# *Dep't of Finance v. Lo*

OATH Index No. 3673/23 (Mar. 25, 2024)

Petitioner alleged respondent stole or facilitated the theft of vouchered contraband on eight occasions and stole vouchered contraband on one occasion. Petitioner also contended that respondent engaged in the crimes of petit larceny, official misconduct, and public corruption. ALJ found proof insufficient to establish the charges by a preponderance of the evidence and recommends that the charges be dismissed.

---

**NEW YORK CITY OFFICE OF**
**ADMINISTRATIVE TRIALS AND HEARINGS**

*In the Matter of*
**DEPARTMENT OF FINANCE**
*Petitioner*
*- against -*
**TIMOTHY LO**
*Respondent*

---

## REPORT AND RECOMMENDATION

**CHRISTINE STECURA,** *Administrative Law Judge*

Petitioner, the Department of Finance (the "Department" or "petitioner") brought this employee disciplinary proceeding against respondent, Deputy City Sheriff Timothy Lo, under section 75 of the Civil Service Law. Petitioner alleged that respondent stole or facilitated the theft of vouchered contraband on eight occasions and stole vouchered contraband on one occasion. The charges allege violations of the Department's rules as well as sections of the New York State Penal Law ("Penal Law") and Chapter 68 of the New York City Charter ("Chapter 68" or "the Charter") (ALJ Ex. 1). Respondent denied the charges.

A two-day trial was held via videoconference. Petitioner relied upon video and documentary evidence, and the testimony of three witnesses. Respondent testified on his own behalf, presented the testimony of one witness, and offered documentary evidence.

Based upon the record before me, I find that petitioner failed to establish the charges by a preponderance of the evidence, and I recommend the charges be dismissed.

**PRELIMINARY MATTERS**

Respondent was served with the disciplinary charges on June 21, 2023 (ALJ Ex. 1). Respondent contended that the charges should be dismissed as time-barred because they were served after the 18-month statute of limitations period and petitioner failed to establish the crimes exception (Tr. 11-12). Section 75(4) of the Civil Service Law provides an exception to the statute of limitations period: "such limitations shall 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) (Lexis 2024). For the crimes exception to apply, the Department must establish each element of the crimes alleged, as defined by the Charter and the Penal Law, by a preponderance of the evidence. *See Dep't of Correction v. Blanc*, OATH Index No. 2571/11 at 5-6 (Feb. 2, 2012), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 12-40-SA (Aug. 10, 2012). The fact that the Department of Investigation ("DOI") investigated complaints related to these charges, but no criminal charges were filed against respondent does not bar reliance on the crimes exception (Tr. 9, 12, 57). *See Foran v. Murphy*, 73 Misc.2d 486, 488 (Sup. Ct. N.Y. Co. 1973) (failure of grand jury to indict does not prevent reliance upon the crimes exception to the statute of limitations or preclude a finding of misconduct at an employee discipline action).

For each specification, respondent is charged with conduct in violation of Chapter 68 section 2604(b)(3) of the Charter, which if proven would constitute a crime. *See* Charter § 2606(c) (Lexis 2024) ("Any person who violates section twenty-six hundred four . . . of this chapter shall be guilty of a misdemeanor"); Penal Law § 10.00(6) (Lexis 2024) (Penal Law defines a misdemeanor as a crime). He is also charged with the crimes of petit larceny, official misconduct, and public corruption for each specification. Penal Law §§ 155.25, 195.00, 496.06 (Lexis 2024).

The statute of limitations would not apply to the charges if the Department were able to prove by a preponderance of the evidence each element of the crimes alleged. *Dep't of Correction v. Martinez*, OATH Index No. 1899/23 at 7 (Nov. 3, 2023), *modified on penalty*, Comm'r Dec. (Nov. 22, 2023) (18-month statute of limitations did not apply to charges, which included allegations that officer committed acts that would constitute violations of the Penal Law and the Charter); *Blanc*, OATH 2571/11 at 5-6. However, as discussed below, the Department failed to establish the charges by a preponderance of the evidence, and therefore the crimes exception does not apply.

Respondent further argued that the case should be dismissed because petitioner charged respondent with the theft or facilitating the theft of "vouchered contraband," but none of the items that were purportedly stolen were vouchered (Tr. 12, 332; ALJ Ex. 1). Petitioner maintained that it did not matter if the contraband was vouchered because it was seized pursuant to a lawful order and the theft of contraband was impermissible (Tr. 352-53). As discussed below, it was undisputed that none of the seized contraband was vouchered (Tr. 272-73, 352-53). Nevertheless, since I am recommending dismissal of all charges because the evidence was insufficient, it is unnecessary for me to consider dismissal of the charges on this basis.

## ANALYSIS

***Introduction***

The petition contains six charges with nine specifications for incidents that occurred at 30-10 Starr Avenue (ALJ Ex. 1).[1] Petitioner alleges that on December 10 and 21, 2020, January 4, 2021, February 11, 2021, and March 1, 8, 11, 12, and 17, 2021, respondent was "observed stealing or facilitating the theft of vouchered contraband from the evidence storage container located in the parking garage of 30-10 Starr Avenue, Queens NY" (*Id.*). Petitioner also alleges that on January 4, 2021, respondent was "observed stealing vouchered contraband from the evidence storage container located in the parking garage of 30-10 Starr Avenue, Queens NY" (*Id.*).

Petitioner alleges that respondent stole or facilitated the theft of contraband (ALJ Ex. 1; Tr. 348). For each of the crimes charged, petitioner is required to prove respondent's knowledge or intent. Chapter 68 section 2604(b)(3) of the Charter prohibits public servants from using their position "to obtain any financial gain, contract, license, privilege or other private or personal advantage, direct or indirect, for the public servant or any person or firm associated with the public servant." Charter § 2604(b)(3); *see, e.g., Taxi & Limousine Comm'n v. Dubose*, OATH Index No. 177/11 at 9 (Aug. 13, 2010), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-27-A (May 4, 2011) (TLC lieutenant violated section 2604(b)(3) of the Charter when he used his position to seize a privately owned vehicle and steal money from within it); *Human Resources Admin. v. Bonner*, OATH Index No. 472/17 at 11 (Dec. 5, 2016), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2017-0031 (Mar. 30, 2017) (eligibility specialist violated section 2604(b)(3) of the Charter when she used her position to coerce a client into using her supplemental benefits to buy groceries for her).

---

[1] Specification four, dated January 21, 2021, was withdrawn at the beginning of trial (Tr. 6).

Penal Law section 155.25 states that '[a] person is guilty of petit larceny when [they] steal[] property." Penal Law § 155.25. Penal Law section 155.05 ("Larceny; defined") provides that a person "steals property" and "commits larceny" when, with "intent to deprive another of property or to appropriate the same to [them]self or to a third person, [they] wrongfully take[], obtain[] or withhold[] such property from an owner thereof." Penal Law § 155.05. Such conduct would also constitute public corruption under the Penal Law when a public servant either commits petit larceny using their public office or acts in concert with a public servant to commit petit larceny and the subject stolen property belongs to the government. Penal Law § 496.06.

Penal Law section 195.00 states that "[a] public servant is guilty of official misconduct when, with intent to obtain a benefit or deprive another person of a benefit," they either commit an act related to their office knowing it is unauthorized or "knowingly refrain[] from performing a duty which is imposed upon [them] by law or is clearly inherent in the nature of [their] office." Penal Law § 195.00.

Petitioner further alleged that respondent violated the Department's Code of Conduct in part by: "us[ing] [his] position as a public servant to obtain a financial gain, privilege or other private or personal advantage;" "misus[ing] [his] official capacity for personal benefit or the benefit of another;" "commit[ing] an act relating to [his] office but constituting an unauthorized exercise of [his] official functions, knowing that such an act is unauthorized," "engag[ing] in conduct that is prejudicial to good order and discipline," and "engag[ing] in conduct that is likely to bring the City or agency into disrepute." (ALJ Exs. 1, 2).

Although petitioner alleged that respondent "facilitated theft" in eight of the nine specifications, it did not allege accomplice liability or charge respondent with criminal facilitation or conspiracy. Nevertheless, petitioner argued that respondent's facilitation was knowing and intentional because respondent knew his colleagues intended to steal from the Department when respondent opened the door for them to enter the storage container and he knew that his colleagues improperly took Department property. It contended that respondent facilitated his colleagues' theft when he "unlocked and opened the door for his co-conspirators to steal" (Tr. 350). It further argued that "[r]espondent . . . walked into the evidence storage container with his fellow co-conspirators[,] . . . walked out with them [and] [t]he theft he facilitated happened directly in front of him" (*Id.*).

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); see also *Rinaldi & Sons, Inc. v. Wells Fargo Alarm Service, Inc.*, 39 N.Y.2d 191, 196 (1976).

For reasons detailed below, I found that petitioner failed to establish the charges by a preponderance of the evidence. Petitioner's proof as to theft and facilitation of theft is solely circumstantial. Petitioner argued that even if it cannot prove what specifically was stolen, because the storage unit contained contraband, "you must infer that [it] is more likely than not that" respondent either stole or facilitated his co-workers' theft of contraband (Tr. 349-350). "Circumstantial evidence, if sufficiently reliable and probative, may form the sole proof in an administrative proceeding." *Dep't of Consumer Affairs v. Major World, et al.*, OATH Index No. 1897/17, mem. dec. at 57 (Jan. 24, 2019), *aff'd sub nom. Major World Chevrolet v. Salas*, 2023 N.Y. App. Div. LEXIS 2376 (1st Dep't 2023) (citations omitted). 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 (*citing Sherman v. Concourse Realty Corp.*, 47 A.D.2d 134 (2d Dep't 1975)).

"In order to establish a fact in issue by circumstantial evidence, the inference sought to be drawn must be based on and reasonably taken from proven collateral facts." *Dep't of Education v. Fleischmann*, OATH Index No. 1528/05 at 10 (July 26, 2006); *Transit Auth. v. Dugger*, OATH Index No. 794/91 at 17 (May 14, 1991). As stated in *Fleicshmann* at 10, "It is only permissible to draw an inference from the proven collateral facts where it is more likely that the inference arises as a consequence of the proven facts. If the probabilities are evenly balanced, no inference as to the fact in dispute may be drawn. To do so would be speculative."

Petitioner acknowledges that it cannot prove what was taken from the storage container. However, petitioner contends that because the storage container contained seized contraband, it is more likely than not that respondent knew that his colleagues intended to steal seized contraband, knew that his colleagues stole Department property, or himself stole Department property. In the

eight instances in which respondent was charged with facilitating theft, it was undisputed that respondent unlocked the storage container where seized contraband was being stored. As discussed below, however, it was also undisputed that none of the seized contraband which was stored in the storage container was vouchered, and it was unrebutted that the storage container contained items besides seized evidence. Thus, the inference sought by petitioner is unreasonable.

Petitioner's proof was also deficient in that it failed to show that when respondent unlocked the storage container for his colleagues, he knew that his colleagues were entering with the intent to improperly take Department property. Nor did it prove that respondent knew his colleagues improperly took Department property. Furthermore, there was no credible evidence that established that respondent improperly took Department property.

***Petitioner's Evidence***

Petitioner presented the testimony of Maureen Kokeas, Willy Gomez, and Anastasia Plakas. Kokeas is currently the Commanding Officer of the Bureau of Criminal Investigation ("BCI") within the Sheriff's Office, who was the First Deputy Sheriff when the alleged incidents occurred (Tr. 16-17). She testified that during the pandemic, the Sheriff's Office was responsible for enforcing Covid-related executive orders, including shutting down illegal parties and seizing contraband (Tr. 17-18). Seized contraband, such as alcohol, tobacco, and drugs, was brought to the Sheriff's Office located at 30-10 Starr Avenue, Long Island City (the "Sheriff's Office") and kept inside storage containers located in the parking lot (Tr. 18, 21; Pet. Ex. 1B). Kokeas testified that between 2020 and 2021, she was inside the storage container approximately a dozen times and estimated that 95% of the items inside were seized evidence, such as alcohol and tobacco (Tr. 21-22). The remaining five percent was shelving, desks, file cabinets, and items related to search warrants (*Id.*). Deputy sheriffs were not permitted to remove or keep contraband for personal use (Tr. 22).

Kokeas testified that respondent was responsible for keeping track of seized evidence before and during the pandemic (Tr. 25-27). Kokeas did not have access to the storage container, and if she had evidence, she would give it to respondent or Furney Canteen, respondent's supervisor (Tr. 27, 29-30). She did not know how many times respondent entered the storage container during 2020 and 2021, although it would have been within his job responsibilities to do so (Tr. 26-28). Kokeas admitted that alcohol seized during Covid enforcement raids was not

vouchered for reasons unknown to her (". . . I didn't give it conscious thought until after it was brought to our attention that all this stuff was thrown in there.") and there was no record of what was seized; however, she maintained that the evidence was taken pursuant to a legal order (Tr. 31-34).

Gomez, a former DOI Investigator, testified that in 2021 he investigated allegations that members of the Sheriff's Office were taking contraband seized as part of the Covid enforcement actions for personal use ("DOI Investigation") (Tr. 44-45). In May 2021, he photographed the interior of the storage container, as well as an area in the parking lot beside the storage container and surrounded by metal shelving, referred to as the "man cave" (Tr. 53-54; Pet. Exs. 4, 5). Petitioner presented the photographs as exhibits; however, I gave these photographs minimal weight because they were taken after the time period outlined in the specifications and it was undisputed that the storage container contained seized alcohol during the relevant time period (Tr. 60-63; ALJ Ex. 1; Pet. Exs. 4, 5). Gomez estimated that when he visited in May 2021, 95% of the storage container's contents were alcohol or tobacco, however he admitted that he did not know what was inside the "man cave," or the storage container before May 2021 (Tr. 49, 60-63). He also admitted that he viewed surveillance video footage showing deputy sheriffs pouring alcohol down a drain (Tr. 67).

Plakas, a DOI Assistant Inspector General, testified that she also participated in the DOI Investigation (Tr. 74-75). She testified that deputy sheriffs are not permitted to take seized contraband for personal use (Tr. 177). Plakas admitted that she had never visited the Sheriff's Office and was not aware of the storage container's interior layout (Tr. 125, 129). She also admitted that she viewed surveillance videos showing deputy sheriffs pouring alcohol down a drain and recalled that respondent was present on at least one such occasion (Tr. 133).

Additionally, for each specification petitioner presented surveillance video showing different angles of the parking garage where the storage container was located (Pets. Ex. 6A – 6I). Petitioner also presented documentary evidence including: a copy of the Standard Operating Procedure ("SOP") for evidence collection that respondent testified that he drafted but was never adopted by the Department (Tr. 226, 229; Pet. Ex. 2; Resp. Exs. A1, A), a 2022 evaluation form for respondent that lists tasks and standards but did not include any supervisory comments (Pet. Ex. 3), and screenshots of the video surveillance showing the man cave and storage container (Pet.

Exs. 1A, 1B). I considered this documentary evidence but found it to be of limited value and as such accorded it little weight.

***Respondent's Evidence***

Respondent testified and presented the testimony of Robert Gilliam, a former sergeant who supervised deputy sheriffs at the Sheriff's Office prior to retiring in 2022 (Tr. 198-99). While respondent was not assigned to Gilliam, Gilliam testified that on occasion he supervised respondent "in the field" (Tr. 200). Gilliam described respondent as a "great worker," who "works even when you're not looking," and "takes direction well, [is] punctual . . . knowledgeable . . . polite, kind, [and] always willing to share his knowledge and stay[] until the job is done" (Tr. 212).

Gilliam testified that respondent was responsible for handling evidence for respondent's squad (Tr. 199-200). During the period of December 2020 to March 2021, the Department was seizing "alcohol and anything ancillary . . . [found] at a gathering or [an] illegal party" (Tr. 200). Contrary to the previous practice, seized evidence was not vouchered:

> It wasn't like prior with the tobacco where we had specific bags, we had evidence cards, we had books. There was a whole procedure that we had set up for that. But this was unlike anything we had ever done before. So[,] there was no vouchering that I know of. No vouchering cards. There [were] no specific bags. We would leave stuff in the vehicles . . . Oftentimes, it would spend a night or so in there and then it would go into storage containers that we had in the garages.

(Tr. 201). Gilliam explained that they were "enforcing mandates and [told] we'll figure it out as we go along" but vouchering procedures were never implemented (Tr. 201). They seized items at multiple parties each evening and were unable to keep track of the items that were seized (Tr. 201-02).

Gilliam explained that he had created the "man cave" area prior to Covid by placing shelving in a U-shape (Tr. 202-03; Pet. Ex. 1B). It was initially used to store fleet facility items but later used to store items for Covid-related assignments (*Id.*). The storage container was to the right of the man cave (Tr. 204; Pet. Ex. 1B). Outside of the storage container there were boxes containing masks, face shields, gloves, and other personal protection equipment (Tr. 204).

Gilliam testified that a second room measuring approximately 20 feet long was connected by a doorway to the storage container (Tr. 205-07). The room was on the right of the backside of the storage container (Tr. 211). Together, the storage container and the second room formed a L-

shape (Tr. 210). Gilliam stated that by looking down the length of the storage container with the door between the storage container and second room open, someone could see approximately ten percent of the second room (Tr. 210).

In the storage container, various items were stored on shelves, including liquor, personal items, and personal protection items (Tr. 206). Items stored in the second room were moved to the man cave outside of the storage container during Covid so that the room could be used as an evidence room, but the second room still contained both personal and Department property (Tr. 207-09). Gilliam recalled that the second room contained a television, a refrigerator, a work bench, lights and sirens, jackets, food and cold drinks, and other items (Tr. 207-09). Deputy Sheriffs entered the second room to retrieve items, as well as to sit and relax (Tr. 209). Gilliam also testified that he was familiar with Elisson Jimenez, Furney Canteen, and David Singh, who were all Deputy Sheriffs with the Department, as well as Michael Trano, who was an Investigator with the Department and worked upstairs (Tr. 215-17).

Gilliam testified that some of the alcohol bottles seized during the Covid raids broke and were thrown out and were never placed in the storage container (Tr. 218). He further recalled one occasion when "tons" of seized alcohol ("[m]ore than enough to fill a few stores") were taken from the storage container and put in a City garbage truck to be disposed of (Tr. 219-20).

On cross-examination, Gilliam acknowledged that he participated in Covid enforcement actions and seized alcohol that was stored and locked in the storage container (Tr. 213-14). He agreed that evidence was stored in the storage container "to safeguard" it and that any seized contraband including alcohol belonged to the Department (Tr. 214).

Respondent testified that he was appointed as a Deputy Sheriff in December 2013 (Tr. 223). He started in the Tobacco Task Force and transferred to BCI in 2015, where he was assigned as an evidence custodian (Tr. 223). He testified that he never received any evidence training while at the academy, nor subsequently when he became an evidence custodian, and as a result, he did not know how to properly handle evidence (Tr. 224). In February 2016, he sent a proposed SOP for cigarette inspections to everyone in BCI to remedy evidence collection inconsistencies, but it was never officially adopted (Tr. 226, 229; Resp. Exs. A, A1). In June 2017, a BCI internal audit recommended periodic verifications of seized evidence, however, this never occurred for reasons unknown to respondent (Tr. 229-31; Resp. Ex. B). In January 2018, when the Sheriff was revising the Deputy Sheriff guidebook, respondent emailed him to suggest implementing a SOP on

evidence and attached his proposed SOP, but he never heard back (Tr. 231-33; Resp. Ex. C). In June 2019, respondent requested funding to take an online course in evidence collection, but his request was denied (Tr. 233-36; Resp. Ex. D).

According to respondent, he was ordered to disregard evidence vouchering practices for evidence seized during Covid enforcement (Tr. 236). He understood this to be an order from the Sheriff (*Id.*). He stated that seized contraband was generally "placed inside the storage container, . . . [but] when none of the evidence custodians were available to provide access, it was placed outside [of the storage container]" (Tr. 237-38). Besides respondent, respondent's supervisor, Sergeant Canteen, Deputy Sheriff Singh, and Singh's supervisor, Sergeant Robert Leblanc, also had access to the storage container (Tr. 239). Between December 2020 and March 2021, the storage container contained seized property including cigarettes, alcohol, documents, electronics, and dangerous weapons, as well as Department property, including search warrants, staplers, boxes, evidence bags, shelving, and personal property, such as lawn chairs, boom boxes, bottles of water, and tires (Tr. 239-40). Respondent testified that he also moved alcohol he found outside of the storage container inside of it (Tr. 240).

Respondent stated that the storage container has shelves along both sides (Tr. 241). The interior is dim but there are motion sensor lights (Tr. 240-41). At the end of the corridor, there is a second room situated perpendicular to the storage container, forming a L-shape (Tr. 241). The second room was the "original man cave" and it contains shelves and a desk (*Id.*). Respondent estimated the storage container to be 20 feet long and the second room to be between 25 and 30 feet long (Tr. 242). From within the storage container, only the first third of the second room is visible (*Id.*).

During December 2020 to March 2021, seized alcohol was also kept in the second room (Tr. 242-43). Seized alcohol was sealed on the shelves, however alcohol that was of unknown origin or personal property was left in the storage container unsealed (Tr. 243-44). In January 2021, the Department of Sanitation collected and disposed of alcohol from the storage container and the second room, using a "typical sanitation truck" (Tr. 259; Resp. Exs. F, G). Respondent estimated that the amount of alcohol disposed of was "in [the] five figures" (Tr. 259).

Respondent denied stealing or facilitating the theft of Department property from the storage container (Tr. 270). He stated that the storage container was locked to safeguard the property inside and to protect it from theft and that the keys to the storage container doors were secured in

a four-digit key box (Tr. 271-72). He acknowledged that the seized alcohol was Department property and even if the seized items were not vouchered, neither he nor any other Department employee was permitted to take it for personal use (Tr. 272-73). Respondent also provided testimony in connection with each specification, as detailed below.

I made two credibility findings in connection with Gilliam and respondent's testimony central to whether petitioner has presented sufficient evidence to prove the allegations by a preponderance of the evidence, as detailed below. First, I credited testimony that the storage container contained items other than contraband. This was not actually in dispute, as Kokeas and Gomez testified that items other than seized evidence were kept in the storage container. Second, I credited testimony that someone inside the storage container may not be able to see into the entirety of the attached second room, which petitioner did not dispute.

***Specification 1: December 10, 2020***

Petitioner alleged that on December 10, 2020, respondent was "observed stealing or facilitating the theft of vouchered contraband from the evidence storage container located in the parking garage of 30-10 Starr Avenue, Queens NY. The theft was captured on CCTV" (ALJ Ex. 1).

Petitioner relied upon four angles of CCTV footage without audio (Pet. Ex. 6A - Angles LIC-Garage-NE Ponderosa 2 (4), LIC-Garage-NE Ponderosa (3), LIC-Garage-SE FSU / Transport Car (4), and LIC-Garage-In-Lane-ParkingSpots (1)). On the right side of the parking lot is a grey storage container which was identified at trial as the storage container where seized evidence was kept (Tr. 77-79). Attached perpendicular to the back end of the storage container is a taller and longer structure, identified at trial as the second room. To the left of the storage container is a structural column with a white table and other miscellaneous items in front of it. To the left of the column and table are metal shelves arranged in a U-shape, containing various items, the interior of which was identified at trial as the man cave. An individual identified at trial as respondent walks toward the storage container from the right, moves a suitcase that is to the right of the storage container doors, walks to the column, and reaches behind it with his right hand (11:10:16 – 11:10:34).[2] An individual identified at trial as Jimenez follows respondent and walks toward the

[2] Respondent testified that keys to the storage container were kept inside of a lockbox with a four-digit keypad behind the column (Tr. 260).

white table and then walks to the storage container (*Id.*). Respondent walks to the storage container and appears to unlock the storage container doors and then walks back to the column and reaches behind it with his right hand (11:10:34 – 11:10:51). Jimenez walks to the storage container entrance, opens the doors, and enters (11:10:51 – 11:10:59). Respondent appears to look toward the surveillance camera (LIC-Garage-NE Ponderosa 2 (4)) and then follows Jimenez into the storage container (11:10:57 – 11:11:04). Jimenez exits the storage container, smiling and looking behind his left shoulder (11:12:16). From the bulging of his profile, Jimenez appears to have a rectangular-shaped object inside of his jacket that he holds with his left hand (11:12:16). Respondent shortly thereafter exits the storage container and closes the storage container doors, appearing to lock them (11:12:17 – 11:12:21).

Jimenez walks to the left, then behind, and around the man cave (11:12:17 – 11:12:19). From there, Jimenez walks across the parking lot (11:12:29 – 11:12:40). Respondent walks to the right of the storage container in the opposite direction of Jimenez (11:12:34 – 11:12:39).

Respondent testified with the aid of the video evidence. He denied removing any items from the storage container (Tr. 248-49). He explained that he asked Jimenez to show him where seized items were stored within the storage container (Tr. 249). Initially, he and Jimenez were beside each other but while respondent was putting things away, he lost sight of Jimenez (Tr. 249-50). While watching the portion of the video showing when Jimenez exited the storage container, respondent denied that Jimenez looked "more bloated" than when he went in (Tr. 288).

Petitioner contended that respondent facilitated Jimenez's theft of vouchered contraband by opening the storage doors (Tr. 350). Even assuming the evidence established that Jimenez wrongfully took Department property from the storage container, it did not establish the finding that respondent saw Jimenez take contraband from within it, or that he knew that Jimenez intended to do so when respondent opened the door. After respondent unlocks the storage container and Jimenez opens the container, there is a period when respondent and Jimenez are in the storage container together. However, the video does not show what happens inside the storage container, or if respondent witnessed Jimenez takes contraband. Nor does it show where respondent and Jimenez are situated within the storage container. I credited respondent's testimony that he was not always aware of Jimenez's whereabouts in the storage container, and I credited Gilliam and respondent's testimony that someone inside the storage container may not see someone who was inside the second room (Tr. 210, 242, 249-50). Petitioner speculates that respondent facilitated

Jimenez's theft of seized contraband because Jimenez appears to be holding an object under his jacket in the video evidence but that is not a sufficient basis to sustain the charge. *See Dugger*, OATH 794/91 at 17 (in a case based on circumstantial evidence, the inference that respondent was guilty must be based on proven facts). When Jimenez exits the storage container, respondent is behind him and does not appear to have a direct line of vision of Jimenez's front upper body or the area Jimenez is holding on his jacket with his left hand.

In sum, petitioner failed to prove by a preponderance of the credible evidence that respondent stole or facilitated the theft of vouchered contraband. Accordingly, this charge is not sustained.

***Specification 2: December 21, 2020***

Petitioner alleged that on December 21, 2020, respondent was "observed stealing or facilitating the theft of vouchered contraband from the evidence storage container located in the parking garage of 30-10 Starr Avenue, Queens NY. The theft was captured on CCTV" (ALJ Ex. 1).

Petitioner relied upon two angles of CCTV footage without audio (Pet. Ex. 6B - Angles LIC-Garage-NE Ponderosa (3) and LIC-Garage NE-Ponderosa 2 (4)). Respondent enters from right of the screen and walks to the column, left of the storage container (10:18:51 – 10:19:09). Respondent walks over to the storage container, appears to unlock and then open the doors, and then enters the storage container, followed by two individuals identified as Rueshiem Jones and Luis Rodriguez (10:19:09 – 10:19:38). Rodriguez exits the container and stands beside it, holding a white rectangular box, which he opens and takes out a tumbler, and respondent exits, walks to the column, and puts his right arm behind it (10:19:44 – 10:19:53). Respondent walks to the storage container, goes back inside, and then exits carrying a white rectangular box, similar to the one Rodriguez has, and appears to say something to Rodriguez, who walks out of camera view (10:19:58 – 10:20:17).

Respondent puts the white rectangular box on a suitcase to the right of the storage container door, and then walks to the storage container, appearing to face inside, holding the right door handle with his hands (10:20:20 – 10:20:46). Jones exits the storage container and respondent closes the door (10:20:46). When Jones exits and walks away, respondent appears to be looking toward the door and not at Jones (10:20:47 – 10:20:51). Jones has a white rectangular box in his

right hand, and he holds both arms below his stomach area (10:20:47). By the bulging of his chest and abdomen area, Jones also appears to have a rectangular or oblong-shaped object under his shirt (*Id.*). Jones walks through the man cave, out of camera view, and when he reappears, he no longer appears to have anything inside his shirt (10:21:14). Respondent locks the storage container doors and walks to the right, out of camera view (10:21:10). Jones walks through the parking lot away from the storage container and then walks back to the man cave with the white rectangular box in his hand. He exits the man cave area and walks back through the parking lot but is partially obscured by a vehicle. When he reappears, he is no longer holding the white box (10:21:18 – 10:23:50). He walks past the storage container and out of camera view (10:23:58).

Respondent testified with the aid of the video evidence. He retrieved the key from the four-digit lock box, unlocked and opened the storage container door, and then went inside, followed by Jones and Rodriguez, who were both deputy sheriffs (Tr. 251). The white rectangular boxes contained tumblers that their union had given them as holiday gifts (Tr. 251-52). He opened the storage container to give Rodriguez and Jones their tumblers and took a third tumbler for another colleague (*Id.*). He testified that the tumblers were stored on the shelves inside the storage container and denied they were vouchered evidence (*Id.*). Respondent was not aware of where Jones was inside the storage container while he waited outside for him, and he denied that he spoke to or looked at Jones when Jones exited the storage container (Tr. 252). Respondent denied seeing anyone take anything other than the union tumblers from the storage container (Tr. 252-53).

On cross-examination, respondent agreed that no one was trying to conceal the white rectangular boxes (Tr. 289). He denied that in the video Jones appeared to be concealing anything or that his body looked larger when he exited the storage container (Tr. 291).

Petitioner contended that respondent stole vouchered contraband or evidence and facilitated Jones and Rodriguez's theft of vouchered contraband or evidence by opening the storage doors (Tr. 350; ALJ Ex. 1). The video evidence shows respondent opening the storage container door for Jones and Rodriguez, as respondent admitted. However, the video evidence does not support a finding that respondent knew that Rodriguez or Jones took contraband or intended to take contraband from the storage container when respondent opened the door. I credited respondent's testimony that he was not aware of Jones's whereabouts within the storage container, and I credited Gilliam and respondent's testimony that a person standing inside the storage container may not be able to see someone who is inside the second room (Tr. 210, 242, 252). I

also credited respondent's testimony that the white rectangular box that respondent, Jones, and Rodriguez took from the storage container were gifts given to them by the union that were stored inside the storage container. While I did not credit respondent's testimony that the video evidence does not show Jones had something inside of his shirt and note that the video evidence shows respondent appearing to look inside the storage container seconds before Jones exited, there is no evidence of what respondent saw or what was happening inside the storage container at that moment (Pet. Ex 6B at 10:20:24 – 10:20:46). *See Dugger*, OATH 794/91 at 17 (in a case based on circumstantial evidence, the inference that respondent was guilty must be based on proven facts). When Jones exits the storage container, respondent does not appear to look at him.

In sum, petitioner failed to prove by a preponderance of the credible evidence that respondent stole or facilitated the theft of vouchered contraband. Accordingly, this charge is not sustained.

***Specification 3: January 4, 2021***

Petitioner alleged that on January 4, 2021, respondent was "observed stealing vouchered contraband from the evidence storage container located in the parking garage of 30-10 Starr Avenue, Queens NY. The theft was captured on CCTV" (ALJ Ex. 1).

Petitioner relied upon two angles of CCTV footage without audio (Pet. Ex. 6C - Angles LIC-Garage-SE Office Entrance (3) and LIC-Garage-NE Ponderosa 2 (4)). An individual identified as Singh reaches behind the column with his right hand (3:00:19). Respondent is standing on a cart situated parallel to the storage container (*Id.*). Singh walks to respondent, as Rodriguez walks towards Singh and respondent from the right side (3:00:45). Respondent and Singh appear to be talking to one another (3:01:07). Singh walks to the storage container entrance and appears to unlock the doors and then opens them (3:01:13 – 3:01:47). Singh enters the storage container, followed by respondent and Rodriguez (3:01:47 – 3:01:51). Jones walks from the right and enters the storage container (3:04:22 – 3:04:30). The storage container door partially closes but the video does not show who is closing the door from within (3:09:27 – 3:09:33). Two individuals wearing blue uniforms walk from the man cave area toward and past the storage container, as a sheriff's car drives past the storage container (3:09:52 – 3:10:11). Respondent peeks his head out of the storage container. He exits holding a black bag in his right hand partially

out of camera view on the right side of his body, and walks to the back of the man cave, out of camera view (3:10:13 – 3:10:27).

Respondent re-emerges from the man cave appearing to no longer be carrying the black bag and walks back to the storage container and re-enters it (3:11:15 – 3:11:25). Jones exits the storage container and walks toward the man cave and then walks back to the storage container and goes inside of it (3:12:46 – 3:13:04). Respondent exits the storage container and walks right, out of camera view (3:13:55 – 3:14:01). Rodriguez exits the storage container (3:14:37). Singh exits the storage container and then goes back inside (3:14:40 – 3:14:54). Singh re-emerges and places cardboard boxes that appear to be empty outside the storage container and Jones exits and does the same thing (3:15:05 – 3:15:30). Jones walks to the back of the man cave (3:15:36). Singh walks in the opposite direction and exits the garage through a door on the right side (3:15:36 – 3:15:50).

Respondent testified with the aid of the video evidence. He stated that Singh was an evidence custodian and therefore permitted to unlock the storage container (Tr. 254). He said that the black plastic bag he was carrying contained two 16-ounce bottles of water which he took from a shelf near the entrance of the storage container (Tr. 255). He denied that any alcohol was removed from the storage container (Tr. 255-56). On cross-examination, respondent admitted he was peeking out of the storage container and looking towards a vehicle because "[t]here[] [was] some commotion that happened outside, and [he] want[ed] to see what it was" (Tr. 294-95). He agreed that he exited the storage container a second after the two people and vehicle had passed (Tr. 296-96).

Petitioner alleged that respondent stole vouchered contraband from the storage container (ALJ Ex. 1). It argued that because "the evidence storage container consists almost entirely of contraband," it was reasonable to infer that the bag carried by respondent contained contraband (Tr. 349-50). Nevertheless, the strength of this assertion is undermined by the credible testimony that the storage container contained other items, including personal items and drinks (Tr. 207-09). Respondent also carried the bag openly to the man cave where it was left, in contrast to other specifications where deputy sheriffs exited the storage container with what appeared to be items inside shirts or jackets. While it is curious why respondent poked out his head before exiting the container, this alone is insufficient to establish that respondent wrongfully took any Department property or contraband. *See Dugger*, OATH 794/91 at 17 (in a case based on circumstantial evidence, the inference that respondent was guilty must be based on proven facts). The video

evidence showed respondent appearing to take a black plastic bag of unknown contents from the storage container to the man cave. Respondent claimed the bag contained two water bottles and petitioner did not rebut this testimony. There was no credible evidence that the bag contained contraband, or that respondent intended to deprive the Department of any property. Additionally, the disposal of cardboard boxes supports respondent's testimony that the individuals were cleaning out the storage unit and were inside for a legitimate business purpose.

Accordingly, this charge is not sustained.

***Specification 5: February 11, 2021***

Petitioner alleged that on February 11, 2021, respondent was "observed stealing or facilitating the theft of vouchered contraband from the evidence storage container located in the parking garage of 30-10 Starr Avenue, Queens NY. The theft was captured on CCTV" (ALJ Ex. 1).

Petitioner relied upon four angles of CCTV footage without audio (Pet. Ex. 6D – Angles LIC-Garage-SE Office Entrance (3), LIC-Garage-NE Ponderosa 2 (4), LIC-Garage-SE FSU/Transport Car (4), and LIC-Garage-SE Executive Parking (1)). Respondent, an individual identified at trial as Canteen, respondent's supervisor, and Jimenez enter the garage from the right side of the building and walk toward the storage container (9:58:00). Respondent is carrying a green jacket on his left arm and a grey backpack on his left shoulder. He reaches behind the column with his right hand and then appears to unlock the storage container doors (9:58:13 – 9:58:28). Canteen opens the storage container doors, and respondent goes inside, followed by Canteen and Jimenez (9:58:48 – 9:58:55). About seven minutes later, Jimenez exits the storage container carrying a dark-colored item covered with what appears to be the green jacket that respondent was carrying before (10:06:20). He walks to a black vehicle in the parking lot, and appears to put the item inside the vehicle, entering from the driver's door (10:06:20 – 10:06:40). Jimenez exits the vehicle with the green jacket but does not appear to have the item he was previously carrying under the jacket. He walks across the parking lot and re-enters the storage container (10:07:17 – 10:07:43). Less than a minute later, respondent exits the storage container carrying the green jacket folded across the front of his body (10:08:01).

Respondent testified with the aid of the video evidence. He admitted that he retrieved the key from the lock box and unlocked the storage container doors which Canteen then opened (Tr.

260). Respondent had asked Canteen and Jimenez to show him where they had placed evidence seized during a Covid enforcement action the prior evening (*Id.*). He testified that he did not remove any property from the storage container and did not see anyone else do so (Tr. 261). While inside the storage container, respondent was beside Canteen, but respondent was unaware of where Jimenez was while they were inside (Tr. 261). Respondent agreed that on the video Jimenez appeared to be carrying a black bag underneath respondent's green jacket but denied that he gave Jimenez his jacket or that at that time he was aware that Jimenez took it (Tr. 299-301).

Petitioner contended that respondent facilitated Jimenez's theft of vouchered contraband or evidence by opening the storage doors (Tr. 350). Respondent admitted that he unlocked the storage container doors. The video evidence shows Jimenez exiting the storage container, carrying a black item covered by a jacket respondent admitted was his, and appearing to put the item into a vehicle. However, the record established that items other than seized contraband were kept in the storage container and the video does not reveal what Jimenez is carrying under the jacket or where respondent was inside of the storage container when Jimenez exited the storage container. I credited respondent's testimony that he was not aware of Jimenez's whereabouts in the storage container or that Jimenez used his jacket to conceal his theft of seized contraband. I also credited Gilliam and respondent's testimony that a person standing inside the storage container may not be able to see someone who is inside the second room (Tr. 210, 242, 261). Even assuming the evidence established that Jimenez wrongfully took Department property from the storage container, it did not establish that respondent was aware Jimenez wrongfully took Department property from the storage container, respondent was aware Jimenez intended to wrongfully take Department property from the storage container when he unlocked the doors, or that respondent permitted Jimenez to use his jacket to wrongfully take Department property from the storage container. Petitioner speculates that respondent knew Jimenez used his jacket to conceal his theft of seized contraband but that is not a sufficient basis to sustain the charge. *See Dugger*, OATH 794/91 at 17 (in a case based on circumstantial evidence, the inference that respondent was guilty must be based on proven facts).

Petitioner also did not present any evidence in support of the allegation that respondent was observed stealing seized contraband.

Accordingly, this charge is not sustained.

***Specification 6: March 1, 2021***

Petitioner alleged that on March 1, 2021, respondent was "observed stealing or facilitating the theft of vouchered contraband from the evidence storage container located in the parking garage of 30-10 Starr Avenue, Queens NY. The theft was captured on CCTV" (ALJ Ex. 1).

Petitioner relied upon four angles of CCTV footage without audio (Pet. Ex. 6E - Angles LIC-Garage-NE Ponderosa 2 (4), LIC-Garage-In Lane (3), LIC-Garage-SE FSU / Transport Car (4), and LIC-Garage-NWOutLane (2)). Respondent, Singh, and a person identified at trial as Robert Schwicke walk toward the storage container (2:49:00). Respondent walks to the column, reaches behind it with his right hand, appears to unlock the doors, and then opens them (2:49:10 – 2:50:04). Respondent, Singh, and Schwicke enter the storage container (2:45:14). Respondent exits the storage container and then re-enters the storage container (2:55:36 – 2:57:03). Singh and Schwicke exit the storage container and stand in front of the entrance, appearing to speak to one another, and then re-enter the storage container (2:58:09 – 2:58:21). Singh, Schwicke, and respondent exit the storage container together (2:58:37). Singh is carrying a large black open container with a black plastic bag inside (2:58:37). Respondent closes the storage container doors and appears to lock the doors (2:58:45). Singh and Schwicke walk across the parking lot and Singh puts the container inside the trunk of a blue vehicle (2:58:45 – 3:00:13). Respondent walks in the opposite direction (2:59:03).

Respondent testified with the aid of the video evidence. He admitted that he unlocked the storage container and that Singh and Schwicke went inside with him and stated that he was unaware of their whereabouts while they were inside (Tr. 262-63). He testified that Singh was the evidence custodian for another squad (Tr. 263, 302). He waited outside the storage container for Singh and Schwicke to lock it up (Tr. 263, 304). Respondent admitted that when he exited, Singh was carrying a black plastic container, but respondent testified that he did not know what Singh was carrying inside the container (Tr. 263-64).

On cross-examination, respondent testified that even though Singh was an evidence custodian, he did not have the password for the lock box because respondent changed it from time to time and he did not want to disclose the password in Schwicke's presence (Tr. 303). Respondent maintained that Singh did not explain why he wanted to enter the storage container or what he did with the contents of the black plastic box (Tr. 305).

Petitioner contended that respondent facilitated Singh's theft of vouchered contraband or evidence by opening the storage doors for him (Tr. 350). The video evidence shows Singh taking a black plastic container with a black plastic bag inside of it and putting it into a vehicle. Although I did not find respondent's testimony that he did not know why Singh wanted to enter the storage container credible, the video does not show what Singh was carrying inside of the black container. Also, the record established that the storage container included items that were not contraband and thus, without further proof as to what Singh was carrying, it is not reasonable to infer that he was carrying seized contraband. Even assuming the evidence sufficiently established that Singh wrongfully took Department property from the storage container, it did not establish that respondent was aware Singh wrongfully took Department property from the storage container, respondent was aware Singh intended to wrongfully take Department property from the storage container when he opened the doors, or that respondent permitted Singh to wrongfully take Department property from the storage container.

Petitioner failed to meet its burden and "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." *Fleischmann*, OATH 1528/05 at 11.

Petitioner also did not present any evidence in support of the allegation that respondent was observed stealing seized contraband.

Accordingly, this charge is not sustained.

***Specification 7: March 8, 2021***

Petitioner alleged that on March 8, 2021, respondent was "observed stealing or facilitating the theft of vouchered contraband from the evidence storage container located in the parking garage of 30-10 Starr Avenue, Queens NY. The theft was captured on CCTV" (ALJ Ex. 1).

Petitioner relied upon two angles of CCTV footage without audio (Pet. Ex. 6F - Angles LIC-Garage-NE Ponderosa 2 (4) and LIC-Garage-SE FSU/Transport Car (4)). Respondent, Singh, and Jimenez are in front of the storage container and respondent reaches behind the column with his right hand (10:25:46 – 10:25:52). Respondent walks to the storage container doors and appears to unlock them, then returns to the column and reaches behind it with his right hand (10:26:07 – 10:26:17). Singh opens the right door and enters the storage container, followed by respondent and Jimenez (10:26:30). Canteen walks to the storage container and goes inside (10:27:24).

Canteen exits the storage container and re-enters it, partially closing the door (10:30:48). Jones walks to the entrance of the storage container, where someone partially concealed by the door is standing, and then Jones enters the storage container (10:32:55 – 10:33:06). Jones exits the storage container and appears to be speaking to somebody inside the storage container and looking at his phone (10:33:32 – 10:33:57). Jimenez exits the storage container holding his left side of his denim jacket with his left hand, appearing to be holding something inside, while looking into the storage container and appearing to speak with Canteen, who exits briefly before re-entering (10:34:04 – 10:34:38). Jimenez and Jones walk across the parking lot to a white car and Jimenez opens the passenger rear side door and enters the vehicle while Jones waits outside (10:34:38 – 10:34:54). Jimenez exits the car and walks with Jones across the parking lot (10:35:01 – 10:35:10). Jimenez no longer appears to have anything inside his jacket (10:35:10). Canteen and respondent exit the storage container and respondent walks to the column and reaches behind it with his right hand, then walks across the parking lot (10:35:09 – 10:35:58).

Respondent testified with the aid of the video evidence. He admitted that he unlocked the doors and Singh opened them (Tr. 265). He stated that he asked the other deputy sheriffs to help him organize the contents of the storage container (*Id.*). After they finished, he closed the doors (*Id.*). He did not remove anything from within the storage container, nor did he see anyone else do so (Tr. 265-66, 313).

On cross-examination, respondent admitted while watching the video that when Jimenez exited the storage container, Jimenez was holding the area near the left pocket of his jacket while he walked to the vehicle (Tr. 311-12). He stated that he enlisted Singh, Jones, and Canteen to help him, but he did not specifically ask Jimenez (Tr. 308). He was not aware of where Jimenez was when he was inside of the storage container (Tr. 312).

Petitioner contended that respondent facilitated Jimenez's theft of vouchered contraband or evidence by opening the storage doors (Tr. 350). Respondent admitted that he unlocked the storage container doors. The video evidence shows Jimenez exiting the storage container, while appearing to carry something under his jacket, and appearing to put the item into a vehicle. However, the video does not show what Jimenez is carrying. Even assuming the evidence established that Jimenez wrongfully took Department property from the storage container, it did not establish that respondent was aware Jimenez wrongfully took Department property from the storage container, respondent was aware Jimenez intended to wrongfully take Department property

from the storage container when respondent unlocked the doors, or that respondent permitted Jimenez to wrongfully take Department property from the storage container. *See Dugger*, OATH 794/91 at 17 (in a case based on circumstantial evidence, the inference that respondent was guilty must be based on proven facts). I credited respondent's testimony that he was not aware of Jimenez's whereabouts in the storage container, and I also credited Gilliam and respondent's testimony that a person standing inside the storage container may not be able to see someone who is inside the second room (Tr. 210, 242, 312). I also noted that the video evidence shows that respondent exited the storage container after Jimenez exited the vehicle without the item under his jacket.

Petitioner also did not present any evidence in support of the allegation that respondent was observed stealing seized contraband.

Accordingly, this charge is not sustained.

***Specification 8: March 11, 2021***

Petitioner alleged that on March 11, 2021, respondent was "observed stealing or facilitating the theft of vouchered contraband from the evidence storage container located in the parking garage of 30-10 Starr Avenue, Queens NY. The theft was captured on CCTV" (ALJ Ex. 1).

Petitioner relied upon five angles of CCTV footage without audio (Pet. Ex. 6G - Angles LIC-Garage-NE Ponderosa 2 (4), LIC- Garage-SE Office Entrance (3), LIC-2FL-Stair_A, LIC-Garage-Front Door to Office, and LIC-Garage-NE Ponderosa (3)). Respondent and an individual identified at trial as Michael Trano, who worked upstairs, stand at the storage container entrance (1:18:45; Tr. 216). Respondent reaches behind the column with his right hand, walks to the storage container, appears to unlock the doors to the storage container, then walks back to the column, and reaches behind the column with his right hand again (1:18-45 – 1:19:09). Respondent walks back to the storage container, opens the door, and goes inside (1:19:13 – 1:19:30). Trano enters the storage container, then re-emerges from the storage container holding a black rectangular box in his left hand (1:19:30 – 1:20:00). Respondent exits the storage container and appears to lock the doors (1:20:09). Respondent and Trano appear to be talking while facing one another (1:20:18 – 1:21:15). A black vehicle drives to the area beside respondent and Trano and respondent and Trano appear to be speaking to the occupants inside the vehicle (1:21:21 – 1:21:36). Respondent walks across the parking lot (1:21:47). Trano walks behind the man cave carrying the black

rectangular box (1:22:00 – 1:22:14). Respondent walks up a staircase, opens a door beside a sign reading "Floor 2 Stair A" and exits (1:22:30 – 1:22:33). Approximately 38 minutes later, Trano exits the "man cave" carrying the black rectangular box, walks across the parking lot, ascends the stairs, opens the door beside a sign reading "Floor 2 Stair A" and exits (2:01:05 – 2:02:06).

Plakas testified that she believed that the black rectangular box that Trano took from the storage container contained Johnnie Walker whiskey based her observation of the shape and color of the box and her belief that there was a Johnnie Walker whiskey logo on the box (Tr. 110, 181-182; Pet. Ex. 6G at 1:20:22). On cross-examination, she admitted she could not state with certainty that the box contained "vouchered evidence" or "a bottle of alcohol" (Tr. 176).

While the video is grainy and it is not possible to read the words on the box, given the size, shape, and color of the box, as well as Kokeas, Gilliam, and respondent's testimony that the storage container was used to store alcohol seized during Covid enforcement, I credited Plakas's testimony that there appeared to be a liquor brand logo on the black rectangular box and I find that it was more likely than not that the black rectangular box Trano took from the storage container was a bottle of alcohol.

Respondent testified with the aid of the video evidence. He admitted he let Trano into the storage container and that Trano "removed [an] item from the shelf," after which respondent "spoke with him briefly and . . . walked away," but respondent denied that he himself took anything from the storage container (Tr. 248). Respondent testified that Trano was a sergeant who outranked him and therefore could give him orders (Tr. 246-48). Trano was also an evidence custodian (Tr. 247). Trano told respondent he needed to take an item out of the storage container, respondent provided Trano access, and Trano took the item in question (*Id.*).

On cross-examination, respondent clarified that at the time of the incident Trano was "an acting supervisor," but respondent was still outranked by Trano and had to take orders from him (Tr. 279-80). He stated that Trano did not have the key code and he did not ask Trano what his reason was for taking something out of the storage container because it was routine for officers to request items to be removed "for examination, for producing to the DA's office or to an outside agency" (Tr. 285-86). Respondent was not asked if the item Trano took was in fact seized evidence or alcohol.

Petitioner contended that respondent facilitated Trano's theft of vouchered contraband or evidence by opening the storage doors (Tr. 350). Respondent admitted he unlocked and opened

the storage container doors upon Trano's request and later spoke with Trano outside the storage container. The video evidence established the rectangular box Trano was carrying when he exited the storage container likely contained alcohol. It also established that Trano and the item he was carrying were in respondent's line of vision for the duration of his and Trano's approximately one-minute conversation. The credible evidence also established that 38 minutes after respondent walked away from Trano, Trano took the item upstairs where he worked (Tr. 216). Respondent did not deny that Trano took something from the storage container, and he admitted during his testimony that taking Department property for personal use was not permitted. To the extent that respondent argued that because Trano outranked him, respondent must obey orders from Trano that required him engaging in misconduct, I did not credit this defense.

However, to prevail, petitioner must establish by a preponderance of the evidence that Trano took seized evidence with an intent to deprive the Department, and respondent facilitated him to do so by opening the door, or that Trano intended to obtain a benefit or deprive the Department of a benefit, and respondent knowingly acted or refrained from acting (ALJ Ex. 1). Petitioner failed to meet its burden.

Petitioner's argument requires inferring that the rectangular box Trano took upstairs was seized evidence and that Trano took it for a non-business purpose. Respondent testified that there were legitimate business purposes for taking items out of the storage container which petitioner did not rebut. Petitioner argued that respondent's argument was implausible because "exiting the evidence storage container with a stuffed shirt is [not] normal conduct" (Tr. 350). However, Trano held the box openly in his hands and did not appear to conceal it at any point (Pet. Ex. 6G). "In order to infer that respondent knew [Trano] intended to steal the items, petitioner was required to show that such inference was the only one that was fair and reasonable in the circumstances." *Transit Auth. v. Wilson*, OATH Index No. 1004/93, at 10 (July 15, 1993) (*citing Markel v. Spencer,* 5 A.D.2d 400 (4th Dep't 1958), *aff'd*, 5 N.Y.2d 958 (1959) (dismissing charge against respondent where petitioner did not establish respondent knew the employee was taking items for personal use); *cf. Dep't of Finance v. Johnson*, OATH Index No. 299/82 at 15-16 (Mar. 1, 1983) (sustaining charge against respondent where respondent provided former employee access to a supply room and allowed her to leave with office supplies). Beyond evidence showing that Trano carried the item to the second floor, there was no credible evidence at trial establishing what Trano did with the item or that he was not permitted to take it from the storage container for a business purpose.

Petitioner also did not present any evidence in support of the allegation that respondent was observed stealing seized contraband.

Accordingly, this charge is not sustained.

***Specification 9: March 12, 2021***

Petitioner alleged that on March 12, 2021, respondent was "observed stealing or facilitating the theft of vouchered contraband from the evidence storage container located in the parking garage of 30-10 Starr Avenue, Queens NY. The theft was captured on CCTV" (ALJ Ex. 1).

Petitioner relied upon three angles of CCTV footage without audio (Pet. Ex. 6H - Angles LIC-Garage-NE Ponderosa 2 (4), LIC -Garage-NE Ponderosa (3), and LIC-Garage-SE FSU / Transport Car (4)). Jones exits a white vehicle and walks across the parking garage toward the man cave and storage container, while appearing to talk on a cellphone (1:28:11 – 1:29:15). Jones stops near the man cave, as respondent walks towards the storage container (1:29:32). Respondent reaches behind the column with his right hand and then walks to the storage container and appears to unlock the door, then walks back to the column and reaches behind it with his right hand again (1:29:32 – 1:30:02). Respondent then walks back to the storage container and opens the right door (1:30:02 – 1:30:09). Jones enters the storage container, followed by respondent (1:30:13). Respondent exits the storage container and walks to a table to the left of the column (1:30:27). Respondent walks back to the storage container just as Jones exits (1:31:07). The two men are facing in the general direction of each other, but it appears that respondent is looking down towards the ground. Jones holds his jacket with both hands at his waist and it appears there is a rectangular or oblong-shaped object inside the center of his jacket (1:31:09). Respondent closes the storage container door and appears to lock the door (*Id*.).

Jones walks behind and through the man cave, then walks across the parking lot to the same white vehicle he previously exited from (1:31:12 – 1:31:54). The vehicle's rear lights flash and Jones enters the vehicle from the driver's side (1:31:57). Approximately nine minutes later, Jones is outside the vehicle with his hands in his pants pockets, and he no longer appears to have an object under his jacket (1:41:00). Jones walks across the parking lot with Canteen (1:41:08).

Respondent testified with the aid of the video evidence. He admitted that he opened the storage container and he and Jones went inside together (Tr. 267). Respondent exited the storage container and checked to see if batteries near the table were charging while he waited for Jones to

exit (Tr. 268). He stated that he was not inside the storage container when Jones was inside, nor did he see if Jones took anything, but he saw Jones going to the mancave after he exited the storage container (Tr. 268). On cross-examination, respondent testified that he opened the storage container for Jones in order for Jones to show him where contraband seized during Covid enforcement actions had been placed (Tr. 315). He further testified that he was aware of what Jones was doing inside the storage container and that Jones was separating evidence seized at different times (Tr. 316). Respondent stated when Jones exited he "only saw a silhouette of [Jones] walking out . . ., and [he] didn't look at him because [he] was focused on closing the door" (Tr. 319).

Petitioner contended that respondent facilitated Jones's theft of vouchered contraband or evidence by opening the storage doors (Tr. 350). I noted that respondent initially testified he saw Jones go to the mancave when he exited the storage container and later stated he saw Jones's silhouette. However, in the video it appears that respondent is looking at the ground when Jones exits the storage container and thus respondent would not have seen that Jones had something inside of his jacket when he exited the storage container. Respondent admitted that he unlocked the storage container doors and testified that Jones was inside to separate evidence. The video evidence shows Jones exiting the storage container, while appearing to carry something inside his jacket, and putting the item into a vehicle. However, the video does not show what Jones is carrying and the record established that the storage container includes items that are not contraband. Even assuming the evidence established that Jones wrongfully took Department property from the storage container, the evidence did not establish that respondent was aware Jones wrongfully took Department property from the storage container, respondent was aware Jones intended to wrongfully take Department property from the storage container when he opened the door, or that respondent permitted Jones to wrongfully take Department property from the storage container. Petitioner bears the burden and "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" *Fleischmann*, OATH 1528/05 at 11.

Petitioner also did not present any evidence in support of the allegation that respondent was observed stealing seized contraband.

Accordingly, this charge is not sustained.

***Specification 10: March 17, 2021***

Petitioner alleged that on March 17, 2021, respondent was "observed stealing or facilitating the theft of vouchered contraband from the evidence storage container located in the parking garage of 30-10 Starr Avenue, Queens NY. The theft was captured on CCTV" (ALJ Ex. 1).

Petitioner relied upon four angles of CCTV footage without audio (Pet. Ex. 6I-Angles LIC-2Fl-Stair_A, LIC-Garage-NE-Ent. View 3 (2), LIC -Garage-NE Ponderosa 2 (4), and LIC - Garage-In-Lane-Parking Spots (1)). Respondent and Jones exit from a door beside a sign reading "Floor 2 Stair A" and descend a staircase (1:41:06 – 1:41:11). Neither appear to have anything in their hands. Respondent exits from another door leading into the parking lot and walks toward the storage container (1:41:11 – 1:41:25). Respondent moves a hand truck aside and walks to the column which he reaches behind with his right hand (1:41:52 – 1:42:01). Respondent walks to the storage container and appears to unlock the doors, then walks back the column and reaches behind it again with his right hand (1:42:08 – 1:42:20). Respondent walks back to the storage container and opens the door on his right side (1:42:20 – 1:42:24). Jones enters the parking lot from the same door previously used by respondent, carrying a backpack in his right hand, walks across the parking lot and enters the storage container (1:42:53 – 1:43:26). Almost three minutes later, Jones emerges from the storage container holding a backpack first in his right hand and then in his left, holding the backpack partially behind his body and then on his left side, and walks across the parking lot (1:46:09 – 1:46:11). Respondent exits the storage container soon after Jones and closes and appears to lock the door (1:46:12 – 1:46:27). Respondent walks in the opposite direction as Jones to the door from which he entered the parking lot and opens the door (1:46:31 – 1:47:02). Respondent then ascends a staircase and enters through a door beside a sign reading "Floor 2 Stair A" (1:47:15 – 1:47:20). Jones walks to a white vehicle, enters the driver's side door, sits down, and closes the door (1:47:34 – 1:47:58). Jones reverses and drives the vehicle out of camera view (1:48:19 – 1:48:30).

Respondent testified that he asked Jones before he left for the day to show him where in the storage container contraband seized at a prior Covid enforcement action had been placed (Tr. 269). Jones was carrying his backpack because he was leaving (*Id.*). They went in, Jones showed him where it was, they walked out, with Jones carrying the same backpack, and respondent closed the door (*Id.*). Respondent denied that either he or Jones took anything from the container (*Id.*).

On cross-examination, respondent denied that the backpack looked heavier when he exited compared to when he initially entered the storage container (Tr. 323-24).

Petitioner contended that respondent facilitated Jones's theft of vouchered contraband or evidence by opening the storage doors (Tr. 350). Respondent admitted to unlocking the storage containers and that Jones was carrying a backpack. However, there is no credible evidence that Jones took contraband from the storage container or that respondent was aware he did or intended to do so when respondent opened the door. From the video, I am unable to discern whether the backpack Jones emerged from the storage container with was heavier or fuller than it was prior to going into the storage container (Pet. Ex. 6I at 1:46:15). There is no camera in the storage container, so even assuming Jones put something inside the backpack while he was inside, from the video it is not clear what if anything Jones took or if respondent saw Jones take anything from the storage container. *See Dugger*, OATH 794/91 at 17 (in a case based on circumstantial evidence, the inference that respondent was guilty must be based on proven facts).

Petitioner also did not present any evidence in support of the allegation that respondent was observed stealing seized contraband.

Accordingly, this charge is not sustained.

## FINDINGS AND CONCLUSIONS

1. Petitioner failed to prove that on December 10, 2020, respondent stole or facilitated the theft of vouchered contraband from the evidence storage container located in the parking garage of 30-10 Starr Avenue, Queen, New York.

2. Petitioner failed to prove that on December 21, 2020, respondent stole or facilitated the theft of vouchered contraband from the evidence storage container located in the parking garage of 30-10 Starr Avenue, Queens, New York.

3. Petitioner failed to prove that on January 4, 2021, respondent stole vouchered contraband from the evidence storage container located in the parking garage of 30-10 Starr Avenue, Queens, New York.

4. Petitioner failed to prove that on February 11, 2021, respondent stole or facilitated the theft of vouchered contraband from the evidence storage container located in the parking garage of 30-10 Starr Avenue, Queens, New York.

5. Petitioner failed to prove that on March 1, 2021, respondent stole or facilitated the theft of vouchered contraband from the evidence storage container located in the parking garage of 30-10 Starr Avenue, Queens, New York.

6. Petitioner failed to prove that on March 8, 2021, respondent stole or facilitated the theft of vouchered contraband from the evidence storage container located in the parking garage of 30-10 Starr Avenue, Queens, New York.

7. Petitioner failed to prove that on March 11, 2021, respondent stole or facilitated the theft of vouchered contraband from the evidence storage container located in the parking garage of 30-10 Starr Avenue, Queens, New York.

8. Petitioner failed to prove that on March 12, 2021, respondent stole or facilitated the theft of vouchered contraband from the evidence storage container located in the parking garage of 30-10 Starr Avenue, Queens, New York.

9. Petitioner failed to prove that on March 17, 2021, respondent stole or facilitated the theft of vouchered contraband from the evidence storage container located in the parking garage of 30-10 Starr Avenue, Queens, New York.

## RECOMMENDATION

I recommend the charges pending against respondent be dismissed.

Christine Stecura
Administrative Law Judge

March 25, 2024

SUBMITTED TO:

**PRESTON NIBLACK**
*Commissioner*

APPEARANCES:

**JOSHUA HANTMAN, ESQ.**
**ARI LIEBERMAN, ESQ.**
*Attorneys for Petitioner*

**DAVID KIRSCH, ESQ.**
*Attorney for Respondent*