Dep't of Correction v. Miller

OATH Index No. 1209/03 (Aug.13, 2003), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 04-43-SA (July 12, 2004)

Amendment of charges allowed, pursuant to relation back theory, where no prejudice shown and respondent had opportunity to litigate; police officer found to be more credible than respondent and respondent's witness; false entry on Sign In and Out sheet inferred from totality of circumstances and proven facts. Penalty: termination recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
LARRY MILLER
Respondent

REPORT AND RECOMMENDATION

DONNA R. MERRIS, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, the Department of Correction ("Department" or "DOC"), pursuant to section 75 of the Civil Service Law. Respondent, Correction Officer Larry Miller, is charged in four specifications with: engaging in outside employment without Department permission; making a false entry on his Staff Sign In and Out sheet for May 25, 2001; engaging in conduct unbecoming an officer by feigning illness and calling in sick on May 26, 2001; and, engaging in conduct unbecoming an officer by failing to inform his command in a timely manner concerning his arrest on May 25, 2001 and failing to inform his command of a court appearance on June 25, 2001.[1]

The hearing commenced before me on May 8, 2003, continued on May 20, 2003 and was concluded on June 5, 2003. Petitioner presented two witnesses: Department of Correction

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[1]The fourth specification concerning the failure to inform his command of the arrest and subsequent court appearance was withdrawn during the instant proceedings. *See* Transcript of May 20, 2003 at 145 and transcript of June 5, 2003 at 11-12.

Investigator Ernest Gaither and New York City Police Detective Sherman Austin. Respondent presented the testimony of a friend, Dale Coxson, and testified in his own behalf. Respondent denies the allegations.

For the reasons stated below, I find that petitioner has sustained specifications one and two by a preponderance of the credible evidence and recommend that respondent be terminated from his position as correction officer. Petitioner has not sustained specification three and that charge should be dismissed.

PRELIMINARY ISSUE

At the hearing, respondent objected to the amendment of the original charges dated May 31, 2001 to include the current specification two alleging that respondent made a false entry in his Uniform Staff Sign In and Out sheet for May 25, 2001 by indicating that he signed out of his facility at 2331 hours. Petitioner alleges that respondent left the facility prior to 2331 hours without permission or authorization. While it is undisputed that respondent was served with the amended charge, the acknowledgment of service does not show the date of service (ALJ Ex. 1). However, at the hearing, counsel for respondent and counsel for petitioner agreed that the amended charges were served two days prior to the commencement of the instant proceeding (Tr. I 4-5).[2] Thus, the amended charges were served on or about May 6, 2003.

Respondent argues that the amendment should be barred because it was not served until more than two years after the date of the incident, therefore, some six months after the 18-month limitations period applicable to Civil Service Law section 75 disciplinary charges (Tr. I 4; Tr. III 7). In addition, respondent argues that the multiple sections of the New York Penal Law cited in connection with the amended charge are inapplicable to the charge of making a false entry on the Sign In and Out sheet (Tr. I 4-5).

The Department advocate argues that ample precedent permits the addition of charges and the amendment of charges to accusatory instruments beyond the statute of limitations period when the amended charge or charges have a factual connection to the transaction described in the timely served instrument. Moreover, the advocate argues, the respondent was not prejudiced by the delay

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[2]Hereinafter, the transcript of the proceedings dated May 8, 2003 will be referred to as "Tr. I", the transcript dated May 20, 2003 as "Tr. II", and the transcript dated June 5, 2003 as "Tr. III".

in amending the charges because he had sufficient notice of the issues and alleged conduct to allow him to present his defense. Finally, petitioner argues that, pursuant to this tribunal's rules of practice, application to amend the charges may be granted by the administrative law judge (Tr. III 20-21). *See* 48 RCNY § 1-25.

This tribunal has held that amendment of otherwise time-barred charges in administrative proceedings should be freely granted under the relation-back doctrine of New York Civil Practice Law and Rules, (CPLR) § 203(f), absent irremedial prejudice, where the original pleadings give notice of the facts charged in the proposed amendment. *See Dep't of Correction v. Lee,* OATH Index Nos. 284-85/88 (Dec. 2, 1988).

Respondent argues that the addition of the charge that respondent falsified his time sheet on May 25, 2001 is not connected to the originally charged specifications relating to respondent's alleged actions in Brooklyn on the night in question. I disagree. The disciplinary proceeding is based on respondent's behavior the night of the alleged incident and respondent had ample notice of the facts on which the Department would rely in its prosecution of the charges and sufficient time to prepare his defense. Here, the added specification arose out of the exact same incident described in specification one. The only added fact concerns the time that respondent signed out of the facility, a fact known to respondent. Moreover, the amendment relates to the same events charged in specification one as respondent was on notice of the alleged time that he was observed in Brooklyn and the time of his arrest as alleged in the police reports provided to respondent. Finally, respondent does not argue that there are witnesses now unavailable, nor did he seek to call additional witnesses on the amended charge. Thus, respondent did not substantiate that he would be prejudiced in his defense of the allegation. In fact, respondent fully litigated the issue raised by the amended charge. Therefore, I find no prejudice accrued and the amendment should be allowed. *See Cerio v. New York City Transit Auth.*, 228 A.D.2d 676, 645 N.Y.S.2d 822 (2d Dep't 1996); *Gatto v. Brown*, 234 A.D.2d 22, 650 N.Y.S.2d 162 (1st Dep't 1996); *Police Dep't v. Strom*, OATH Index No. 546/00, at 3-4 (July 20, 2000).

ANALYSIS

The charges arose out of an incident which occurred between 11:30 p.m. on May 25, 2001 and 12:30 a.m. on May 26, 2001 at or near 2515 Atlantic Avenue in Brooklyn, the site of a social

club known as the Pussycat Lounge. It is undisputed that respondent was at the address when the New York City Police Department conducted a raid on the club. Respondent, along with several other individuals, including respondent's friend, Dale Coxson, was arrested at 12:30 a.m. on May 26, 2001. Initially, respondent was charged with violating Alcohol Beverage Commission Laws 100.01, the sale of alcohol without a license, and 64 (B), operating an unlicensed bottle club, and with criminal nuisance in the second degree pursuant to New York Penal Law section 240.45 (2) (Pet. Exs. 3A, 3B & 9). Respondent was issued a Desk Appearance Ticket returnable to Brooklyn Criminal Court (Pet. Ex. 3A) and released from the Police Precinct early on the morning of May 26, 2001 (Tr. II 137). Subsequently, any prosecution arising out of the arrest was declined by the Kings County Office of the District Attorney (Resp. Ex. A).

The three issues now before me are: 1) whether or not respondent violated Department rules and Directives relating to conduct unbecoming an officer and outside employment by working at the club absent permission from petitioner; 2) whether or not respondent left his facility earlier than indicated on his Sign In and Out sheet for May 25, 2001; and, 3) whether or not respondent feigned sickness later in the day on May 26, 2001 due to the arrest just after midnight on May 26.

Specification one: Failure to Obtain Authorization to Engage in Outside Employment

Respondent is charged with working as a manager at the unlicensed club and, as such, failed to obtain Department authorization to engage in the outside employment. Department Directive 2250R requires any member of the Department seeking to engage in off-duty employment to file a written request for permission to do so with the Chief of Administration, through the Commanding Officer of the employee's facility. Dep't Directive No. 2250R (III) (eff. Feb. 18, 2000). According to Department Rules and Regulations, a finding that members of the Department have violated any rules and regulations or engaged in conduct unbecoming an officer subjects the member to disciplinary action and possible dismissal from the Department. Dep't Rule 3.20.030 (eff. 1996).

Petitioner's proof with respect to this charge consisted of the hearsay testimony of Department Investigator Ernest Gaither, who testified as to the procedures he used to collect information related to respondent's arrest; the police department documents relating to the arrest; and, the testimony of New York City Police Detective Sherman Austin, who was acting as an undercover officer the night of the arrest, May 25-26, 2001.

Investigator Gaither testified that he was assigned to investigate a report that a correction officer had been arrested at a social club on May 25, 2001. After reviewing the Department's initial investigation report (Pet. Ex. 1), Investigator Gaither telephoned New York City Police Department (NYPD) Detective Joseph Rosetti, who was referred to as the arresting officer on police documents generated as a result of respondent's arrest, on May 30, 2001 (Pet. Ex. 3B). It is Investigator Gaither's testimony that Detective Rosetti informed him that it was not possible to speak to the undercover officer who had been present at the social club. Detective Rosetti then told Investigator Gaither that the undercover officer had been involved in surveillance at 2515 Atlantic Avenue for some three months prior to May 25, 2001. During that time, the undercover had observed respondent at the club "acting in the capacity of a manager" (Tr. I 17). At the time of the arrest, respondent had, on his person, a key that was confirmed by the Police Officers as one that belonged to the social club. The Police Department prepared a voucher for the key which indicates that the key unlocked the "roll down security gates at 2515 Atlantic Ave." (Pet. Ex. C). The arresting officers also confiscated some alcohol from the club (Tr. I 13-17; Pet. Exs. 3A, 3B, 3C).

During the course of his investigation, Investigator Gaither found that respondent had not requested permission from the Department to engage in outside employment as required by Department Directive 2250R. The Directive requires a member of service who wishes to engage in outside employment while off-duty, to submit a request stating the name of the establishment, whether or not a firearm is required for the employment, the hours the member will work, who owns the establishment and, the member must state the reason for making the request for outside employment (Tr. I 40).

As a result of his investigation, Mr. Gaither determined that respondent was at the unlicensed social club absent permission to engage in outside employment (Tr. I 41; Pet. Ex. 7).

One of the undercover officers who was at the club on May 25-26, 2001, NYPD Detective Sherman Austin, testified at the instant proceeding. According to his testimony, Detective Austin and two other undercover officers arrived at the club at approximately 23:20 hours and were told that the club was not open. The officers returned at 23:45 hours, at which time they were frisked by a man the Detective believes to have been Dale Coxson. Detective Austin then gave $20.00 to respondent, who was at the door. Inside the club, Detective Austin observed women walking around

"scantily dressed" (Tr. II 88) and giving lap dances. The Detective observed the serving of alcohol, however, Detective Austin saw no licenses of any kind displayed in the club (Tr. II 86-88).

After the undercover officers had been inside the club for a while, respondent came to the room and informed the patrons that the police were outside and that he was going to return the money they had given him. As the people left the club, respondent handed each some money (Tr. II 87).

The undercover officer's task was to observe the activity in the club, then, after leaving the premises, to radio the team of police officers that would effectuate the arrests to give descriptions of the persons to be arrested. Once the arrests were made, the undercover officers drove by the address in order to tell the field officers that the right persons had been arrested. Detective Austin drove by and identified respondent for the arresting officers (Tr. II 87). It is Detective Austin's testimony that he observed respondent take money from people at the door and make the announcement that the money would be returned and that people should leave because police officers were gathering outside the premises. The arrests were made at approximately 00:30 hours (Tr. II 88).

It is respondent's testimony that he went to the social club on May 25, 2001 to meet a friend, Dale Coxson. Respondent arrived at the club around midnight and met Mr. Coxson outside on the street. Mr. Coxson told respondent that he was doing the club bouncer a favor by "holding down" the door. Prior to May 25, 2001, respondent had gone to the club two or three times to meet his friend, Mr. Coxson, but respondent never entered the club, nor did he ever pay a fee to enter the club or buy alcohol while there. Respondent testified that the times he was at the club, he was there for only a few minutes. On May 25, 2001, police officers arrived and arrested respondent. Respondent, according to his testimony, did not have a key to the establishment in his pocket when he was arrested. Respondent denies working at the club or ever being compensated for anything he did at the club. He testified that he never met the owner or manager of the club and that he does not personally know the bouncer (Tr. II 117-120, 132, 134, 140-142).

Dale Coxson testified that, on the night of May 25, 2001, he was in front of 2515 Atlantic Avenue watching the door for a friend who runs the social club. The friend had gone to purchase some beer. Mr. Coxson, while he frisked people, was not an employee of the establishment, nor was he paid to watch the door for about ten minutes. Other people were outside the club, one of whom

was taking money. The person taking money was not respondent. Respondent came to the address and spoke to Mr. Coxson for about ten minutes, then moved away to speak to a girl. Mr. Coxson never saw respondent enter the social club. The police officers arrived and ordered Mr. Coxson to stand against the wall. When respondent came to see what was happening, the police officers told respondent to stand against the wall as well. The police officers took the men into the building where the arrests were made (Tr. II 147-51).

Much was made at the hearing of the hearsay evidence petitioner presented to support the allegation that respondent was acting as an employee of the social club. It is axiomatic that hearsay testimony may form the sole basis for a finding of fact in administrative proceedings. *People Ex Rel Vega v. Smith*, 66 N.Y.2d 130, 495 N.Y.S.2d 332 (1985). However, reliance on such evidence is not without limitation. The hearsay must be so substantially reliable and probative that a reasonable inference of the existence of a fact may be culled therefrom. *300 Gramatan Avenue Assoc. v. State Division of Human Rights*, 45 N.Y.2d 176, 179-80, 408 N.Y.S.2d 54, 56 (1978). Where respondent is afforded the ability to challenge the reliability and the sufficiency of the hearsay, and the manner in which it was obtained, respondent's rights are adequately protected. *See Taxi and Limousine Comm. v. Arisme*, OATH Index No. 1216/95 (June 13, 1995).

Here, the information on the arrest reports was obtained from the undercover officers by the officers involved in the arrest and recorded contemporaneously in the reports (Pet. Exs. 3A, 3B & 3C, 9). The information consistently identifies respondent as an "employee" or, that respondent was "acting like the manager" of the club. Most important, the police department voucher identifies respondent as having a key in his possession when he was arrested that operated the roll down security gate at 2515 Atlantic Avenue, the address of the social club (Pet. Ex. 3C).

Moreover, the reliability of this information is enhanced by the testimony of one of the undercover officers, Detective Sherman Austin. Detective Austin testified credibly, was straightforward and has no interest in the outcome of this proceeding. I credited the testimony that respondent collected the $20.00 entry fee to the club from the detective and that, when the police arrived, it was respondent who returned money to the patrons as they exited the club. These actions, in conjunction with the fact that respondent had a key to the building security gates, are clear indicia

of more than a casual relationship with the establishment. The logical conclusion to be drawn is that respondent was observed by the police officers engaging in a supervisory capacity at the club.

Respondent's general denial that he worked at the club and his denial that he was in possession of the key places the credibility of petitioner's witnesses and the official records of the police department against respondent's credibility. Respondent has a decided interest in avoiding the imposition of discipline. Most important, respondent's denial infers that the records are fabricated or that there was a misidentification of him by the police officers. While human error is always a possibility, the record is replete with references to respondent as the "manager" of the club. It is the focus on respondent in the arrest records and the fact that he was in possession of the key at the time of his arrest that serves to establish respondent's relationship to the club.

I did not credit the testimony of Dale Coxson that respondent was not the individual collecting the $20.00 entry fee on the night in issue or that respondent was arrested only after he returned to the arrest scene after speaking to an unidentified woman. On cross examination, it was established that Mr. Coxson, a former Department of Correction employee, believes that he was wrongfully terminated from the Department under circumstances unrelated to the instant matter. Thus, his testimony on behalf of his friend, Officer Miller, I found to not be credible.

Respondent had the opportunity to test petitioner's evidence and to examine the undercover police officer who participated in the surveillance of the club and who observed respondent at the location. Thus, where, as here, the hearsay evidence is corroborated by the testimony of an eyewitness at the hearing, respondent has had opportunity to test the reliability of the evidence.

Accordingly, I find that petitioner has established by a preponderance of the credible evidence that respondent was engaged in performing employment tasks at the social club.

Respondent argues that he was never compensated for anything he did at the club, therefore he was not an employee of the social club. It has been held that, even if such a claim of non-payment is credited, respondent may not be absolved of notifying the Department that he was engaged in the activity. *See Dep't of Correction v. Ryant*, OATH Index No. 369/87 (May 25, 1988). The purpose to be served by Department Directive 2250R is to allow the Department to monitor potential conflicts between an officer's primary responsibilities to his position and any outside work. The notice requirement is not strictly dependent on whether an officer is paid. To limit the definition of

employment in this context to work performed in exchange for compensation may only promote the consequences which the Department seeks to avoid. *Ryant*, at 13.

On the basis of the evidence before me and the inferences which may be drawn from that evidence, I find that respondent engaged in outside employment at the social club located at 2515 Atlantic Avenue in Brooklyn without notifying the Department in violation of Directive 2250R.

Specification Two: False entry on respondent's Uniform Staff Sign In and Out Sheet for May 25, 2001

Here, petitioner alleges that respondent engaged in conduct unbecoming an officer by making a false entry on the Department Uniform Staff Sign In and Out sheet for May 25, 2001. Petitioner alleges that respondent left the facility prior to the end of his tour without permission or authorization, but recorded a complete tour on the timesheet. Respondent signed in at 1431 hours and signed out at 2331 hours and was, subsequently, paid for a complete tour (ALJ Ex. 1; Pet. Ex. 4).

Department Rule 3.05.150 provides, in relevant part: "An employee's authority over a post ceases at the end of the employee's tour of duty when properly relieved. . ." In addition, Rule 4.30.020 provides:

> Members of the Department shall not make any false entries or notations or render any false reports concerning the business of the Department. . .

Department Rules (eff. 1996).

It is undisputed that respondent was scheduled to work the 15:00 to 23:31 tour at the Adolescent Reception Detention Center on Riker's Island ("ARDC") on May 25, 2001. Respondent signed into the facility at 14:31 hours and, the sign out sheet reflects that respondent signed out at 23:31 hours (Gaither: Tr. I 29-30; Pet. Ex. 4).

Petitioner infers from the police report (Pet. Ex. 3B), which states that the "time of the occurrence" was 23:20 hours, that respondent was at 2515 Atlantic Avenue when the undercover officers first arrived. While Detective Austin testified that he and his fellow officers arrived at the location at 23:20 hours, he did not testify that he saw respondent at that time. Detective Austin's testimony is that they were turned away from the club at 23:20 hours because it was not yet open.

It was at 23:45 hours, when Detective Austin returned to the club that he was frisked by respondent's friend, Mr. Coxson, and then gave respondent $20.00 as an entry fee to the club (Tr. II 86).

The credible facts before me lead only to the conclusion that respondent could not have left his facility at Rikers Island in Queens at 11:31 p.m. and travel to 2515 Atlantic Avenue in Brooklyn to arrive by 11:45 p.m.

Investigator Gaither testified that members of service are required to sign in the exact time of arrival at their facility and the exact time of departure when leaving the building. After changing from their uniform, officers sign out in the area of the front gate of the facility and begin the process of leaving the facility and Rikers Island. When leaving ARDC, the officer must show his/her shield and identification card to the front gate officer who releases the front gate of the building. Once out of that building, the officer must then walk for approximately five minutes to the Samuel Perry Control Center, where the officer again must show a shield and identification card, then wait to go through a turnstile in order to exit the Control Center. According to Investigator Gaither's testimony, the shift leaving at 11:31 p.m. is a busy one with many officers attempting to go through the control check points.

Once the officer is out of the buildings, he/she has access to either the immediate parking lot or a bus stop for transportation away from Rikers Island. It would take an officer ten to fifteen minutes to get to a vehicle in the parking lot. In order to exit the parking lot, the car must go through a checkpoint at which the officer must open the trunk and, again, present his shield and identification card. This inspection could take as long as ten to fifteen minutes. Departing the first checkpoint for the vehicle, the officer then must drive across a bridge, at the end of which is another toll booth checkpoint. The officer must again provide his shield and identification card as well as access to the trunk of the vehicle. This process could take another five to ten minutes. Thus, from the time an officer signs out at the front gate of the ARDC, it is estimated that it would take thirty minutes to exit Rikers Island.

Investigator Gaither testified that he lives in close proximity to 2515 Atlantic Avenue in Brooklyn. It is his experience that, absent heavy traffic, it takes twenty-five to thirty minutes to drive to that area of Brooklyn from Rikers Island. The approximate total time to exit the facility and leave

Rikers Island and drive to the area close to 2515 Atlantic Avenue in Brooklyn would be fifty-five to sixty minutes (Gaither: Tr. I 33-35).

It is respondent's testimony that he was properly relieved of his post on May 25, 2001 at 11:10 p.m. He proceeded to his locker to change clothes, then left the facility at 11:31 p.m. According to respondent's testimony, if anyone tried to leave the facility early, a department captain or deputy warden would see that person from the glass-enclosed control room. That evening, it took respondent twenty-five or thirty minutes to get to Brooklyn as the traffic was light and he arrived at the club around midnight (Tr. II 116-17).

Mr. Coxson testified that he called respondent's cell phone number and spoke to respondent at 11:40 p.m. Respondent said that he was still on Rikers Island (Tr. II 155). Mr. Coxson told respondent that, "[there are] a lot of girls [here] with fat asses and [you] should come by to check it out" (Tr. II 158).

In sum, the facts before me relating to this allegation are:

> 11:31 p.m. – respondent signed out at Rikers Island;
> 11:45 p.m. – undercover police officer testified that he gave respondent $20.00 at the location of the club in Brooklyn;
> 12:00 – respondent testified that he arrived at 2515 Atlantic Avenue, Brooklyn, after being relieved from his post at 11:10 p.m.;
> 12:30 a.m. – respondent was arrested.

I have credited Detective Austin's testimony that he gave respondent the $20.00 fee to enter the club at 11:45 p.m. The police officers involved in the operation that evening recorded their observations in contemporaneous reports as noted above. Moreover, I observed no bias against respondent on the part of Detective Austin nor did I find any motivation for the detective to fabricate his testimony. Accordingly, I find that Detective Austin gave respondent $20.00 to enter the club at 11:45 p.m. on May 25, 2001.

In addition, I credited Investigator Gaither's testimony as to the amount of time it normally takes to exit the facility, leave Rikers Island, then drive to the area of Brooklyn in which 2515 Atlantic Avenue is located. Investigator Gaither lives in that area of Brooklyn and is experienced in commuting to and from Rikers Island. As explained above, I did not credit Mr. Coxson's testimony.

Based on the credible testimony that it would take approximately one hour for an officer to leave his post, change clothes, exit the facility and Rikers Island, then commute to 2515 Atlantic Avenue in Brooklyn, respondent could not sign out at ARDC at 11:31 p.m. and be in Brooklyn at 11:45 p.m. Even if respondent left his post at 11:10 p.m. as he testified, he could not have commuted to the site in Brooklyn by 11:45 p.m., only thirty-five minutes after leaving his post. In any event, respondent's testimony is that he signed out at 11:31 p.m. Moreover, if respondent did sign out at 11:31 p.m., it is highly unlikely that he could have gone through two security checks before exiting the facility, walked to his car, gone through two more security checks to get off Rikers Island, commute to Brooklyn and arrive at the club at midnight, some twenty-nine minutes after he signed out.

Accordingly, the inference that must be drawn from the credible facts before me is that respondent left his facility, ARDC, prior to 11:31 p.m., the time indicated on his May 25, 2001 Sign In and Out Sheet. *See Francis v. New York City Transit Auth.*, 112 A.D.2d 994, 492 N.Y.S.2d 803 (2d Dep't 1985) (permitting inferences from findings of fact based upon facts proved).

Specification Three: feigned illness on May 26, 2001

Petitioner alleges that respondent, following his arrest and release on May 26, 2001, called in sick and feigned illness for his May 26, 2001 scheduled tour (ALJ Ex. 1).

Petitioner's proof of this allegation consists of a copy of respondent's Individual Employee Sick History (Pet. Ex. 5) which indicates that respondent called in sick on May 26, 2001 and that he returned to full duty on May 28, 2001. The sick code, 03, indicates that respondent complained of a gastrointestinal upset (Pet. Ex. 5 attachment). In addition, respondent's 2001 attendance sheet indicates that he was on sick leave on May 26, 27, 2001 (Pet. Ex. 6). Investigator Gaither testified that respondent did not report for work on May 26 and May 27, 2001, however, respondent was paid for those sick days (Tr. I 39).

It is respondent's testimony that he was released from the police precinct in Brooklyn around 8:00 a.m. or 9:00 a.m. on the morning of May 26, 2001. Respondent was scheduled for a tour of duty from 3:00 p.m. to 11:31 p.m. on May 26. He reported in sick that day with a stomach ailment (Tr. II 137). Respondent had been previously diagnosed with a stomach problem and had medication to relieve his symptoms. While he reported sick on May 27, 2001 and did not report for his tour,

respondent did go to his facility on May 27 in order to submit a report as to his arrest of May 26, 2001 (Tr. II 128, 138).

Petitioner has not shown by a preponderance of evidence that respondent feigned any illness on May 26, 2001 or May 27, 2001. Indeed, petitioner merely infers that, because respondent called in sick immediately following his arrest, he could not have been ill. Petitioner has no medical evidence to support the inference, nor is there any evidence that respondent was required to be seen by a Department doctor or required to present medical evidence of his illness for the two days. Petitioner's evidence does show that respondent had been absent from work due to a gastrointestinal ailment seventeen times between March 1, 1996 and May 26, 2001 (Tr. I 64; Pet. Ex. 5). Thus, there is some evidence to support respondent's testimony that he had a pre-existing condition. Undoubtedly, the events of the evening of May 25-26, 2001 were stressful for respondent. It is likely that the stress could have caused a gastrointestinal upset. *See Dep't of Correction v. Penisi*, OATH Index No. 981/00 (May 15, 2000) (where the evidence is equally balanced, the party having the burden of proving its case by a preponderance of the credible evidence has not met its burden). Here, the Department's inference failed to outweigh the credible evidence put forth by respondent.

Therefore, petitioner has not shown by a preponderance of the credible evidence that respondent feigned illness on May 26, 2001.

FINDINGS AND CONCLUSIONS

1. On May 25, 2001, respondent engaged in outside employment at a club located at 2515 Atlantic Avenue, Brooklyn, New York without notifying the Department of that employment and seeking permission to engage in outside employment, in violation of Department Directive 2250R.

2. On May 25, 2001, respondent made a false entry on his Uniform Staff Sign In and Out sheet. Respondent left the facility on Rikers Island prior to the time indicated on his Sign In and Out sheet in violation of Department Rule 4.30.020.

3. Petitioner has not shown by a preponderance of the credible evidence that respondent feigned illness when he called in sick on May 26, 2001 and May 27, 2001.

THEREFORE:

Petitioner has sustained specifications one and two by a preponderance of the credible evidence. Petitioner has not sustained specification three and the charge should be dismissed.

RECOMMENDATION

Upon making the foregoing findings, I requested and received a summary of respondent's personnel history in order to make an appropriate penalty recommendation. Respondent was appointed to his position as a correction officer on April 4, 1991. Respondent has a prior disciplinary record.

The record reflects that respondent was the subject of an arrest in 1993, however, the memorandum of complaint issued in that case was subsequently administratively filed by the Department. In 1999, respondent was arrested and the matter was resolved with respondent accepting the loss of eight vacation days. Respondent has received three unit citations in recognition of his work. The citations were awarded in 1996, 1998 and 2001. Respondent's use of sick leave is unremarkable. In the past three years, respondent has reported late to his tour on twelve occasions, nine of which were recorded in 2001.

In this proceeding, respondent has been found guilty of the serious misconduct of engaging in outside employment without authorization to do so from the Department and with making a false entry on his time sheet. The Department asks for a recommendation that respondent be terminated from his position as a correction officer.

Instances involving outside employment without prior authority do not always command a recommendation of termination of employment. *See Dep't of Correction v. Sorisio*, OATH Index No. 2110/96 (Apr. 30, 1997), *modified on penalty*, Com'r Decision (Mar. 31, 1998) (recommended 40-day suspension without pay modified to 60-day suspension, plus one-year probation as per negotiated plea). However, in some instances, termination has been imposed following a recommendation short of termination. *See Dep't of Correction v. Schmaeling*, OATH Index No. 384/84 (Jan 8, 1985) (respondent, while on medical leave, opened bar in the morning, swept the floor and occasionally ran business errands; recommended 60-day suspension increased to termination). Or, in some instances, a termination recommendation has been subsequently settled by stipulation. *Dep't of Correction v. Duffin*, OATH Index No. 1471/96 (June 25, 1996) (termination recommended;

agreement by parties that respondent would accept a thirty-day suspension and one-year limited probation).

Similarly, misconduct involving the falsification of official documents such as employee time sheets, often command a penalty recommendation of termination. *See Human Resources Admin. v. Williams*, OATH Index No. 2155/01 (Oct. 18, 2001), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD03-29-SA (Apr. 15, 2003); *Dep't of Citywide Admin. Services v. Done*, OATH Index No. 1119/02 (Apr. 3, 2002); *Health and Hospitals Corp. (Queens Hospital Center) v. Blackman*, OATH Index No. 389/98 (Nov. 3, 1997); *Human Resources Admin. v. Evans*, OATH Index Nos. 1313/90, 102/91 (Dec. 10, 1990), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 92-46 (Apr. 30, 1992) (falsification of doctor's note).

In the instant case, it is the combination of events that aggravates the penalty recommendation. Respondent was shown not only to have engaged in outside employment without authority, but was also shown to have falsified his time records. Moreover, his knowing presence at an illegal club and his arrest are actions that are antithetical to his status as a peace officer. *See Dep't of Correction v. Bradley*, OATH Index No. 336/82 (June 8, 1983) (arrest for presence at illegal gambling parlor served to bring discredit upon the Department). Respondent's conduct puts into question his character and fitness to maintain his status as a correction officer and peace officer. While respondent is a twelve year employee, he does have a history of prior arrests. Thus, I find no mitigating factors that would justify a penalty recommendation short of termination. *See Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 356 N.Y.S.2d 833 (1974) (deliberate acts involving dishonesty render mitigatory factors inapplicable).

Accordingly, I recommend that respondent be terminated from his position as correction officer.

Donna R. Merris
Administrative Law Judge

August 13, 2003

SUBMITTED TO:

MARTIN F. HORN
Commissioner

APPEARANCES:

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