Ryan's presence. Mr. Ryan was present for the entire interview. They asked him to tell them everything he did on January 3 from the time he reported to duty, and particularly step by step what he did with the fare box. He was not told at that point why he was being asked (Tr. 218-19, 235-36, 243-44, 247-49).

Mr. Dugger stated that he was assigned to empty the box. He took the pail, went to the box, emptied it, brought the pail back to the booth, dumped the contents into the revenue bag and put the bag up on the board. The clerk then took the pail and emptied his wheels (i.e., the

turnstiles), and brought the pail back in. According to Mr. Dugger, he never left the booth. He sealed the bag with the two punches and deposited the bag in Booth 201 (Tr. 219). Mr. Dugger was then informed that the preset amount was not in the bag and he was asked for an explanation. He had none and was arrested. He was not asked for a written statement that day nor did Mr. McMahon take notes of the interview (Tr. 241-42). Mr. McMahon stated that he did not review any written material before testifying (Tr. 242).

The respondent came back on January 7 and was re-interrogated by Messrs. McMahon and Ryan. They went over what he had said on the 4th. This time he said that the clerk had emptied the contents of the pail into the revenue bag and then took the pail to empty the turnstiles ("pull his wheels"). When the discrepancy with his statement on the 4th was pointed out, he said, "That's the way it happened." He may also have denied giving a different account on the 4th, but Mr. McMahon did not recall. After the interview, Mr. Dugger was asked for a written statement, which he gave (Tr. 221-23, 232-35; Petitioner Exhibit 4).

The clerk at that booth from 1300 to 2100 hours was Christopher Spruell. Mr. Spruell's reports for that day (Petitioner Exhibits 5A and 5B) indicate that he had no overages or shortages (Tr. 223-25). The witness identified Petitioner Exhibit 6 as a report of the revenue bags deposited in the safe on January 3. It includes entries by both Mr. Spruell and the respondent (Tr. 226-27). It indicates that the respondent made his deposit at 2000 hours and that it was witnessed by Earl Davis, a clerk, as is normal procedure. The clerk would also fill in the time (Tr. 229-31).

Mr. McMahon confirmed that only supervisors may open non-registering fare boxes, that the supervisor who empties a box is responsible for the funds, and that the funds cannot be commingled with other funds (Tr. 227-28). According to the witness, on one occasion that he

can remember, the bag was opened and counted at the station in the presence of the police (Tr. 239-40).

Dennis Cherry testified that he has been with the Authority for twenty-two years. He held the title of Supervisor Level 2 in the Station Department on January 4, 1991, but has since been promoted to Superintendent (Tr. 249-50). On January 4, he took part in the investigation of the respondent. A little after 4:00 p.m., Mr. Dugger came down to Labor Relations. Mr. Cherry introduced Messrs. Ryan and McMahon and explained that they were conducting an investigation. Mr. Dugger was asked to explain in detail everything he did on January 3 (Tr. 250-51).

According to Mr. Cherry, Mr. Dugger stated that he was informed by the field office to empty the non-registering fare box at Bowling Green. He picked up the key at the field office and arrived at Bowling Green at 1900 hours. He emptied the box into the token pail, then returned to the booth and emptied the contents of the pail into the revenue bag. The clerk had to go outside to empty the turnstiles so he "held the board" (i.e., dispensed tokens), and left the revenue bag on the other board. When the clerk came back in, he filled in the receipt, put it in the bag, punched the bag and dropped it in booth R201. Mr. Cherry testified that he asked Mr. Dugger to repeat and be specific about emptying the box, and the respondent gave the same account. (Tr. 251-53).

Mr. Cherry testified that he then told the respondent about the count and the shortage. The respondent replied that it was a frame-up, that he would never do something like that. About that time, the police detectives arrived and left with Mr. Dugger. Mr. Cherry stated that after the respondent left, Mr. Ryan asked him to write a statement, which he immediately did,

based upon notes he had taken. He no longer has the notes, and he did not ask the respondent to verify the statements attributed to him (Petitioner Exhibit 7; Tr. 253-56, 259-61).

Christopher Spruell has been employed by the Authority as a railroad clerk for five years. On January 3, 1991 he worked a 1:00-9:00 p.m. tour at token booth R200A on the northbound side of the Bowling Green station, relieving another clerk whom he believed was Iris Farulla. The station has three turnstiles and a non-registering fare box. When he arrived on January 3, as required, he checked the turnstiles. He does not recall if any one was out of operation, but he emptied all three and each had tokens in it. The box was not in use, and the plate was latched over the token slot. It took two or three minutes to empty the turnstiles and take readings, and it took about fifteen minutes overall to collect, count and bag the tokens.

Sometime during the rush hour (4:30-5:00 p.m.), he opened the box because the turnstiles went down and because of crowd congestion. There was no sticker covering the slot (Tr. 269-74, 295-98). Mr. Spruell stated that the turnstiles are cheap and break down frequently. He is supposed to note breakdowns on his fare board or call them in. And he is supposed to call the field office when he puts a fare box into operation, which he did. That day a passenger told him that a token had jammed (Tr. 302-05, 311-14, 353). He did not recall which turnstile was out of operation; usually it is number 3. At 7:00 p.m., he emptied only number 1 so he believes that 2 and 3 must have been inoperable. He empties the turnstiles two or three times during a tour, because a part-time booth does not carry a big reserve of tokens (Tr. 306-10, 317-19, 347, 352).

Thereafter, people began using the box, and he had his assistant, Ann Fales, who worked from 2:45 to 7:00 p.m., hit the switch to open the turnstile. According to Mr. Spruell, while he was still outside the booth, he could hear the fares clink as people deposited them, which meant

that the box was empty. That is always the sound it makes right after he opens up a box for use.

The sound is deadened or dulled when there are contents in the box (Tr. 275-77, 329-31; *see also* 350-51).

Mr. Spruell testified that at around 7:00 p.m., Mr. Dugger entered the station and came to the door of the booth. Mr. Spruell was performing his normal duties. As the respondent came in, Ms. Fales left. The respondent called in, put his briefcase (i.e., a small attache case) down and opened it, grabbed a pail, went outside, emptied the box, came back in and set the pail down on the floor between them. The emptying only takes five or ten seconds because when the key is inserted the tokens fall out. The respondent then started to do paperwork. Mr. Spruell picked up the pail, poured the entire contents into a revenue bag, put it on the floor and told Mr. Dugger that he was going to retrieve his wheels. He did so because it is convenient to empty the turnstiles while someone else is there. Mr. Dugger held his board while he emptied the turnstiles, and he heard the respondent selling tokens. He only emptied one turnstile, which takes about five seconds. He then came back in and "started running my tokens", i.e., emptied them into the coin counter. After Mr. Dugger finished his paperwork, he sealed the bag and took it downstairs. The respondent took one seal from his briefcase and was given the booth punch by Mr. Spruell (Tr. 277-82, 286-88, 331-38, 341-43, 345-46, 353-54).

According to Mr. Spruell, the respondent had placed his briefcase on top of the board. He saw that it contained papers and cologne, his punch and perhaps some seals. It was still open after Mr. Spruell emptied his turnstile and returned to the booth and remained open while Mr. Dugger dropped off the bag (Tr. 280, 288, 340-41, 349). In his opinion, the respondent must have seen him pick up the pail to empty it (Tr. 283). In any event, after he did so and

before he collected his tokens, he told the respondent that he had emptied the tokens into a bag and showed him the bag, which was on the floor (Tr. 284-85).

Mr. Spruell testified that he did not see Mr. Dugger take any money or tokens from the bag, nor did he take any. Nothing about the respondent's appearance when he left suggested that he was carrying \$600 of tokens on his person or in his briefcase. The only thing Mr. Spruell noticed was that the respondent had put some of the cologne (Grey Flannel) on. After the respondent dropped off the bag, he came back for his briefcase. Mr. Spruell stated that before testifying counsel warned him that his testimony that he handled the bag and tokens might be considered an admission against interest (Tr. 289-92, 339, 355).³

Mr. Dugger testified that he has been employed by the Authority since January 1983 and has been a Supervisor Level 2 since May 1985. Mr. Dugger confirmed that on January 3, 1991, he emptied the non-registering fare box by the booth manned by Mr. Spruell. When he first arrived, he put his briefcase down, took off his coat, and greeted the two clerks. After the lunch relief clerk left, he went outside and emptied the contents of the fare box into a pail which he had obtained from the booth. This took less than a minute. He then took the pail inside the booth and placed it on the floor in the middle of the booth between him and Mr. Spruell. Thereafter,

³ Subsequent to the hearing, counsel for the respondent produced a report of a Detective B. Altera who interviewed Mr. Spruell on January 7, 1991. In the interview Mr. Spruell stated that he had emptied the pail into the revenue bag. As counsel requested in his accompanying letter, I will accept the report into evidence (Respondent Exhibit F) together with the Authority Advocate's responding letter, and determine the appropriate weight to accord the evidence. However, counsel is mistaken in claiming that the report was withheld from the respondent until after the hearing thereon. The report is part of Petitioner's Exhibit 8 for identification, which was not accepted into evidence on the respondent's objection. Finally, I note that counsel mistakenly characterizes Mr. Spruell as a subject of investigation based on the report. He is clearly denominated as a witness; the term "subject" has reference to his interview, not his status.

he opened his briefcase, got out his pen, started to do his paperwork, and called in that he was at the Bowling Green station (Tr. 356-59, 361-62).

Mr. Dugger testified that he did not empty the pail nor did he hear or see it emptied, although he was only two or three feet away from Mr. Spruell, who told him that he had emptied the pail into a revenue bag, which the respondent saw on the floor. He had been on the phone with his back to Mr. Spruell and when he turned around, Mr. Spruell had the empty pail in his hand. At that point, he questioned the clerk, asking "What happened to the tokens?" Mr. Spruell said he poured them into the revenue bag and pointed to it. Mr. Dugger asked "why" and Mr. Spruell replied that he wanted to go out and get his tokens, which he then proceeded to do. When the clerk returned from emptying the turnstiles, which took five to ten seconds, and while the clerk "prepared his tokens" by putting them in the coin counter and "running" them, Mr. Dugger was selling tokens, doing his paperwork and was on the phone with a supervisor, Barbara Fletcher. He serviced three or four customers. When the respondent was finished, he put his paperwork in the bag, which he had left on the floor, sealed it and deposited in the safe in the main booth downstairs (Tr. 359-60, 362-69).

Mr. Dugger denied that he stole any money or tokens, nor did he see Mr. Spruell take anything (Tr. 360). He confirmed that on January 4, he was called to the labor relations department. He already knew Messrs. Ryan, McMahon and Cherry. Mr. Dugger was asked if he stated at that time that he had emptied the pail into the revenue bag. Mr. Dugger testified as follows: "I stated on January 4 to Mr. Cherry in particular and Mr. McMahon was present, Mr. Ryan was out of the room at the time, I stated that the clerk poured the contents into the bag and a smart remark was made by Mr. Cherry saying, "What are you saying, the clerk took the tokens." I said "no, I'm not saying that, I'm only saying what happened. You asked me what

happened and that's what happened." (Tr. 369-72). No one asked him to sign any statements on January 4th, he did not see Mr. Cherry taking notes and he did not see a tape recorder. He was interviewed for about an hour and he was asked to cooperate and say that the clerk took the tokens, which he would not do. The supervisors then left the conference room and a police officer came in and arrested him (Tr. 374-77).

Mr. Dugger testified that when he was interviewed he did not know there was a shortage. It is a violation for a supervisor who is handling tokens to let them out of his possession and be handled by a clerk. The respondent related that on a prior occasion he participated in an investigation and in that case the contents of the revenue bag were counted at the safe in the presence of the supervisor being investigated and the police (Tr. 372-74).

The case against Mr. Dugger, as the parties surely agree, was a circumstantial one. No one saw Mr. Dugger steal anything or caught him redhanded with Transit Authority property. Rather, the agency's case rests on establishing several collateral facts from which it seeks to have this tribunal draw an inference of guilt. However, the Authority failed to establish all of those facts, or to reasonably exclude other explanations for the purportedly missing funds.

As an elementary proposition in cases based on circumstantial evidence, the inferences sought to be drawn must be based on proven facts. *Francis v. New York City Transit Authority*, 112 A.D.2d 994, 492 N.Y.S.2d 803 (2d Dept 1985); *Ridings v. Vaccarello*, 55 A.D.2d 650, 390 N.Y.S.2d 152 (2d Dept 1976). In this case, the Authority needed to establish three facts in order to permit this tribunal to infer that Mr. Dugger engaged in a theft: 1) that the fare box Mr. Dugger was sent to empty contained \$1153.60; 2) that he emptied the fare box; 3) and that he remitted only \$550.23. Yet, it was not satisfactorily established that the fare box initially contained \$1153.60 or that only \$550.23 was remitted by Mr. Dugger.

There was no evidence that the machine, which was relied on to count the funds Mr. Dugger remitted, was accurate. The funds were not run through a second time, nor was a control run. And no one bothered to recount the funds manually. Further, no one testified that the box was ever checked to make certain that all of the funds deposited therein were actually emptied. The evidence did show that deposits need not be removed but fall out once the box is opened with a key. Also, Mr. Betancourt testified that the box, once opened, will not reclose if not completely empty (Tr. 78-79), and Mr. Muhammed stated that the box was in perfect working order (Tr. 144). Nonetheless, it is possible that the system somehow malfunctioned, and that some funds remained in the box. Thus, there is no clear proof that all of the \$1153.60 allegedly placed in the box was emptied by Mr. Dugger, and most importantly, that only \$550.23 was remitted.⁴

There was also substantial doubt that the fare box contained \$1153.60 at the time Mr. Dugger was sent to empty it. Mr. Betancourt failed to provide reasonable assurances within the context of an administrative proceeding that he maintained custody over the funds. *Police Department v. O'Reilly*, OATH Index No. 237/89 (July 24, 1989); *Department of Correction v. Perez*, OATH Index No. 345/88 (November 7, 1988). He provided no information as to whether or how he safeguarded the concededly open bag (Tr. 108) of tokens at his residence on the evening preceding the integrity check, nor did he indicate that he was the only person with access to the funds at that location. Thus, it is possible on the record of this proceeding that an

⁴ It is unlikely that the bag remitted by Mr. Dugger was tampered with between the time of deposit in the safe and the time of the count, as it had two seals affixed which were undisturbed at the time of the count. To that extent, contrary to the respondent's urging, it was unimportant that Mr. Dugger was not confronted immediately at the time he deposited the funds.

indeterminate number of people had access and, unbeknownst to the investigators, removed a portion or portions of the funds before the deposit was made into the fare box.

Thus, a finding of guilt cannot be made because all of the collateral facts upon which the Authority relies were not proven. Even had all three necessary facts been proven, an inference of guilt could not reasonably be drawn because persons other than Mr. Dugger could well have helped themselves to the missing monies.

Circumstantial evidence is sufficient to support an inference only where it is the most reasonable one that can be fairly drawn from the facts and other explanations can be fairly and reasonably excluded. *E.g., Nieskes & Craig, Inc. v. Schoonerman*, 40 A.D.2d 931, 337 N.Y.S.2d 750 (4th Dep't 1972). *1 N.Y. Pattern Jury Instructions* 1:70 (1986 Supp.); *Department of Transportation v. Turnage*, OATH Index No. 227/86 (July 10, 1986) (circumstantial evidence insufficient to support inference that ferry booth clerk stole funds from turnstile). And while the proponent need not negate the existence of remote possibilities or disprove all other possible explanations or inferences, it must show that the inference sought to be drawn is the only one that is fair and reasonable. Where the probabilities are evenly balanced, an inference cannot be fairly and reasonably drawn. *Markel v. Spencer*, 5 A.D.2d 400, ___, 171 N.Y.S.2d 770, 778, *aff'd* 5 N.Y.2d 958, 184 N.Y.S.2d 835 (1959), *Department of Transportation v. Mascia*, OATH Index No. 403/85 (May 30, 1986).

In this case, the Authority's investigation was so flawed that the conclusion that Mr. Dugger stole monies from non-registering fare box No. 395 cannot fairly be made. And it appeared from the demeanor of most of the agency's witnesses that they knew as much. Thus, Messrs. Ryan, Muhammad and McMahon were each notably defensive and evasive on cross-examination, which, given their positions, was uncharacteristic and troubling.

Supervisors Betancourt and Muhammad, in large part because of the flawed manner of the investigation, certainly had several opportunities to take the missing funds. Mr. Betancourt took the monies home on the night of January 2 in an unsealed bag. Although I credit the investigators' testimony that the money was counted when they received it at the Labor Relations office that day, it was wholly incredible, as they claimed, that they recounted the sum as they deposited each individual token and coin into the box on the morning of January 3. Thus, it is not impossible that Mr. Betancourt, if dishonest, took some portion of the \$1153.60 while at home, relying on the probability that it would not be recounted.

Similarly, it is entirely unfathomable why Mr. Muhammad was entrusted with the key to the box while he alone stood guard over it for some time in the early morning on the 3rd before the station opened.⁵ He clearly had the opportunity, if dishonest, to open the box and skim some of the funds, without any fear of detection. And, of course, the investigators, if dishonest, could have easily conspired to ensure that Mr. Dugger was discovered with a shortage after his retrieval of the fare box funds by merely failing to deposit all they received.

In most cases, one can rule out the possibility that the persons charged with an investigation were involved in the very misconduct they investigated and uncovered. Even in this case, it remains unlikely that Messrs. Betancourt and/or Muhammad had anything to do with the missing funds. But some doubt remains, based on the investigative techniques described above, and based on their credibility, as discussed below, enough that a case based on circumstantial evidence will not stand against Mr. Dugger.

⁵ Or why he kept in his possession the more than \$1000 that the investigators had emptied from the box, during the hours of approximately 5-10 a.m., while, among other techniques, he "blended in with the homeless."

Apart from the unbelievable claim that the investigators recounted the money as they loaded the fare box, there were other problems with the testimony of each investigator. One wholly incredible aspect was the assertion that they wrote their investigatory reports (Respondent Exhibits C and E) independently of each other. Putting aside whether or not any deception was intended, both men reported that he "and" his fellow investigator had the box under constant observation from 0400 to 1600 hours. In a further uncanny coincidence, both investigators on their timecards noted their hours of work on January 3 as 0400 to 1600 hours, but stated that he only worked eight hours. Yet each conceded that except for the period from 4:00 to 6:00 a.m., only one of them was at the station watching the fare box at any one time. Clearly, use of the word "and" was inaccurate. Just as clearly, the investigators consulted when preparing their reports, which contained this identical mistake.⁶

Finally, Mr. Muhammad's honesty was brought into issue by the revelation that he registers his car in Kentucky and has a Kentucky driver's license although he has not resided there in years. He full well knows that his mere ownership of property in Kentucky does not entitle him to circumvent the Motor Vehicle Law registration and licensing provisions (Vehicle and Traffic Law §250 (McKinney's 1986 and 1991 supp.)), which he is required to comply with as a New York resident. Mr. Muhammad never explained the reason for such deception, although saving on insurance was suggested. His failure to address the matter keeps other possibilities in play, such as avoiding paying for parking summonses. In any event, while

⁶ Neither investigator from the outset of his testimony attempted in the least, to convey the impression that he and his fellow investigator were together in the station for the entire twelve hours. Thus, at trial, certainly no deception was intended. Nevertheless, for purposes of securing criminal and disciplinary charges against the respondent, the apparent representation that the investigators were together the whole time may have had significance.

ordinarily one might not consider such improper registration a significant transgression, an investigator, whose integrity must be beyond attack when a witness, cannot afford to engage in such behavior.

In sum, while it may not be likely that either Mr. Betancourt or Mr. Muhammad or both of them stole the missing funds or that the funds were taken by others while in Mr. Betancourt's home, unfortunately these possibilities cannot be fairly ruled out. Even if I were to find that a shortage existed, that the investigators were impeccably honest and that they properly safeguarded and deposited the funds, a more likely and troublesome explanation for the loss exists.

A very distinct possibility is that Mr. Spruell stole the monies. As the investigators acknowledged, Mr. Spruell was suspected of participating with Mr. Dugger in skimming funds from non-registering fare boxes. Yet, Mr. Spruell had exclusive guard over the fare box in question for almost three hours between the time the investigators departed and Mr. Dugger arrived. Indeed, according to the Authority's witnesses, he was responsible for preventing tampering with the fare box during those hours. What is the likelihood that Mr. Spruell, in league with a Supervisor Level 2, perhaps Mr. Dugger or perhaps someone else, made or obtained a copy of one of the two keys which open the box?⁷ There was no showing that the fare box keys were unique and incapable of being duplicated, or were changed from time to time.

Mr. Spruell certainly was not a credible witness. He was extremely defensive on cross-examination. He was thoroughly unbelievable in claiming that he heard tokens being

⁷ Indeed, there was no proof where the two authorized keys were between the time Mr. Muhammad delivered one to the field office and the time Mr. Dugger picked one up. In fact, an incomplete system apparently existed for tracking the keys utilized by the supervisors to empty the fare boxes.

deposited in the fare box, once he put it in operation,⁸ and could deduce from the sounds made that the fare box was empty. Similarly, his recollection about the contents of Mr. Dugger's attache case and whether it was open or closed at various times seemed completely fabricated. And his testimony about which turnstiles were inoperable was inconsistent, made little sense and was not borne out by any documentary evidence (*see e.g.* Petitioner Exhibit 5A).

Thus, based on Mr. Spruell's ample opportunity and lack of credibility, he could well have been the one who stole the monies, if he was able to open the box. Again, a case based on circumstantial evidence cannot afford such lingering doubts.

Of course, absent the failure to prove that funds were taken, the Authority established that Mr. Dugger was also a likely suspect. In fact, given Mr. Spruell's overly supportive, yet incredible testimony, and the likelihood that a theft, if any, occurred in the token booth, the most plausible scenario would place Messrs. Dugger and Spruell in league in the theft of the funds. In any event, Mr. Dugger conceded that he was responsible for the funds he collected from the box. If the investigators deposited the \$1153.60, the box was not tampered with before the respondent arrived, the respondent emptied all of the funds, and the count of \$550.23 was accurate, then clearly Mr. Dugger took the money or, at the very least, was responsible for the loss.

⁸ Mr. Spruell's testimony that he placed the box in operation, and so notified the field office, was not controverted.

In this regard, it is irrelevant whether or not the fare box was placed in operation as claimed by Mr. Spruell, as that circumstance could only have resulted in funds being added to those deposited by the investigators. Thus, the opportunity to take more monies would have existed, indeed, the opportunity to take funds without being detected would have existed.⁹

Had the investigators kept the box and Mr. Dugger under observation, perhaps they could have observed him take the funds, but they did not. Had the shortage been determined at the time of deposit, and a search conducted of Mr. Dugger, his possessions and the surroundings at that time (including a count at fare booth R200A), perhaps he could have been caught with Authority funds, but that too was not done.

Only one circumstance strongly supports the Authority's allegations that Mr. Dugger was the culprit, and that is, his statements and testimony surrounding the emptying of the fare box. Mr. Dugger testified that after he emptied the fare box into the pail, Mr. Spruell emptied the contents of the pail into the revenue bag. The respondent's testimony was not believable because he claimed that he had no idea Mr. Spruell had done so until the clerk so advised him. Given their very close proximity and that of the pail to him, Mr. Dugger certainly would have heard and seen Mr. Spruell empty the pail before the deed was accomplished even if he was unaware that Mr. Spruell intended to do so and had begun to. In fact, the respondent's report of January 7 (Petitioner Exhibit 4) contains no hint that he had been surprised by Mr. Spruell's

⁹ For instance, had \$1153.60 been originally deposited, and passengers added \$500 to that sum, \$500 could have been skimmed without the Authority's knowledge. That appears to be why the investigators' mission included making sure the box was not placed in use. How, in actuality, they could have prevented a clerk from placing the box in operation without compromising the investigation is unclear.

actions. Thus, if that event occurred, it appears that it did with Mr. Dugger's knowledge and tacit approval, as Mr. Spruell's testimony suggested.

Furthermore, it appears that when interviewed on January 4, Mr. Dugger claimed that he emptied the contents of the pail into the revenue bag. Messrs. Cherry and McMahon so testified credibly, and Mr. Cherry's report of January 4, which pre-dated Mr. Dugger's change of story,¹⁰ attributed that statement to the respondent.¹¹ When interviewed on January 7, Mr. Spruell supported Mr. Dugger's January 7 version, as he did at trial. Counsel's suggestion, that Mr. Dugger may have initially lied because he quickly realized on January 4 that his permitting Mr. Spruell to handle the funds in any way was improper, is plausible, but the respondent's change of story equally appeared to conveniently add another suspect.

The circumstantial evidence arrayed against Mr. Dugger and the difficulties with the respondent's testimony, however, still do not satisfy the Authority's burden of demonstrating that the respondent's guilt is the only fair and reasonable conclusion, and that other equally plausible explanations can be fairly and reasonably excluded. Nor can it overcome the failure to prove that a shortage, in fact, existed. The Authority handles vast amounts of money. No doubt the handling of those funds must be carefully monitored and, from time to time, the integrity of the handlers tested. But the testing methods also require integrity to ensure correct identification of corrupt parties. The integrity test of Mr. Dugger, in its execution, if not design, failed to meet

¹⁰ I find no merit to the assertion that the date of the report was changed from January 7 (Tr. 257-59).

¹¹ I did not believe the respondent's claim that on January 4 he said Mr. Spruell emptied the box. Again, better investigative techniques, such as the taping of his interview that day or the taking of a statement from him at that time would have put this issue to rest.

that standard. Therefore, I am constrained to recommend that the charge against Mr. Dugger be dismissed.

Ray Fleischhacker
Administrative Law Judge

May 14, 1991