

Dep't of Transportation v. Solli

OATH Index No. 1442/13 (Apr. 26, 2013)

Highway repairer charged with backing up truck without a spotter, injuring a co-worker. ALJ found evidence sufficient to sustain the charges and recommended a penalty of 20 days' suspension.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF TRANSPORTATION
Petitioner
- against -
DONNA SOLLI
Respondent

REPORT AND RECOMMENDATION

JOHN B. SPOONER, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, Department of Transportation, pursuant to section 75 of the New York State Civil Service Law. Petitioner alleges that respondent Donna Solli, a highway repairer, backed up her truck without using a spotter and injured a co-worker.

At the hearing held before me on April 3, 2013, petitioner presented the testimony of two highway repairers and a supervisor, who described respondent backing up her truck and striking one of the workers. Respondent testified on her own behalf, insisting that she backed up using a spotter.

For the reasons provided below, I find that the charges should be sustained and that respondent should be suspended for 20 days.

ANALYSIS

This case concerns an incident which occurred near the end of the work day at around 3:00 p.m. on December 2, 2011, when respondent was assigned to drive a truck loaded with asphalt to a street being repaired on Lincoln Place in Brooklyn. Two other highway repairers, Ms. Blanding and Mr. Archer, were assigned to the Lincoln Place work site as safety personnel.

Their duties included redirecting traffic and pedestrians and acting as spotters to back up trucks delivering asphalt to the location (Blanding: Tr. 13; Archer: Tr. 50).

The safety guidelines for Department truck drivers backing up trucks were not in dispute. Mr. Rao, a supervisor, stated that the standard operating procedure for all Department drivers was that “[t]he driver shouldn’t back up any vehicle without a spotter visible in their driver’s side mirror” (Tr. 80). Respondent confirmed that the guidelines, as described by Mr. Rao, required that drivers only back up when a spotter is visible in the side mirror (Tr. 94).

Ms. Blanding, Mr. Archer, and respondent each provided different accounts of what happened that afternoon as respondent backed up her truck. Ms. Blanding testified that, on December 2, sometime before respondent arrived, Ms. Blanding assisted the driver of a large 40-ton Flow Boy truck to back up to the asphalt machine. The truck ended up at an angle and needed to straighten out (Tr. 14-15).

At 3:00 p.m., respondent arrived at the site driving a Mack truck loaded with asphalt. Mr. Archer directed respondent to drive the truck into a closed portion of Lincoln Place across an intersection from the area being paved. Ms. Blanding testified that, after respondent drove to the spot where Mr. Archer directed her, Ms. Blanding walked over and told respondent that she would clear the area and then back respondent up. She also signaled to respondent with her hand to stay where she was (Tr. 17). Ms. Blanding then walked back to where the Flow Boy truck was parked and, with her back to respondent’s truck, began stopping pedestrians from entering the area. As Ms. Blanding directed pedestrians, she heard the driver of the Flow Boy truck honking his horn. She then felt something strike the back of her head “hard.” She thought she was “going to die” and saw respondent’s truck stop only inches away from her face (Tr. 15-16).

Ms. Blanding indicated that she was dazed and in shock and had to sit down (Tr. 16). An ambulance was called. About 40 minutes later, respondent asked Ms. Blanding if she hit her. Ms. Blanding replied that respondent had “knocked the hell out of me” and asked why respondent backed up without a spotter (Tr. 18). At the emergency room, Ms. Blanding was treated for a “slight concussion” and was out of work for approximately four months (Tr. 18-19). She suffered from headaches and fears of another accident (Tr. 20).

The second eyewitness, Mr. Archer, confirmed that, after respondent arrived, he told her to pull up on Lincoln Place and wait for directions. But, in contrast to Ms. Blanding’s testimony that she told respondent not to move, Mr. Archer testified that he saw Ms. Blanding begin, by

verbal commands, to direct respondent to back up her Mack truck. Mr. Archer then saw pedestrians walking into the street behind the Mack truck. Mr. Archer heard Ms. Blanding yell and signal with a raised fist for respondent to stop. Ms. Blanding then went behind the truck to direct the pedestrians out of the way. Mr. Archer stated that, at this point, the truck continued to go slowly backwards, even as Mr. Archer and other onlookers yelled and the Flow Boy driver honked his horn. The truck struck Ms. Blanding in the back of her head (Tr. 51-53, 55).

Mr. Archer directed respondent to drive back to the safety zone across the intersection and told her she had backed into Ms. Blanding. Respondent told Mr. Archer she did not know that Ms. Blanding had been struck. Mr. Archer also reported the accident to his supervisor, Mr. Rao. Ms. Blanding was transported away by ambulance (Tr. 55-56).

Mr. Rao confirmed that he was notified at around 3:00 p.m. by Mr. Archer that Ms. Blanding had been struck by a truck driven by respondent (Tr. 79). When Mr. Rao reported to the scene and spoke with Ms. Blanding, she said she was "okay" but complained of neck and back pain (Tr. 80). Respondent told Mr. Rao that she stopped her truck when she heard a scream (Tr. 82).

Respondent testified that she arrived at the Lincoln Place site and drove her truck into the space on Lincoln Place next to the intersection with New York Avenue, as directed by Mr. Archer. Ms. Blanding then walked over and told respondent, "Donna, I am going to back you up when I get to the back of your truck." Respondent said "OK." Like Mr. Archer, respondent testified that Ms. Blanding waved respondent to back up and respondent put the truck in reverse and did so. Respondent stated that she drove back until she "heard stop" and saw Ms. Blanding signal for her to stop by raising her arms. Respondent then stopped and set the emergency brake (Tr. 90-92). After three minutes, Mr. Archer came over and told respondent she had hit Ms. Blanding. Respondent got out of the truck and saw Ms. Blanding sitting in a safety truck some distance away. Ms. Blanding complained of neck pain (Tr. 92-93, 96).

The three eyewitnesses, Ms. Blanding, Mr. Archer, and respondent, presented conflicting accounts of how respondent backed up and then stopped her truck. Ms. Blanding insisted that she never signaled for respondent to back up, while Mr. Archer and respondent both testified that Ms. Blanding started to back respondent up. Mr. Archer and respondent both stated that Ms. Blanding then signaled respondent to stop. Mr. Archer said that respondent did not stop, while

respondent insisted that she did. Ms. Blanding and Mr. Archer agreed that the Flow Boy driver honked his horn and bystanders, including Mr. Archer, yelled at respondent to stop, while respondent never mentioned hearing this.

Of the three eyewitnesses, both respondent and Ms. Blanding exhibited a number of factors undermining their credibility. Respondent had by far the greatest interest in the outcome of the hearing and the most compelling reason to deny any misconduct. Respondent's account of stopping the truck immediately upon a signal from Ms. Blanding was contradicted by the testimony of Ms. Blanding and more importantly of Mr. Archer, both of whom stated that respondent's truck continued moving until it struck Ms. Blanding in the back of the head. Respondent's hearing testimony was also inconsistent with her statement to Mr. Rao at the time of the accident that she stopped because she heard a scream. In fact, the only way to credit respondent's hearing account of Ms. Blanding being positioned on the driver's side of the truck when it stopped was to find that Ms. Blanding lied about the truck striking her. Given the fact that the accident occurred on a public street with multiple eyewitnesses, including one who testified credibly that he saw the truck hit Ms. Blanding and then reported the accident immediately to Mr. Rao, this was clearly not credible.

One detail provided by respondent seemed more consistent with Ms. Blanding's account. Respondent contended that, when signaled to stop by Ms. Blanding, she immediately put on her emergency brake. The action of engaging the emergency brake was not consistent with a routine stop while being spotted. Instead, the use of the emergency brake suggested an awareness of an emergency, such as an accident, despite respondent's insistence that she had no idea what happened until several minutes after stopping.

In her statements, respondent provided another detail about Ms. Blanding that seemed implausible. In her hearing testimony, she insisted that, while Ms. Blanding was working, she was wearing earphones for her cell phone (Tr. 90). In respondent's recorded interview, respondent indicated that the earphones were the reason that Ms. Blanding must not have heard respondent pull the emergency brake (Pet. Ex. 9 at 5). These accounts were contradicted by the testimony of Ms. Blanding, who admitted that she used a Bluetooth earpiece for her phone but denied that she had it in place while working (Tr. 28-29). Mr. Archer also did not mention Ms. Blanding having earphones on. It seemed likely that respondent embellished this detail in an

effort to shift the blame for the accident to Ms. Blanding herself. It further diminished the weight I accorded to her testimony.

In general, I found Ms. Blanding to be a more biased witness than Mr. Archer. Ms. Blanding displayed some resentment toward respondent, whom she accused of rushing to dump her load before the end of her shift. Ms. Blanding may also have had some motive to avoid taking any blame for the accident and to make the injury appear worse than it was. According to Mr. Archer, Mr. Rao, and respondent, there were no visible injuries on Ms. Blanding. No medical records were submitted to corroborate her statement that she suffered a concussion. Given these circumstances, it seemed somewhat surprising that Ms. Blanding was absent from work for four months. It seemed plausible that Ms. Blanding may have embellished her testimony in part to justify this extended absence.

In Ms. Blanding's written statement about the incident (Pet. Ex. 3), written on December 4, 2011, also contradicted her trial testimony that she initially directed respondent not to move her truck. In the report, Ms. Blanding stated that, after respondent turned on to Lincoln Place, respondent began backing up without being spotted. Ms. Blanding wrote that she stopped respondent "right away" and then walked over to the Flow Boy truck and stopped some pedestrians from crossing. She heard "yelling and horns blowing" as the truck struck her in the back of the head.

Mr. Archer was a more reliable witness than either Ms. Blanding or respondent. He seemed to have no interest in the outcome of the hearing. He was also in the best position to observe the movement of the truck as it approached Ms. Blanding.

It is true that there were some inconsistencies between Mr. Archer's testimony and other evidence. While in his hearing testimony Mr. Archer indicated that he saw Ms. Blanding begin to spot respondent and back the truck up, he never mentioned this detail in either his written statement or in his pre-hearing interview. In the interview, Mr. Archer stated that Ms. Blanding and respondent spoke, respondent started backing up, and Ms. Blanding told her to stop, without mentioning that Ms. Blanding ever started spotting for respondent. Moreover, Mr. Rao recalled that, when he arrived on the scene, Mr. Archer told him that he didn't really see what happened (Tr. 84). At the hearing, Mr. Archer denied making this statement to Mr. Rao (Tr. 64).

Thus, while Mr. Archer's account was the most neutral eyewitness version provided, I found his failure to offer, in either of his previous statements, the detail that Ms. Blanding began to back respondent up significant. This inconsistency undermined Mr. Archer's testimony on this issue and, given the other contradictory accounts from Ms. Blanding and respondent, prevented a fact-finding as to whether respondent was being spotted by Ms. Blanding when she began backing up. Because petitioner bears the burden of proof, I found the conflicting testimony on this question inadequate to establish that respondent began to back up without being spotted at all.

The evidence, however, firmly supported a finding that respondent backed up the truck for several seconds without a spotter. On this point, I credited Mr. Archer's testimony, corroborated by that of Ms. Blanding, that Ms. Blanding signaled to respondent to stop but that respondent did not stop for several seconds. During these seconds, Ms. Blanding walked behind the truck to clear pedestrians and was struck in the back of the head.

Respondent's actions of backing up her truck for several seconds, without being able to view a spotter, then hitting Ms. Blanding in the head with the moving truck, violated the Department safety guidelines that a driver must have the spotter in sight at all times when driving a truck in reverse. Had respondent been watching Ms. Blanding, as required, she would have recognized that she did not have a spotter and should have immediately stopped the truck. Respondent's actions constituted a failure to use reasonable care, as required by Department Code of Conduct paragraph 24, and also neglect of duty under paragraph 31, conduct prejudicial to the good order under paragraph 2, and conduct tending to bring the agency into disrepute under paragraph 1.

Based upon the proof, I therefore find that both charges should be sustained.

FINDING AND CONCLUSION

Charges I, II, III, and IV should be sustained in that, on December 2, 2011, respondent backed up a truck without seeing a spotter in her side mirror, in violation of Department Code of Conduct paragraphs 1, 2, 24, and 31.

RECOMMENDATION

Upon making the above findings, I requested and received information regarding respondent's personnel history. She was appointed to the Department as an assistant highway repairer in 1990 and promoted to highway repairer in 1997. She has been disciplined three times. In 2007, she forfeited a day of annual leave for threatening a co-worker. In 2009, she was suspended for one day after being convicted of operating a vehicle under the influence. In January 2011, after a hearing at OATH before Judge Miller, she was suspended for eight days for insubordination. *See Dep't of Transportation v. Solli*, OATH Index No. 2888/10 (Jan. 26, 2011).

Respondent's evaluations are all favorable. Her 2009 evaluation was good or very good, and her 2010, 2011, and 2012 evaluations are all very good. While respondent's 23-year tenure and her very good evaluations demand mitigation of any penalty, her disciplinary history suggests that, at the same time, that an enhanced penalty of more than eight days is called for.

As discussed above, some of the facts surrounding the accident, such as whether respondent started to back up the truck without a spotter, could not be determined. In addition, Ms. Blanding's actions of signaling respondent to stop and then walking behind the truck seemed somewhat careless. The better course would have been for Ms. Blanding to confirm that respondent saw her signal and stopped the truck, before moving behind it. In addition, the extent of Ms. Blanding's injuries were not clarified by any reliable medical proof, except Ms. Blanding's own testimony that she was absent from work for several months.

Respondent's actions of driving backwards without being able to see Ms. Blanding, causing the truck to strike Ms. Blanding in the back of the head, constituted a breach of the safety guidelines deserving of a significant penalty. Although counsel for petitioner made no specific penalty recommendation, he cited to a number of cases where penalties of 15 to 45 days' suspension were given to employees found guilty of negligence in driving vehicles. In *Taxi & Limousine Commission v. Alvarez*, OATH Index No. 924/11 (Dec. 17, 2010), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-43-A (July 12, 2011), an inspector was suspended for 20 days for failing to yield the right of way, causing a collision. In *Department of Sanitation v. David*, OATH Index No. 766/07 (Jan. 25, 2007), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 07-101-M (Oct. 25, 2007), a sanitation worker was suspended for eight days for driving a truck off the road and other unrelated misconduct. In *Department of Sanitation v. Corley*,

OATH Index No. 1578/01 (May 31, 2002), *aff'd*, NYC Civ. Serv Comm'n Item No. CD 03-02-SA (Feb. 5, 2003), a sanitation worker was given a 45-day suspension for four driving incidents including backing a truck through an intersection and hitting a vehicle, clipping a tractor trailer, running a red light, and failing to yield to pedestrians in a crosswalk. In *Department of Sanitation v. Guastafeste*, OATH Index No. 658/00 (May 1, 2000), *aff'd*, 282 A.D.2d 398 (1st Dep't 2001) a sanitation worker received a 30-day suspension for the negligent operation of heavy equipment that resulted in two accidents and running a stop sign.

Based upon all of these factors, particularly respondent's prior disciplinary record and the seriousness of the safety violation, I recommend that respondent be suspended for 20 days for the misconduct found to have occurred here.

April 26, 2013

John B. Spooner
Administrative Law Judge

SUBMITTED TO:

JANETTE SADIK-KHAN
Commissioner

APPEARANCES:

JEREMY WEINSTEIN, ESQ.
DENETRA WILLIAMS, ESQ.
Attorneys for Petitioner

LICHTEN & BRIGHT, P.C.
Attorneys for Respondent
BY: STUART LICHTEN, ESQ.