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ASIM REHMAN
COMMISSIONER AND
CHIEF ADMINISTRATIVE LAW JUDGE

MICHAEL D. TURILLI
ADMINISTRATIVE LAW JUDGE
212-933-3018

March 19, 2024

Hon. Preston Niblack
Commissioner
NYC Department of Finance
One Centre Street, Room 500
New York, NY 10007

Re: *Dep't of Finance v. Canteen*,
OATH Index No. 3664/23

Dear Commissioner Niblack:

Enclosed for your review and decision is the record of the above-referenced proceeding, including my Report and Recommendation. A copy of the report has been sent to respondent's attorney, who has a right to comment on it before you take final action. Your office should promptly inform respondent's attorney of the date by which comments should be submitted.

Please have your office send a copy of your final decision to the Office of Administrative Trials and Hearings by email to lawclerks@oath.nyc.gov so that we may complete our files.

Very truly yours,

Michael D. Turilli
Administrative Law Judge

MDT: im

Encl.

c: Joshua Hantman, Esq.
Ari Lieberman, Esq.
David Kirsch, Esq.

Dep't of Finance v. Canteen

OATH Index No. 3664/23 (Mar. 19, 2024)

Petitioner failed to establish that respondent stole or facilitated the theft of seized contraband from the Department's evidence storage container on six occasions. ALJ recommends that the charges be dismissed.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF FINANCE
Petitioner
- against -
FURNEY CANTEEN
Respondent

REPORT AND RECOMMENDATION

MICHAEL D. TURILLI, *Administrative Law Judge*

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

A trial was held before me on December 19, 20, and 27, 2023. The proceedings were held remotely by videoconference. Petitioner relied upon documentary, photographic, and video evidence and the testimony of four witnesses. Respondent testified on his own behalf and offered documentary, photographic, and video evidence and the testimony of two witnesses.

For the reasons set forth below, I find that petitioner failed to prove that respondent stole or facilitated the theft of seized contraband from the evidence storage container and recommend that the charges be dismissed.

¹ Petitioner withdrew the specification alleging that respondent stole or facilitated the theft of seized contraband from the evidence storage container on March 21, 2021 (Tr. 10; ALJ Ex. 3 at Spec. 6). Prior to trial, petitioner amended each specification to allege that respondent stole or facilitated the theft of seized contraband, as opposed to vouchered contraband, as previously alleged (ALJ Exs. 2, 3).

PRELIMINARY MATTER

Section 75 of the Civil Service Law provides an 18-month statute of limitations for the commencement of a disciplinary proceeding against a civil service employee. Civ. Serv. Law § 75(4) (Lexis 2024). A disciplinary proceeding is commenced by service of formal disciplinary charges on the employee. *See Dep't of Correction v. Pearson*, OATH Index No. 391/14 at 4 (Dec. 18, 2013), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2014-0252 (July 10, 2014). Petitioner charged respondent with stealing or facilitating the theft of seized contraband from December 2020 to March 2021. The initial charges against respondent were served on May 2, 2023, more than 18 months after the alleged incidents, and were later amended on June 16, 2023, and August 16, 2023 (ALJ Exs. 1, 2, 3).

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

Stealing contraband from the evidence storage container or intentionally facilitating the theft of such property, if proven by a preponderance of the evidence, would constitute several crimes, including petit larceny, public corruption, official misconduct, and a violation of Chapter 68 of the Charter. *See* Penal Law §§ 155.05(1), 155.25 (Lexis 2024) (“A person is guilty of petit larceny when he steals property” and “[a] person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.”); Penal Law § 195.00 (“A public servant is guilty of official misconduct when, with the intent to obtain a benefit or deprive another person of a benefit . . . [h]e commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is

unauthorized; or [h]e knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.”); Penal Law § 496.06 (“A person commits the crime of public corruption when: (a) (i) being a public servant he or she commits a specified offense through the use of his or her public office, or (ii) being a person acting in concert with such public servant he or she commits a specified offense, and (b) the state or any political subdivision thereof or any governmental instrumentality within the state is the owner of the property.”); Charter § 2606(c) (Lexis 2024) (“Any person who violates section twenty-six hundred four . . . of this chapter shall be guilty of a misdemeanor”); *see also* Penal Law § 20.00 (“When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.”).²

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

ANALYSIS

Petitioner alleged that respondent stole or facilitated the theft of seized contraband from the evidence storage container located in the parking garage at 30-10 Starr Avenue on December 6 and 9, 2020, February 11, 2021, and March 4, 7, and 8, 2021 (ALJ Exs. 2, 3). Based on these specifications, petitioner charged respondent with violating six rules of its Code of Conduct, including stealing, or permitting others to misappropriate, departmental property, failing to

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

comply with Chapter 68 of the Charter, misusing his official capacity for personal benefit, committing an unauthorized exercise of his official functions, engaging in conduct likely to bring the City into disrepute, and engaging in conduct prejudicial to good order and discipline (ALJ Exs. 2, 3, 4). Petitioner did not specifically allege the type of contraband stolen but argued that the items had been taken from the evidence container used to store alcohol seized by the Department during the pandemic (Tr. 16-17).

Respondent denied the charges. Petitioner has the burden of proving the charges by a preponderance of the credible evidence. *See Dep't of Correction v. Hall*, OATH Index No. 400/08 at 2 (Oct. 18, 2007), *adopted*, Comm'r Dec. (Nov. 2, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 08-33-SA (May 30, 2008). Preponderance has been defined as “the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence.” *Prince, Richardson on Evidence* § 3-206 (Lexis 2008). “If the evidence is equally balanced, or if it leaves the [trier of fact] in such doubt as to be unable to decide the controversy either way, judgment must be given against the party upon whom the burden of proof rests.” *Id.*; *see Rinaldi & Sons, Inc. v. Wells Fargo Alarm Service, Inc.*, 39 N.Y.2d 191, 196 (1976).

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

Petitioner's Evidence

Petitioner principally relied upon surveillance videos of the inside of the Starr Avenue garage (Pet. Exs. 4, 5-A, 6-A, 7, 8, 9, 10).³ The surveillance camera provides a birds-eye view of the area. In each of the videos, the camera angles entitled LIC-Garage-NE Ponderosa show a “U” shaped enclosure made of black metal shelving situated along the wall of a parking garage. Boxes and various equipment are stacked on the shelves. The interior of the enclosure can be accessed through a space between the garage wall and the last shelving unit on either side. A couch, a tall file cabinet, and additional shelving are located against the garage wall. The

³ The surveillance videos were recorded from multiple camera angles and do not contain any audio recording.

enclosure was referred to as the “man cave” or the “Ponderosa” by witnesses at trial (Tr. 42, 86, 156, 282, 302). On December 6, 2020, the shelving forming the perimeter of the man cave partially obstructed the camera’s view into the man cave (Pet. Ex. 5-A). Thereafter, the boxes on the top shelves fully obstructed the camera’s view into the man cave (Pet. Exs. 6-A, 7, 8, 9, 10).

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

December 6, 2020 Video

The video from December 6, 2020 begins by showing three individuals, identified at trial as respondent, Deputy Sheriff Jones, and Lieutenant Davis, walking into the man cave at approximately 7:30 p.m. (Pet. Ex. 5-A, LIC-Garage-NE Ponderosa (3) at 7:34:30-7:35:00; Tr. 205). Inside the man cave, Deputy Sheriff Jones removes what appears to be a cigar from a black box on a shelf and hands it to Lieutenant Davis (Pet. Ex. 5-A, LIC-Garage-NE Ponderosa (3) at 7:35:00-7:35:11). An individual, identified at trial as Deputy Sheriff LeBlond, exits the open door of the evidence storage container and walks into the man cave, as Deputy Sheriff Jones and respondent remove more cigars from the box (*Id.* at 7:35:11-7:35:35; Tr. 207). All four individuals then sit down and smoke cigars while conversing for approximately the next two hours (Pet. Ex. 5-A, LIC-Garage-NE Ponderosa (3) at 7:37:40-9:21:27). The camera’s view of respondent while seated in the man cave during this time is mostly obstructed. As Lieutenant Davis and respondent stand up from their seats and give each other a goodbye hug, respondent can be seen holding a bottle with a white label and a gold top in his left hand (*Id.* at 9:23:31-9:23:53). Lieutenant Davis departs the man cave (*Id.* at 9:23:55-9:24:25). Respondent bends down out of view of the camera, goes over to close the black cigar box with his now empty left hand, and appears to gather belongings (*Id.* at 9:23:58-9:25:00). The bottle is no longer visible. He exits the man cave, carries a black container about the size of a lunch box to a white vehicle

parked nearby, walks back empty-handed, and proceeds to walk out of view of the camera (*Id.* at 9:25:00-9:26:04).

Almost ten minutes later, respondent rejoins Deputy Sheriff LeBlond in the man cave (*Id.* at 9:34:40). Deputy Sheriff LeBlond bends down out of view in the same place where respondent bent down about twenty minutes earlier (*Id.* at 9:46:35-9:46:58; Pet. Ex. 5-C). Respondent and Deputy Sheriff LeBlond exit the man cave together and converse for over thirty seconds in an aisle of the parking garage (Pet. Ex. 5-A, LIC-Garage-NE Ponderosa (3) at 9:47:03-9:47:47). During that time, Deputy Sheriff LeBlond has an object protruding from the pouch of his hooded sweatshirt. The object is largely concealed in the sweatshirt pouch, but the light-colored tip of the object slightly extends out of the left side of the pouch. Respondent departs, enters a white vehicle, and drives away (*Id.* at 9:47:50-9:48:58). Deputy Sheriff LeBlond walks to a gold vehicle parked nearby, removes a bottle with a white label and gold top from his hooded sweatshirt, places the bottle in a cardboard box in his trunk, covers the bottle with what appears to be a manila envelope, closes the trunk, and drives away (Pet. Ex. 5-A, LIC-Garage-SE Executive Parking (1) at 9:48:00-9:48:48).

December 9, 2020 Video

The video from December 9, 2020 begins by showing five individuals, identified at trial as respondent, Deputy Sheriff Jones, Deputy Sheriff Jimenez, Deputy Sheriff Singh, and Deputy Sheriff Rodriguez, gathering empty cardboard boxes from the area near the evidence storage container at approximately 9:30 p.m. (Pet. Ex. 4, LIC-Garage-NE Ponderosa 2 (4) at 9:26:00-9:28:44; Tr. 88-89). Respondent passes two cardboard boxes to Deputy Sheriff Jimenez, who uses a ladder to place the boxes on the top shelf of the man cave (Pet. Ex. 4, LIC-Garage-NE Ponderosa 2 (4) at 9:28:44-9:29:26). Deputy Sheriff Jones passes a large white cooler to Deputy Sheriff Jimenez, who places it on the top shelf next to the two cardboard boxes (*Id.* at 9:31:05-9:31:40). Respondent and Deputy Sheriff Jones lift a large empty cardboard box and pass it to Deputy Sheriff Jimenez, who places it on the other side of the other two cardboard boxes on the top shelf (*Id.* at 9:32:42-9:33:06). Deputy Sheriff Jimenez descends the ladder and places four long pieces of cardboard along the side of the shelves (*Id.* at 9:33:06-9:34:43). Deputy Sheriff Jimenez ascends the ladder again and places another large cardboard box on the top shelf (*Id.* at 9:40:42-9:41:07). Deputy Sheriff Singh then ascends the ladder and places a large white box on

top of the cooler (*Id.* at 9:47:24-9:48:30). Throughout this time, respondent is on the phone, walking in and out of the man cave, and occasionally pointing at the boxes on the top shelf. The camera's view into the man cave is now fully obstructed by the cardboard boxes and cooler on top of the shelves. At 9:49 p.m., respondent exits the garage through a white door and returns about two minutes later (Pet. Ex. 4, LIC-Garage-NE Storage Container (1) at 9:49:03-9:51:27). Records maintained by the Department confirmed that respondent's identification card was used to gain access to the Operations Desk at 9:49 p.m. on December 9, 2020 (Pet. Ex. 12). Security Coordinator Tamika Mack testified that the surveillance camera system was located at the Operations Desk in 2020 and 2021 and surveillance videos were displayed on computer screens there (Tr. 67-68).

Another video from December 9, 2020 continues by showing an individual, identified at trial as respondent, walking from the man cave to behind the white column, where he appears to retrieve a key (Pet. Ex. 6-A, LIC-Garage-NE Ponderosa 2 (4) at 10:23:00-10:23:26; Tr. 166-67). Using the key, respondent unlocks two padlocks and opens the door to the evidence storage container (Pet. Ex. 6-A, LIC-Garage-NE Ponderosa 2 (4) at 10:23:26-10:24:04). As respondent returns to the white column, an individual, identified at trial as Deputy Sheriff Jones, walks from the man cave into the container, holding a black jacket in his right hand (*Id.* at 10:24:04-10:24:17; Tr. 168). Respondent then follows Deputy Sheriff Jones into the container (Pet. Ex. 6-A, LIC-Garage-NE Ponderosa 2 (4) at 10:24:17-10:24:20). Over two minutes later, Deputy Sheriff Jones exits the container alone, now wearing the black jacket, and walks to the man cave (*Id.* at 10:26:56-10:27:01). Given the angle of the camera, his left profile and back are visible as he walks from the container to the man cave. As he walks, his right arm swings by his side while his left hand appears to be in his jacket pocket. When the speed of the video is slowed and the image is enlarged, there appears to be a protrusion in the front of his jacket. One minute later, respondent exits the container, closes and locks the door, and walks to the man cave (*Id.* at 10:28:06-10:28:34). Deputy Sheriff Jones exits the man cave (*Id.* at 10:29:10-10:29:14). He appears to still have his left hand in his jacket pocket, but there is no protrusion in the front of his jacket. He walks across the garage to a white vehicle, drives the vehicle to a parking spot closer to the man cave, and reenters the man cave (Pet. Ex. 6-A, LIC-Garage-NE Ponderosa (3), LIC-Garage-In Lane-Parking Spots (1), & LIC-Garage-In Lane (3) at 10:29:14-10:32:12).

February 11, 2021 Video

The video from February 11, 2021 begins by showing three individuals, identified at trial as respondent, Deputy Sheriff Lo, and Deputy Sheriff Jimenez, walking towards the evidence storage container at approximately 10:00 p.m. (Pet. Ex. 7, LIC-Garage-NE Ponderosa 2 (4) at 9:58:05-9:58:24; Tr. 172). Deputy Sheriff Lo is carrying a green jacket over his left forearm and respondent is wearing a blue jacket. Deputy Sheriff Lo removes a key from behind the white column and unlocks two padlocks on the container door (Pet. Ex. 7, LIC-Garage-NE Ponderosa 2 (4) at 9:58:24-9:58:39). Respondent opens the container door and all three enter the container (*Id.* at 9:58:39-9:58:56). Over seven minutes later, Deputy Sheriff Jimenez exits the container alone (*Id.* at 10:06:18-10:06:26). He walks in the direction of the camera and his front profile is fully captured. He is now carrying the green jacket and a black object appears to be cradled in his arms under the jacket. He walks to a black SUV parked nearby, places the jacket and object in the front seat, sits down, and closes the door behind him (Pet. Ex. 7, LIC-Garage-NE Ponderosa 2 (4) & LIC-Garage-SE Executive Parking (1) at 10:06:26-10:06:51). He exits the vehicle about 20 seconds later and returns to the container with the green jacket clenched in his left hand (*Id.* at 10:07:12-10:07:38). Approximately 20 seconds later, Deputy Sheriff Lo exits the container with the green jacket in his right hand and walks off (Pet. Ex. 7, LIC-Garage-NE Ponderosa 2 (4) 10:08:00-10:08:24). Two minutes later, respondent exits the container carrying the blue jacket over his right forearm and walks into the man cave (*Id.* at 10:10:04-10:10:21). Deputy Sheriff Jimenez then exits the container, walks into the man cave, goes back inside the container, and finally exits and locks the container (*Id.* at 10:11:29-10:14:45).

March 4, 2021 Video

The video from March 4, 2021 begins by showing an individual, identified at trial as Deputy Sheriff LeBlond, retrieving the key to the evidence storage container from behind the white column and unlocking the container door at approximately 11:00 p.m. (Pet. Ex. 8, LIC-Garage-NE Ponderosa 2 (4) at 11:11:45-11:12:11; Tr. 176). As Deputy Sheriff LeBlond is opening the container door, an individual, identified at trial as respondent, walks from the man cave to the container and they enter the container together (Pet. Ex. 8, LIC-Garage-NE Ponderosa 2 (4) at 11:12:11-11:12:31; Tr. 177). Respondent is wearing a dark hooded sweatshirt closed with a single zipper at the top. Another individual, identified at trial as Deputy Sheriff

Jimenez, exits the man cave and enters the open container (Pet. Ex. 8, LIC-Garage-NE Ponderosa 2 (4) at 11:14:01-11:14:08; Tr. 177). Deputy Sheriff Jimenez is wearing a dark hooded jacket. Over five minutes later, Deputy Sheriff LeBlond exits the container, returns the key to the white column, and walks into the man cave (Pet. Ex. 8, LIC-Garage-NE Ponderosa 2 (4) at 11:19:27-11:20:06). Deputy Sheriff Jimenez then exits the container and walks into the man cave (*Id.* at 11:20:24-11:20:35). Given the angle of the camera, his left profile and back are visible as he walks from the container to the man cave. When the speed of the video is slowed and the image is enlarged, there appears to be a protrusion in the front of his jacket. Both of his arms swing freely at his side as he walks to the man cave. Respondent then exits the container, closes the container door, and walks into the man cave (*Id.* at 11:20:28-11:20:56). Respondent reenters the container, exits, locks the container door, and returns to the man cave (*Id.* at 11:21:14-11:23:30). Both times, respondent walks back to the man cave with his hands in the pockets of his hooded sweatshirt.

March 7, 2021 Video

The video from March 7, 2021 begins by showing an individual, identified at trial as respondent, retrieving the key to the evidence storage container from behind the white column and unlocking the container door at approximately 7:15 p.m. (Pet. Ex. 9, LIC-Garage-NE Ponderosa 2 (4) at 7:13:30-7:13:51; Tr. 179). As respondent opens the container door, another individual, identified at trial as Deputy Sheriff Jimenez, walks from a black sedan parked near the man cave towards the open container, and puts on and zips up a black jacket over a hooded sweatshirt (Pet. Ex. 9, LIC-Garage-NE Ponderosa 2 (4) at 7:13:51-7:14:21; Tr. 179). Deputy Sheriff Jimenez enters the storage container while respondent gets into a black SUV, parks it closer to the man cave, exits the vehicle, and enters the man cave (Pet. Ex. 9, LIC-Garage-NE Ponderosa 2 (4) at 7:14:21-7:15:23). Deputy Sheriff Jimenez then exits the container and locks the container door (*Id.* at 7:15:43-7:16:20). He walks to the black sedan and drives away (*Id.* at 7:16:20-7:17:40). Deputy Sheriff Jimenez initially walks in the direction of the camera so that his front profile is fully captured. The contour of a rectangular object is visible underneath the front side of his jacket.

March 8, 2021 Video

The video from March 8, 2021 begins by showing three individuals, identified at trial as Deputy Sheriffs Lo, Singh, and Jimenez, walking towards the evidence storage container at approximately 10:30 a.m. (Pet. Ex. 10, LIC-Garage-NE Ponderosa 2 (4) at 10:25:40-10:26:05; Tr. 181-82). Deputy Sheriff Jimenez is wearing a denim jacket open over a light-colored shirt. Deputy Sheriff Lo retrieves the key to the evidence storage container from behind the white column and unlocks the container door (Pet. Ex. 10, LIC-Garage-NE Ponderosa 2 (4) at 10:26:05-10:26:14). Deputy Sheriff Singh, who has been holding a white paper in his hand, opens the container door and all three enter the container (*Id.* at 10:26:14-10:26:32). About one minute later, another individual, identified at trial as respondent, enters the open container (Pet. Ex. 10, LIC-Garage-NE Ponderosa 2 (4) at 10:27:15-10:27:24; Tr. 183). Over three minutes later, respondent briefly exits the container to close the door halfway (Pet. Ex. 10, LIC-Garage-NE Ponderosa 2 (4) at 10:30:43-10:30:48). Approximately two minutes later, another individual, identified at trial as Deputy Sheriff Jones, walks into the container (Pet. Ex. 10, LIC-Garage-NE Ponderosa 2 (4) at 10:32:51-10:33:07; Tr. 183). Deputy Sheriff Jones exits the container, followed by Deputy Sheriff Jimenez and respondent, and Deputy Sheriff Jimenez and respondent appear to be conversing with each other while standing several feet apart (Pet. Ex. 10, LIC-Garage-NE Ponderosa 2 (4) at 10:33:30-10:34:37). Deputy Sheriff Jimenez initially walks in the direction of the camera so that his front profile is fully captured, and then turns to face respondent with his back to the camera. As he stands outside of the container, Deputy Sheriff Jimenez appears to have his left hand underneath an object that is completely covered by the left side of his denim jacket. Respondent reenters the container as Deputy Sheriff Jimenez walks to a white vehicle parked nearby in the garage, opens the passenger side rear door, bends down, closes the door, and walks away with both hands free at his side (Pet. Ex. 10, LIC-Garage-NE Ponderosa 2 (4) & LIC-Garage-SE FSU/Transport Car (4) at 10:34:37-10:35:47). As Deputy Sheriff Jimenez walks to the vehicle, his left arm remains at the left side of his jacket and his right arm swings freely at his side. According to time records maintained by the Department, Deputy Sheriff Jimenez did not work on March 8, 2021, but rather used 10 hours of sick leave (Pet. Ex. 11). Respondent approved his timesheet on March 17, 2021 (*Id.*).

Petitioner's Witnesses

Petitioner also relied upon the testimony of Maureen Kokeas, who served as the First Deputy Sheriff in 2020 and 2021 and is now the Commanding Officer of the Department's Bureau of Criminal Investigations ("BCI") (Tr. 28-29). As First Deputy Sheriff, she was responsible for overseeing BCI and familiar with respondent, who was employed as a sergeant in BCI and supervised several deputy sheriffs (Tr. 29-30, 36). She described respondent as an excellent employee (Tr. 36). She explained that the Sheriff's Office enforced various Executive and Mayoral Orders related to business closures and congregations of people during the COVID pandemic in 2020 and 2021 (Tr. 30-31). The Sheriff's Office conducted enforcement raids, which involved dispersing illegal congregations, closing unlicensed establishments, and seizing alcohol, tobacco, and drugs found at the locations (Tr. 31). The seized contraband, which was primarily alcohol, was brought back to the parking garage at 30-10 Starr Avenue and stored in the evidence container (Tr. 31-32). She acknowledged that the alcohol seized during the COVID enforcement raids and stored in the evidence container in the Starr Avenue garage in 2020 and 2021 was never vouchered (Tr. 37, 54). Some of the seized alcohol was destroyed with the assistance of the Department of Sanitation in January 2021 (Tr. 55).

Commanding Officer Kokeas testified that she had been inside the evidence storage container over a dozen times in 2020 and 2021, and she estimated that 95% of its contents consisted of contraband, such as seized alcohol, tobacco, weapons, and other evidence (Tr. 34, 39). The remaining contents included furniture, a safe, and equipment (Tr. 34, 40). She later clarified that she did not believe that there was any seized tobacco in the container during the pandemic because the Sheriff's Office was "not conducting [their] regular course of business," but rather targeting bars and parties in COVID enforcement raids (Tr. 56-57). She was not aware of any employees' personal alcohol or tobacco being stored in the evidence container (Tr. 59-60). Commanding Officer Kokeas had been in the man cave several times in 2020 and 2021, but never saw alcohol there until investigators opened the locked file cabinet in May 2021 (Tr. 45-48). She did not know if the alcohol found in the locked file cabinet was seized contraband or an employee's personal property (Tr. 48-49). She denied telling respondent to place boxes on top of the shelves in the man cave on December 9, 2020 (Tr. 43).

Investigator Willy Gomez and Director of Vendor Integrity Anastasia Plakas testified regarding the investigation conducted by the Department of Investigation ("DOI"). In 2021,

Investigator Gomez and Director Plakas, who served as a Special Investigator at the time, were assigned to the DOI unit overseeing the Department (Tr. 73-74, 153). DOI received several anonymous complaints in 2021, alleging that members of the Sheriff's Office were taking alcohol that had been seized during enforcement raids and drinking alcohol on the job (Tr. 74-75, 112, 154). Investigator Gomez was assigned to investigate the complaints on behalf of DOI and Director Plakas assisted as needed with the investigation (Tr. 75, 243).⁴ As part of the investigation, Investigator Gomez requested and reviewed the surveillance videos from the Starr Avenue garage and inspected the garage on May 19 and 21, and June 2, 2021 (Tr. 76-77, 123-24). Investigator Gomez and Director Plakas did not know whether the Department vouchered the contraband seized in 2020 and 2021 (Tr. 119-120, 128, 142, 198-99).

Director Plakas testified regarding her review of the surveillance videos, but never personally visited the evidence storage container or man cave in the Starr Avenue garage (Tr. 197, 236-37). Based on her review of the surveillance videos, she concluded that respondent removed items including alcohol from the evidence storage container and was present while his subordinates did the same (Tr. 155). However, Director Plakas admitted on cross examination that she did not know whether the bottle of alcohol in respondent's hand on December 6, 2020 was seized contraband (Tr. 226-27). She further acknowledged that she could not say whether respondent or the other deputy sheriffs removed seized contraband from the evidence storage container on December 9, 2020, February 11, 2021, or March 4, 7, and 8, 2021 (Tr. 238, 246, 248, 253, 259, 264-65, 272).

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

⁴ Investigator Gomez is no longer employed by DOI (Tr. 73).

Liberty Ave 11/14/2020 11 Hennessy, 10 J.W. Black, 12 Tito's, 1 Casamigos, 1 Jack Daniels, 1 Ron Viejo de Caldas" (*Id.*).

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

Respondent's Evidence

Respondent has been employed by the Sheriff's Office since 2013, first as a Deputy Sheriff Level I and then as a Deputy Sheriff Level II or sergeant (Tr. 322). As a sergeant in BCI from 2018 through 2023, respondent oversaw a squad of deputy sheriffs, which was responsible for cigarette tax enforcement and the investigation of crimes, including the collection of evidence (Tr. 322-23). He never received any training on evidence collection procedures (Tr. 323). Respondent testified that there was no standard operating procedure for evidence collection at the Starr Avenue garage during the COVID pandemic in 2020 and 2021 (Tr. 324). He recalled that Sheriff Fucito directed the deputy sheriffs in August 2020 to seize contraband in COVID-related raids, load it in their vehicles, and bring it to the Starr Avenue garage (Tr. 324-25). The contraband seized in these enforcement raids was not vouchered (Tr. 325). Some of the seized alcohol was poured out periodically at the Starr Avenue garage or destroyed by the Department of Sanitation in January 2021 (Tr. 356-58; Resp. Exs. F, G, H).

The evidence storage container was connected by a metal door to a back room that was two or three times larger than the container (Tr. 326-28). The rooms were configured in an "L" shape and only 15% of the back room would be visible when standing in the container (Tr. 327, 329). Respondent testified that the container and the back room were used to store seized alcohol, tobacco, drugs, and dangerous instruments, as well as equipment, PPE, clothing, documents, currency, training materials, the personal property of former employees, and personal alcohol (Tr. 332-33). Respondent testified that some deputy sheriffs, including Deputy

Sheriff LeBlond, brought personal alcohol to work in 2020 and 2021, but he never saw anyone place their personal alcohol inside the storage container (Tr. 389-92). The key to unlock the door of the evidence storage container was kept in a nearby lockbox, which required a four-digit code to open (Tr. 388-89). Respondent was one of the few individuals with access to the key in the lockbox (Tr. 389).

The man cave was located adjacent to the evidence storage container and was primarily used for equipment storage (Tr. 325-26). There was also a couch, chairs, file cabinet, and refrigerator in the man cave (Tr. 331). There were personal snacks and drinks inside the refrigerator, including soda, beer, and liquor (Tr. 331-32). Respondent denied that any of the drinks in the man cave were seized contraband and did not know who placed the alcohol in the refrigerator (Tr. 332, 400, 405-06). He did not recall ever opening the file cabinet in the man cave and first learned about the alcohol kept inside the cabinet during the DOI inspection (Tr. 407-08). He did not know who placed the alcohol in the file cabinet and testified that he never saw anyone drinking alcohol in the man cave (Tr. 400-01). He recalled speaking with First Deputy Sheriff Kokeas in the garage on December 9, 2020, and she told him to place boxes on top of the shelves in the man cave to block the surveillance camera's view of the couch in the man cave (Tr. 330-31). He further testified that the other deputy sheriffs who helped him place the boxes on the shelves, such as Deputy Sheriffs Jimenez and Jones, knew that there were cameras looking into the man cave because he told them (Tr. 353). He admitted that they placed the boxes there to block the camera's view of the couch in the man cave (Tr. 398-99).

Respondent denied that he ever removed seized contraband from the evidence storage container or saw anyone else do so (Tr. 376, 470). Through his testimony, respondent addressed the events captured on each of the six surveillance videos. Respondent testified that he purchased the cigars and alcohol depicted in the video from December 6, 2020, and brought them to the man cave (Tr. 343, 350). He produced bank records showing a \$83.19 transaction at NWS Wine and Spirits on November 28, 2020, and a \$106 transaction at Aroma Dominican Cigars on November 12, 2020 (Resp. Exs. C, D). Respondent testified that he purchased a bottle of scotch as a gift for Deputy Sheriff LeBlond on November 28, 2020, and that he purchased cigars for his co-workers on November 12, 2020 (Tr. 335-37). On December 6, 2020, respondent ended his 16-hour work shift at 6:30 p.m. and stayed in the man cave to hang out with co-workers for the next three hours (Tr. 341-43, 346; Resp. Ex. E-1). Respondent,

Lieutenant Davis, Deputy Sheriff LeBlond, and Deputy Sheriff Jones smoked cigars from respondent's personal cigar case and "decompressed" after a difficult day (Tr. 343). He explained that they had conducted an operation on December 5, 2020, to arrest pub owners who had declared an "autonomous zone" and refused to shut down (Tr. 337-38). During the operation, another sergeant was hit by the owner's car and injured (Tr. 338). Respondent offered e-mail correspondence from Sheriff Fucito on December 6, 2020, at approximately 2:00 a.m., which listed the potential criminal charges related to the incident, and respondent's text messages with Chief Grayson and First Deputy Sheriff Kokeas on the morning of December 6, 2020, which discussed the incident and the injuries suffered by the sergeant (Resp. Ex. E).

Upon departing the man cave on December 6, 2020, respondent admitted that he held a bottle of alcohol in his hand, but he denied that it was seized contraband from the evidence storage container (Tr. 349-50, 415). Respondent testified that it was the bottle purchased at the liquor store for Deputy Sheriff LeBlond but could not recall whether he gave it to Deputy Sheriff LeBlond the day before or the week before (Tr. 350, 411). He did not recall why the bottle was in the man cave that evening and surmised that Deputy Sheriff LeBlond had left it there (Tr. 411-12). Upon review of the surveillance video, he acknowledged that the bottle in his hand appeared to be the same bottle that Deputy Sheriff LeBlond later brought to his vehicle and that an object appeared to be sticking out of Deputy Sheriff LeBlond's sweatshirt pocket as they talked in the garage (Tr. 416-17).

On December 9, 2020, respondent directed Deputy Sheriff Jones to help him move contents within the evidence storage container to locate files from an old case in the back room (Tr. 354-55, 418-19). Deputy Sheriff Jones helped respondent move items in the back and then exited the container while respondent was still in the back room (Tr. 355). While inside, respondent did not observe Deputy Sheriff Jones remove anything from the container (*Id.*). Upon review of the surveillance video at trial, respondent denied that Deputy Sheriff Jones had anything in his jacket (Tr. 421-26).

On February 11, 2021, respondent, Deputy Sheriff Lo, and Deputy Sheriff Jimenez entered the evidence storage container to separate items that had been seized during a cigarette tax inspection earlier in the day and stored in the back room (Tr. 363). He explained that they seized large volumes of alcohol and tobacco during the pandemic and routinely had to reorganize the container's contents (Tr. 428-29). While inside, respondent did not observe Deputy Sheriff

Jimenez remove anything from the container and did not recall that Deputy Sheriff Jimenez exited the container with Deputy Sheriff Lo's jacket (Tr. 364-65, 430). Upon review of the surveillance video, respondent denied that Deputy Sheriff Jimenez held a black box in his hands under the green jacket and stated that he appeared to be holding onto his belt with his left hand (Tr. 427-28). Respondent denied that any object was in his arm under the blue jacket when he exited the container (Tr. 433).

On March 4, 2021, respondent entered the evidence storage container to move certain items and determine what needed to be destroyed before the weekend enforcement raids (Tr. 367, 434-35). Respondent denied removing anything from the evidence storage container that day and did not observe anyone else remove anything either (Tr. 367-68). Upon review of the surveillance video, respondent insisted that the "bulge" under his hooded sweatshirt was his "COVID belly," that there was nothing in the pockets of his sweatshirt, and that he was wearing a zippered hooded sweatshirt with shallow side pockets, not a large front pocket (Tr. 367, 436). Respondent further denied that Deputy Sheriff Jimenez had any bulge in his jacket upon exiting the container (Tr. 435).

On March 7, 2021, respondent opened the evidence storage container as he and Deputy Sheriff Jimenez were in the process of swapping vehicles (Tr. 370-71). Respondent opened the container to get some equipment, but he never went inside (Tr. 438-39). Respondent stated that he was never inside the container with Deputy Sheriff Jimenez and did not observe Deputy Sheriff Jimenez remove anything from the container (Tr. 372). Upon review of the surveillance video, respondent acknowledged that something appeared to be under Deputy Sheriff Jimenez's jacket and surmised that he had put on a bulletproof vest while inside (Tr. 440).

Respondent went on a "trash run" on March 7, 2021, which involved the removal of items from a target's garbage, and stored the items collected in the evidence container (Tr. 373-74). He produced photos of cardboard boxes bearing labels that related to the trash run on March 7, 2021, and text messages between him and other deputy sheriffs from approximately 3:00 a.m. on March 8, 2021, which was at the end of the trash run (Resp. Exs. I, J; Tr. 378). On the morning of March 8, 2021, he instructed Deputy Sheriff Lo to enlist others to sort through and organize the items from the trash run that had been placed inside the container and the back storage room the night before (Tr. 374-75, 449-52). Inside the container, respondent recalled reprimanding his staff for not completing the tasks (Tr. 452-54). He did not recall why Deputy

Sheriff Jimenez came to the Starr Avenue garage that day while on sick leave (Tr. 447-48). While inside with others, respondent did not observe Deputy Sheriff Jimenez remove anything from the container (Tr. 374, 457). While talking to Deputy Sheriff Jimenez outside of the container, respondent did not observe anything in Deputy Sheriff Jimenez's left hand under the jacket (Tr. 458). Upon review of the surveillance video, respondent denied that Deputy Sheriff Jimenez had anything under his jacket and stated that his left hand appeared to be in his pocket (Tr. 456-57).

Respondent also relied upon the testimony of Chief of Detectives James Grayson and Sergeant Robert Gilliam, both of whom are retired from the Department (Tr. 277-78, 298). As the Chief of Detectives within BCI in 2020 and 2021, Chief Grayson directly reported to First Deputy Sheriff Kokeas, and supervised respondent, who he described as an excellent and reliable employee (Tr. 278-79). He recalled that BCI was responsible for COVID-related enforcement raids in 2020 and 2021, and that they seized evidence such as alcohol, marijuana, and untaxed cigarettes during those raids (Tr. 279-80). During this "chaotic" time, Sheriff Fucito directed them to store the seized contraband at the Starr Avenue garage, but not to voucher the evidence (Tr. 280-81). Seized contraband was supposed to be placed in the evidence storage container but was sometimes left unsecured in the parking garage outside of the container (Tr. 280, 290, 293). The evidence storage container consisted of a grey shipping container, with shelves lining both of its sides, connected by a door to another storage room (Tr. 282-83). The rooms were configured such that only 20% of the back room would be visible when standing in the grey container (Tr. 283-84).

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

Sergeant Gilliam, who was responsible for supervising deputy sheriffs and maintaining the vehicular fleet, last worked at the Starr Avenue garage in October 2020 and retired from the Department on December 31, 2021 (Tr. 292, 309-10; Pet. Ex. 13). During the pandemic, Sheriff Fucito directed the deputy sheriffs to enforce social distancing and public gathering restrictions (Tr. 299-300). Sergeant Gilliam testified that there were no evidence collection procedures utilized in the COVID enforcement, describing it as a “fluid situation,” wherein they took contraband “off the street” and stored it at the Starr Avenue garage (Tr. 298-99). He recalled that seized contraband would sometimes remain in trucks or outside in the garage before eventually being stored in the evidence container (Tr. 300). Prior to the pandemic, they had specific procedures for seizing and storing contraband, which included evidence bags, cards, and logbooks (*Id.*). However, Sergeant Gilliam testified that, at Sheriff Fucito’s direction, seized contraband was not vouchered during the pandemic and they had no way to keep track of seized items (Tr. 301). The evidence storage container consisted of a grey shipping container connected by a steel fire door to a second, larger room (Tr. 313-14). The rooms were configured in an “L” shape and only 10% of the back room would be visible when standing in the grey container (Tr. 316-17). Shelving lined the walls of the container and seized alcohol was stored there, along with equipment like vests, and personal items, such as bags, clothing, and bottles (Tr. 314-15). The back room contained more shelving, a refrigerator, microwave, work bench, television, and various equipment (Tr. 317).

In 2019, Sergeant Gilliam created the man cave, which was a “U” shaped area made of shelving where equipment for the vehicular fleet and facility was stored (Tr. 302-03). Personal property belonging to the deputy sheriffs, including a refrigerator, couch, and clothing, was also stored there (Tr. 303). The area was used for lunch breaks and relaxation, and he never saw any alcoholic beverages in the area (*Id.*). During the pandemic, the man cave area was also used for work meetings, which were frequently attended by Sheriff Fucito, First Deputy Sheriff Kokeas, and Chief Grayson (Tr. 304-06). Even though Sergeant Gilliam was on leave from October 2020 through December 2021, he returned to the Starr Avenue garage on approximately 20 occasions from December 2020 to March 2021 (Tr. 311; Pet. Ex. 14). He recalled that respondent called him in the evening on December 9, 2020, to tell him that First Deputy Sheriff Kokeas wanted respondent to place boxes on the shelves in the man cave and he told respondent to use the old computer boxes in the garage (Tr. 311-12).

Theft and Facilitation

Petitioner charged respondent with stealing or facilitating the theft of seized contraband from the evidence storage container in the Starr Avenue garage on December 6 and 9, 2020, February 11, 2021, and March 4, 7, and 8, 2021 (ALJ Exs. 2, 3 at Specs. 1-5, 7). Petitioner argued at trial that respondent facilitated the theft of seized contraband by Deputy Sheriffs LeBlond, Jones, or Jimenez on all six dates, and stole seized contraband on December 6, 2020, February 11, 2021, and March 4, 2021 (Tr. 493-97).

It was undisputed that the evidence container in the Starr Avenue garage stored, albeit not exclusively, the alcohol and other contraband seized by the Sheriff's Office during their COVID enforcement raids in 2020 and 2021. It was also undisputed that the Sheriff's Office did not voucher any of the seized contraband stored in the evidence container in 2020 and 2021. Petitioner was therefore unable to offer any documentary evidence of the specific contents of the evidence storage container from December 2020 to March 2021 or establish through documentary evidence that seized contraband was missing from the container after the charged incidents of theft. Petitioner did not offer the testimony of any witnesses who personally observed respondent or the other deputy sheriffs steal seized contraband from the container or in possession of seized contraband in the man cave. Nor did petitioner rebut the testimony that respondent and the other deputy sheriffs were permitted to enter the evidence storage container for legitimate business reasons.

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

Petitioner sought to establish that respondent stole seized contraband from the evidence storage container or intentionally facilitated the theft of seized contraband by other deputy sheriffs through circumstantial evidence. A finding of misconduct may be established in a disciplinary proceeding solely by circumstantial evidence. *Dep't of Sanitation v. O'Neill*, OATH Index No. 2632/10 at 5 (Sept. 14, 2010), *aff'd*, 91 A.D.3d 583 (1st Dep't 2012). Circumstantial evidence is defined as “direct evidence of a collateral fact, that is, of a fact other than a fact in issue, from which, either alone or with other collateral facts, the fact in issue may be inferred.” *Prince, Richardson on Evidence* § 4-301. “A finding based entirely on circumstantial evidence may be established in a civil service disciplinary proceeding so long as the circumstantial evidence supports the conclusion that ‘the inference drawn is the only one that is fair and reasonable.’” *Dep't of Social Services (Human Resources Admin.) v. DeFrance*, OATH Index No. 1593/20 at 8 (Sept. 28, 2020), *adopted*, Comm'r Dec. (Dec. 16, 2020), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2020-0810 (Feb. 19, 2021). “[I]t is not necessary for the Department to disprove all other possible explanations or inferences in order to sustain its case.” *Dep't of Sanitation v. Guastafeste*, OATH Index No. 658/00 at 16 (May 1, 2000), *aff'd*, 282 A.D.2d 398 (1st Dep't 2001). However, “[i]f the probabilities are evenly balanced, no inference as to the fact in dispute may be drawn. To do so would be speculative.” *Dep't of Education v. Fleischmann*, OATH Index No. 1528/05 at 10 (July 26, 2006).

Petitioner failed to prove by a preponderance of the credible evidence that respondent stole seized contraband from the evidence storage container on December 6, 2020, February 11, 2021, or March 4, 2021. On February 11, 2021, the video evidence established that respondent exited the evidence storage container carrying his blue jacket over his right forearm and walked into the man cave. No object was discernible underneath the jacket on the video. Although respondent was wearing the blue jacket when he entered the container over ten minutes earlier, little can be reasonably inferred from that fact. There are several legitimate reasons as to why respondent may have removed his jacket while inside the container. Even when coupled with respondent's awareness of the video surveillance in the area, it would be far too speculative to find that he removed and carried the jacket over his arm to conceal seized contraband given the lack of clear video evidence in support of the charge.

Likewise, on March 4, 2021, the video evidence showed that respondent exited the evidence storage container twice within three minutes and walked into the man cave with his

hands in the pockets of his hooded sweatshirt. No object was discernible in his pockets on the video. Although Director Plakas testified that respondent appeared to have “something inside” of the “central front pouch” area of his sweatshirt (Tr. 178), I credited respondent’s testimony that he was wearing a zippered hooded sweatshirt that day, which had shallow pockets on the side but no front pouch. Such description of his outerwear was consistent with the video evidence, which showed a zipper at the top of the sweatshirt. Without a large front pouch, it is unlikely that respondent would have been able to fully conceal a bottle of alcohol in the pocket of his hooded sweatshirt as he walked to the man cave.

With respect to December 6, 2020, it was undisputed that respondent was in possession of a bottle of alcohol in the man cave with Lieutenant Davis, and that Deputy Sheriff LeBlond departed the Starr Avenue garage with the same bottle in the trunk of his car about 25 minutes later. In the intervening time, the video evidence showed that Deputy Sheriff LeBlond bent down in the same place in the man cave that respondent appeared to have put the bottle down earlier, concealed the bottle in the front pocket of his hooded sweatshirt, and exited the man cave with respondent. Deputy Sheriff LeBlond then walked alone to his vehicle and placed the bottle in the trunk. In support of the contention that respondent stole the bottle from the evidence storage container and intentionally facilitated its theft by Deputy Sheriff LeBlond, petitioner argued that respondent was in possession of “a bottle of liquor at the workplace right next to the evidence storage container overflowing with liquor” and that Deputy Sheriff LeBlond engaged in suspicious conduct by concealing the bottle in his hooded sweatshirt and the trunk of his car (Tr. 492-93).

I was not persuaded, however, that the only fair and reasonable inference to be drawn from these facts was that respondent had stolen the bottle of alcohol from the container. Notably, petitioner did not offer any video evidence showing that respondent removed the bottle of alcohol from the nearby evidence storage container on December 6, 2020. Although respondent worked a 16-hour shift ending at 6:30 p.m. on December 6, 2020, petitioner only offered two hours of surveillance video from that day and the video did not establish how respondent came to be in possession of the bottle. From the beginning of the video at 7:34 p.m. until respondent was seen holding the bottle at 9:23 p.m., respondent did not enter the evidence storage container. The evidence further showed that respondent walked into the man cave empty-handed and stayed in the man cave for the next two hours smoking cigars with other

deputy sheriffs and Lieutenant Davis. Indeed, respondent's possession of the bottle in plain view of a superior officer during that time tends to weaken the conclusion that the bottle had been stolen from the nearby evidence container.

Although the subsequent concealment of the bottle could be indicative of the fact that Deputy Sheriff LeBlond knew that the bottle was seized contraband, it does not necessarily follow that respondent knew that the bottle had been removed from the evidence container. Not only was there no video evidence showing how the bottle came to be in the man cave, but respondent also recalled that Deputy Sheriff LeBlond and other deputy sheriffs used to bring personal alcohol to the workplace. This testimony was corroborated by Chief Grayson, who recalled personal alcohol in the man cave refrigerator, and by DOI photographs depicting beer and single serving wine bottles alongside other snacks and beverages in the man cave refrigerator in May 2021.

Respondent denied that the bottle was seized contraband from the evidence storage container. However, I was not convinced by respondent's alternative explanation of its provenance. Respondent testified that he purchased a bottle of scotch as a gift for Deputy Sheriff LeBlond on November 28, 2020, and gave the bottle to Deputy Sheriff LeBlond at work either the day or week before December 6, 2020. He produced a bank account transaction report, which corroborated a purchase from a liquor store on November 28, 2020. The report for the transaction was not itemized and did not specifically corroborate the purchase of a single \$83 bottle of scotch. More importantly, respondent did not provide any reason for why he would have purchased such an expensive gift for a co-worker and the video evidence did not comport with a gift exchange between co-workers.

Despite the less than credible explanation provided by respondent, petitioner still bears the burden to establish the essential elements of its case. *See Fleischmann*, OATH 1528/05 at 11 (noting that petitioner cannot "rely on the vagueness or arguable credibility of respondent's explanations as to how he came to be in possession of the [fake] bids to fill in the gap in its required proof"); *Fire Dep't v. Loscuito*, OATH Index No. 509/06 at 20-21 (June 14, 2006), *adopted*, Comm'r Dec. (June 28, 2006), *aff'd*, 50 A.D.3d 905 (2d Dep't 2008) ("This tribunal has long held that 'where an agency fails to establish essential elements of its case, it may not rely upon inconsistencies in a respondent's testimony, or even a lack of credibility, to substitute for proof.'"). Having relied almost exclusively upon limited video evidence, petitioner failed to

prove by a preponderance of the credible evidence that respondent stole or intentionally facilitated the theft of seized contraband from evidence storage container on December 6, 2020. *See Health & Hospitals Corp. (North Central Bronx Hospital) v. Friday*, OATH Index No. 1055/21 at 7 (May 5, 2022) (dismissing charge that respondent stole hospital supplies where video evidence showed him walking out of the hospital with a shoulder bag, but there was no proof of what was in the bag and there was no inventory documenting the stolen items); *Dep't of Education v. Robles*, OATH Index No. 2275/09 at 12 (Oct. 19, 2009), *adopted*, Chancellor's Dec. (Nov. 16, 2009) (finding circumstantial evidence insufficient to prove that a custodian engineer stole heating oil from a public school's boiler system in 55-gallon drums where "no one connected the dots that would establish that oil had been transferred from the boiler to the drums and then transported in the drums from the facility by respondent").

Petitioner also did not prove by a preponderance of the credible evidence that respondent intentionally facilitated the theft of seized contraband from the evidence storage container by Deputy Sheriffs Jones and Jimenez on December 9, 2020, February 11, 2021, or March 4, 7, and 8, 2021. Petitioner argued that respondent purposely facilitated the theft of seized contraband on these dates by unlocking and opening the evidence container for other deputy sheriffs or by closing the container door to obstruct the view from the outside (Tr. 490, 494, 496-97, 499). However, petitioner failed to establish that respondent had the requisite knowledge or intent for facilitation under the charged crimes. *See Fleischmann*, OATH 1528/05 at 10 (finding circumstantial evidence insufficient to establish that respondent had the requisite knowledge or intent for the charged criminal conduct in a disciplinary proceeding brought under the crimes exception); *Transit Authority v. Wilson*, OATH Index No. 1004/93 at 10 (July 15, 1993) (finding that the evidence was insufficient to establish that respondent knew his subordinate was stealing items by placing them in a private car).

The video evidence established that Deputy Sheriff Jones removed an object from the container, concealed it under his jacket, and brought it to the man cave on December 9, 2020. Deputy Sheriff Jones was aware of the surveillance camera in the area, as less than an hour earlier he assisted respondent with placing boxes on top of the shelves in the man cave to block the camera's view. Respondent unlocked and opened the container door and was inside the container with Deputy Sheriff Jones for over two minutes, but Deputy Sheriff Jones exited alone. The video evidence relied upon by petitioner, without more, is insufficient to establish that

respondent intentionally facilitated the theft of seized contraband by opening the door of the evidence storage container on December 9, 2020. Even assuming the object concealed by Deputy Sheriff Jones was seized contraband, it cannot be reasonably inferred from the video evidence that respondent knew that Deputy Sheriff Jones intended to steal contraband when respondent opened the container door and entered with Deputy Sheriff Jones. Moreover, considering the size and shape of the storage area, the video evidence did not establish that respondent observed Deputy Sheriff Jones take an object and place it under his jacket while inside the container. The grey shipping container and the larger back storage room formed an “L” shape and very little of the back room was visible from the container. It is plausible that respondent was in the back storage room while Deputy Sheriff Jones exited the container, as he claimed.

The video evidence established that Deputy Sheriff Jimenez removed an object from the container, concealed it under Deputy Sheriff Lo’s green jacket, and brought it to a parked vehicle on February 11, 2021. Deputy Sheriff Jimenez was also aware of the surveillance camera in the area, as he assisted respondent with placing boxes on top of the shelves in the man cave to block the camera’s view on December 9, 2020. Respondent opened the container door and was inside the container with Deputy Sheriff Jimenez for over seven minutes, but Deputy Sheriff Jimenez exited alone. The video evidence relied upon by petitioner, without more, is insufficient to establish that respondent intentionally facilitated the theft of seized contraband by opening the door of the evidence storage container on February 11, 2021. Even assuming the object concealed by Deputy Sheriff Jimenez was seized contraband, it cannot be reasonably inferred from the video evidence that respondent knew that Deputy Sheriff Jimenez intended to steal contraband when respondent opened the container door and entered with Deputy Sheriff Jimenez. Moreover, considering the size and shape of the storage area, the video evidence did not establish that respondent observed Deputy Sheriff Jimenez take an object and place it under the green jacket while inside the container. The grey shipping container and the larger back storage room formed an “L” shape and very little of the back room was visible from the container. It is plausible that respondent was in the back storage room while Deputy Sheriff Jimenez exited the container, as he claimed.

With respect to March 4, 2021, the video evidence was inconclusive and equivocal on whether Deputy Sheriff Jimenez concealed an object underneath his jacket as he walked from the

container to the man cave. A protrusion in the front of his jacket was barely visible even when the speed of the video was slowed, and the image was enlarged. Both of his arms swung freely at his side as he walked to the man cave, which would seem incompatible with concealing contraband under a jacket. Moreover, petitioner did not identify the specific action taken by respondent to facilitate Deputy Sheriff Jimenez's alleged theft of contraband from the container and none is apparent on the video. Although respondent was inside the container with Deputy Sheriff Jimenez for over six minutes and they exited the container at approximately the same time, respondent did not unlock or open the container door for Deputy Sheriff Jimenez. Petitioner therefore did not establish that respondent intentionally facilitated the theft of seized contraband by Deputy Sheriff Jimenez on March 4, 2021.

The video evidence established that Deputy Sheriff Jimenez removed an object from the container on March 7, 2021, and walked to a parked vehicle with it under the front of his jacket. Respondent unlocked and opened the container door and observed Deputy Sheriff Jimenez enter the container but never entered the container himself. He did not observe Deputy Sheriff Jimenez exit the container or walk to the parked vehicle. The video evidence relied upon by petitioner, without more, is insufficient to establish that respondent intentionally facilitated the theft of seized contraband by opening the door of the evidence storage container on March 7, 2021. Even assuming the object under Deputy Sheriff Jimenez's jacket was seized contraband, it cannot be reasonably inferred from the video evidence that respondent knew that Deputy Sheriff Jimenez intended to steal contraband when respondent opened the container door for Deputy Sheriff Jimenez.

The video evidence established that Deputy Sheriff Jimenez removed an object from the container, concealed it under his jacket using his left hand, and brought it to a parked vehicle on March 8, 2021. Respondent did not unlock or open the container door and was inside the container with Deputy Sheriff Jimenez and other deputy sheriffs for over six minutes. Three minutes after he first entered the container, respondent partially closed the container door behind him. The video evidence further showed that respondent exited the container at the same time as Deputy Sheriff Jimenez and they conversed while standing in close proximity for approximately 30 seconds.

In support of the inference that respondent intentionally facilitated the theft of seized contraband by closing the container door to obstruct the view from the outside, petitioner argued

in part that respondent knew that Deputy Sheriff Jimenez had no legitimate reason for being at the Starr Avenue garage on March 8, 2021. Indeed, Deputy Sheriff Jimenez's presence at the Starr Avenue garage on the morning of March 8, 2021 was odd and left unexplained on this record. According to his timesheet, Deputy Sheriff Jimenez was out of work on sick leave on March 8, 2021. Deputy Sheriff Jimenez submitted his timesheet on March 17, 2021, and respondent approved it later that same day. Petitioner did not establish, however, that respondent was aware at approximately 10:30 a.m. on March 8, 2021 that Deputy Sheriff Jimenez had requested sick leave for the day. Although petitioner inquired on cross examination whether respondent received an e-mail from Deputy Sheriff Pineiro at 7:30 a.m. on March 8, 2021 regarding Deputy Sheriff Jimenez's use of sick leave on March 8 and 9, 2021, respondent did not recall the e-mail and petitioner did not produce it.

Petitioner further contended that the theft occurred in the "clear view" of respondent as they exited the container together (Tr. 497). Given the proximity and vantage point as he conversed with Deputy Sheriff Jimenez outside the container, respondent may have noticed a suspicious bulge under Deputy Sheriff Jimenez's jacket. However, this fact alone is insufficient to reasonably support the inference that respondent partially closed the door three minutes earlier with the intent to conceal Deputy Sheriff Jimenez's actions inside the container. It cannot be reasonably inferred from the video evidence that respondent knew that Deputy Sheriff Jimenez intended to steal contraband when respondent partially closed the container door. As previously noted, the grey shipping container and the larger back storage room formed an "L" shape and very little of the back room was visible from the container. Respondent plausibly testified that he and the other individuals were sorting through evidence from a trash run that had been placed into the container and the back room the night before, and he produced photographs to corroborate the collection of evidence on the trash run. Considering the size and shape of the storage area, the video evidence did not establish that respondent observed Deputy Sheriff Jimenez take an object and place it under his jacket while inside the container. Moreover, if respondent had knowledge of a theft and had intended to conceal Deputy Sheriff Jimenez's actions from potential onlookers, it is more likely that he would have closed the door entirely, as opposed to partially.

In sum, petitioner failed to establish by a preponderance of the credible evidence that respondent stole or intentionally facilitated the theft of seized contraband from the evidence

storage container on six occasions from December 2020 to March 2021. Accordingly, the charges are not sustained.

FINDINGS AND CONCLUSIONS

1. Petitioner failed to prove that respondent stole seized contraband from the evidence storage container located at 30-10 Starr Avenue on December 6, 2020, February 11, 2021, or March 4, 2021.
2. Petitioner failed to prove that respondent intentionally facilitated the theft of seized contraband from the evidence storage container located at 30-10 Starr Avenue on December 6 and 9, 2020, February 11, 2021, or March 4, 7, and 8, 2021.

RECOMMENDATION

I recommend that the charges be dismissed.



Michael D. Turilli
Administrative Law Judge

March 19, 2024

SUBMITTED TO:

PRESTON NIBLACK
Commissioner

APPEARANCES:

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