Dep't of Education v. Brust

OATH Index No. 2280/07 (Sept. 29, 2008), *adopted*, Chancellor's Decision (Oct. 22, 2008), appended

Custodian engineer who told female secretary he loved her and persistently and obsessively sent her other messages of a romantic and sexual nature, offering to give her "the world," kept numerous candid photographs of her at his desk, repeatedly stared at her breasts and buttocks, and bought her lavish gifts found liable for sexual harassment and misconduct. Custodian engineer also found to have threatened retaliation against secretary for filing a sexual harassment complaint with the Department, and defrauded the Department of funds by paying four members of his staff for hours they did not actually work. Respondent was also intoxicated at work in elementary school during hours when children were at school. Charge of insubordination not proved and should be dismissed, as should charge that he grabbed or tried to grab secretary's shoulder. ALJ recommends termination of employment.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF EDUCATION
Petitioner
-against-
CRAIG BRUST
Respondent

REPORT AND RECOMMENDATION

JOAN R. SALZMAN, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, Department of Education (the "Department"), pursuant to section 75 of the Civil Service Law. Respondent Craig Brust ("Brust"), a custodian engineer, is charged with (i) insubordination; (ii) misconduct; (iii) sexual harassment; (iv) criminal conduct in the nature of fraud; and (v) neglect of his duties (ALJ Ex. 1). Respondent denies all of the charges.

A 14-day hearing was conducted before me on December 6, 7, and 13, 2007, January 15, 16, and 29, February 12 and 29, March 6, 7, and 27, April 16, and May 2 and 12, 2008.

Petitioner presented the testimony of Ms. L ("Ms. L"),[1] Francisco Rivera ("Rivera"), and John Lombardi ("Lombardi"), all cleaners at P.S. 188, Anthony Harris ("Harris"), the fireman at P.S. 188 in Coney Island, Sonia Maldonado ("Maldonado"), president of the P.S. 188 PTA, William Estelle ("Estelle"), Director of School Facilities for Staten Island Integrated Service Center, and George Nagy ("Nagy"), an investigator from the Office of the Special Commissioner of Investigation for the New York City School District ("SCI"). Respondent testified on his own behalf and presented the testimony of Matthew Wile ("Wile"), senior union official and custodian engineer, Robert Drach ("Drach"), custodian engineer, Gerald Smith ("Smith"), assistant cook at P.S. 188, Alison Nieves ("Nieves"), teacher at P.S. 188, Kimberly Koleci ("Koleci"), teacher and Dean of Student Discipline at P.S. 188, Pamela Harris, a retired New York City Correction Officer, alumna of P.S. 188, and member of local community organizations supporting young people, and Stephen Khadaroo ("Khadaroo"), the former fireman at P.S. 188.

For the reasons set forth below, I find that respondent engaged in misconduct -- sexual harassment, retaliation, fraud, intoxication at work, and neglect of his duties -- and recommend the termination of his employment. There was no proof that respondent grabbed or tried to grab Ms. L's shoulder (specification 18(b)), or that he was insubordinate, and those charges should be dismissed.

ANALYSIS

Respondent has been employed by the Department of Education for 31 years, the last five as the custodian engineer of P.S. 188, an elementary school located in Brooklyn (Tr. 2322, 2328). As a custodian engineer, respondent oversees the direct maintenance and repair of the school building and supervises a staff of employees, including a fireman and cleaners (Estelle: Tr. 1352). During the summer of 2004, respondent found that he was falling behind in his paperwork (Tr. 2334) and hired Ms. L, under the title of cleaner (Tr. 2334), to function as his secretary while school was in session. During the summers and other breaks, Ms. L worked as a cleaner, painting the school and cleaning (Tr. 568, 1058). Ms. L was the only female cleaner

[1] In keeping with the spirit of Executive Order No. 41 (Sept. 17, 2003), which defines certain domestic violence information as confidential, the version of this decision being published on the internet omits references to the complainant's name.

employed at P.S. 188, and the only female employee working for respondent during her tenure at P.S. 188 (Tr. 988, 2656).

In June 2006, respondent's and Ms. L's relationship began to sour (Brust: Tr. 2342; Ms. L: Tr. 563-67). In mid-October of that year, Ms. L spoke to the school's principal, Frederick Tudda, and complained of conduct allegedly directed towards her by respondent during the summer that she felt amounted to sexual harassment (Tr. 608-09, 614).[2] She told Tudda that respondent's actions had reached the point where she did not want to come to work anymore. In addition, she explained to the principal that respondent had come to work on several occasions intoxicated. Tudda advised Ms. L that she should call the Office of the Special Commissioner of Investigation for the schools (SCI) and file a complaint (Tr. 608-09). Ms. L called SCI and reported her complaint to Special Investigator Nagy. Nagy's written interview memorandum of October 20, 2006, indicates that he and Investigator Anderson interviewed Ms. L on October 19, 2006, at which time she told him of the cell phone call from Harris. In that call, Harris, acting on behalf of Brust, told her, in substance, that she was fired because she had filed a sexual harassment complaint against respondent (Pet. Ex. 1). SCI subsequently conducted an investigation which, it said, substantiated allegations that respondent had sexually harassed Ms. L, was responsible for financial irregularities involving Ms. L and three other custodial employees,[3] and engaged in misconduct by coming to work in an intoxicated state (Pet. Ex. 15). The Department now seeks termination of respondent's employment.

Respondent claimed that he was denied due process of law because (1) he was not given a full and fair opportunity to defend himself before formal charges were brought; and (2) there was no appointed Local Equal Opportunity Coordinator ("LEOC")[4] in the school who could investigate complaints of unlawful discrimination and provide information on equal educational and employment opportunities under Chancellor's Regulation A-830 (reissued April 28, 2008)

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[2] While Ms. L was initially unsure of the date of this conversation, she later testified that she received a phone call from Anthony Harris, which she recalled receiving on October 18, 2006, later in the afternoon on the same date (Tr. 614-15). She was able to recall the date because she attempted to record the phone call and contacted Mr. Nagy, the City's investigator, about the recording, which was offered into evidence (Pet. Ex. 9). Although the content of the recording (in CD form) is largely inaudible and has only the most limited utility or weight for that reason, I credit Ms. L's and Nagy's testimony that this call occurred on or about October 18, 2006.

[3] The Department officially charged respondent with financial irregularities involving fraudulent overpayment of four employees, including Ms. L, using Department funds.

[4] It is interesting to note that the LEOC procedure has been abandoned under the most recent revision of Chancellor's Regulation A-830 (2008), and complaints are now directed to the Department's Office of Equal Opportunity.

(Tr. 2925-26). This defense must be rejected. Respondent was not denied due process here. First, after Ms. L lodged her complaint with Principal Tudda, Tudda properly directed her to SCI. SCI then thoroughly investigated her complaint and did an extensive report, which respondent was given. Respondent was allowed to review the report with a union representative present, and respondent and his union representative, Joseph Reilly, both signed a Counseling Memorandum, dated May 8, 2007, as did Regional Facilities Manager Estelle, indicating that respondent was given an opportunity at a counseling session to review the SCI report, and was counseled about his obligation to interact lawfully and professionally with employees. Asked at this meeting whether there was any truth to the findings in the report, respondent stated that there was none, and respondent was reassigned to Long Island City until further notice, pending official charges (Estelle: Tr. 1431-34, 1439, 1447-48; Pet. Ex. 24), before any charges were brought. The Department did not violate its own procedures, as argued by respondent. Such notice and opportunity to be heard more than satisfies the procedural protections provided by section 2.1.6 of the Rules and Regulations for the Custodial Force in the Public Schools of the City of New York (Pet. Ex. 20 § 2.1.6). Moreover, respondent had a full opportunity to defend himself here in a full trial on the merits that took 14 days, and about 3,000 pages of transcript, with benefit of counsel of his choice, and the assistance of a second attorney who attended the trial and assisted him and his trial counsel throughout the proceedings.

Second, there was no failure of due process in the lack of training or absence of a LEOC at P.S. 188. Chancellor's Regulation A-830 is entitled "Filing Internal Complaints of Unlawful Discrimination/Harassment." It expressly provides that its procedures "do not deny the right of any individual to pursue other avenues of recourse," and there was nothing precluding Ms. L from going to the principal and to SCI. According to Regulation A-830, LEOC's serve primarily to assist complainants, in addition to providing information. Here, the failure of the Department to appoint a LEOC in P.S. 188 did nothing to curtail Ms. L's, much less respondent's rights. While the lack of any training classes about sexual harassment in P.S. 188 was undisputed, and sensitivity training would have been useful, respondent was charged with knowledge of the law, and, as a 31-year veteran of city government, he should have known better than to pursue a subordinate romantically after she asked him to stop. Regulation A-830 refers to "Federal, State and City laws" prohibiting, *inter alia,* gender-based and sex discrimination and retaliation for making a claim of discrimination. But even if there were no such departmental policy, the

absence of a school district policy on sexual harassment "does not bar discipline for harassment." *Becker v. Churchville-Chili Central School District,* 159 Misc. 2d 22, 25, 602 N.Y.S.2d 497, 499 (Sup. Ct. Monroe Co. 1993); *Petties v. N.Y.S. Dep't of Mental Retardation & Developmental Disabilities*, 93 A.D.2d 960, 961, 463 N.Y.S.2d 284, 286 (3d Dep't 1983) (sexual harassment constitutes "misconduct" under section 75 of the Civil Service Law "regardless of the absence of a specific departmental regulation declaring it so"). In *Becker,* the court reviewed allegations that a male bus driver was sexually harassing a co-worker, and while the court found no hint of sexual harassment on facts distinguishable from those here, it ruled that the school district, "like other employers, would be liable under Federal and State law for failing to stop work place harassment, regardless of its written or de facto policies, and it would certainly be justified in investigating complaints and disciplining violators in the absence of these." *Becker,* 159 Misc. 2d at 25, 602 N.Y.S.2d at 499. *See also Transit Auth. v. Kerr,* OATH Index No. 1234/00 (May 10, 2000), *modified on penalty*, Auth. Decision (July 18, 2000), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD03-22-M (Feb. 5, 2003) (supervisor who made discriminatory statement suspended 15 days despite lack of Equal Employment Opportunity ["EEO"] training). As noted in *Dep't of Correction v. Hansley*, OATH Index No. 575/88, at 32 (Aug. 29, 1989), *aff'd sub nom. Hansley v. Koehler*, 169 A.D.2d 545, 564 N.Y.S.2d 398 (1st Dep't 1991), "No rule or directive is required to make a finding of sexual harassment as misconduct."

Respondent's own subordinates warned him that he could lose his job if he did not control himself and asked him on several occasions to leave Ms. L alone (Rivera: Tr. 1151-5; Lombardi: Tr. 1466-67). He did not misunderstand the rules of conduct. To this day, he denies violating them. He was simply unable or unwilling to control his behavior.

As a preliminary matter, respondent's counsel objected to the introduction of the SCI investigation report and testimony of Investigator Nagy as hearsay. Counsel also argued that the investigation was deeply flawed. To the extent that I have referred to hearsay in this report and recommendation, including the SCI investigation report, I have done so in a limited way, using the report as a record of contemporaneously recorded statements of witnesses by a neutral investigator, who displayed no personal bias and no reason to fabricate or embellish the evidence. He was assigned this investigation and carried it out professionally. I have not relied on such hearsay heavily or exclusively in reaching my decision; non-hearsay evidence of witnesses directly involved in the events independently supports these findings. It is worth

noting that hearsay, with few limitations, is admissible in administrative proceedings, and may form the sole basis for an administrative adjudication if sufficiently probative and reliable. *See* N.Y. Civ. Serv. Law § 75(2) (Lexis 2008) (in civil service disciplinary hearings "[c]ompliance with technical rules of evidence shall not be required"); 48 RCNY § 1-46 (Lexis 2008); *Matter of S & S Pub, Inc. v. New York State Liq. Auth.,* 49 A.D.3d 654, 852 N.Y.S.2d 804 (2d Dep't 2008); *Matter of Café La China Corp. v. New York State Liq. Auth.,* 43 A.D.3d 280, 281, 841 N.Y.S.2d 30, 32 (1st Dep't 2007); *Dep't of Correction v. Graham*, OATH Index No. 1380/03, at 25 (Feb. 25, 2004), *modified on penalty*, Comm'r Dec. (Aug. 6, 2004), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD07-83-M (July 27, 2007). I found Investigator Nagy's report to be sufficiently probative and reliable to provide a contemporaneous record of his investigation, which captured the recollections of the witnesses closer to the time of the relevant events than the time of trial, beginning about a year and-a-half-later. Nagy's investigation, while not perfect, was impartial and fairly accurate in the essential points material to this matter.

During the trial, respondent argued that Nagy's investigation was flawed in that he did not interview certain potential witnesses or ask particular questions. Several of respondent's witnesses, including respondent himself, noted segments of Nagy's report where they claimed Nagy either attributed to them something they did not say or omitted statements they did make. Respondent, however, is entitled to a proper and fair investigation, not a perfect one. *See generally In re Schiff*, 83 N.Y.2d 689, 694, 613 N.Y.S.2d 117, 119 (1994) (record did not support claim that the Commission on Judicial Conduct violated a duty to conduct a fair investigation of the charges by failing to contact or call certain potentially exculpatory witnesses). While there were some minor deficiencies in the investigation, as noted by both respondent and the Department, SCI conducted an investigation that was fair and reasonable. To the extent that respondent, Smith, Harris, and Maldonado asserted that the SCI report misrepresented portions of what they said, I credit the report containing contemporaneous, reliable witness statements, albeit hearsay, over their sworn, contradictory and dubious trial testimony. I found that these four witnesses each had strong motivations to alter their testimony since the initial investigation, including self-preservation in the case of respondent and loyalty to respondent on the part of the other three. *See, e.g., Douglas v. Constantine,* 151 A.D.2d 811, 812-13, 542 N.Y.S.2d 400, 401 (3rd Dep't 1989) (confirming administrative determination finding state police officer guilty of assaulting his wife despite wife's recantation at trial of initial

hearsay statements regarding the assault, where trial testimony was contradicted by other evidence and appeared "rehearsed"); *Bd. of Education v. Roman,* OATH Index No. 1555/97, at 10-13 (Sept. 30, 1997) (crediting contemporaneous hearsay in SCI investigation report about date letter was received over less reliable trial testimony where investigator was unbiased); *Dep't of Correction v. Boyce,* OATH Index No. 789/97, at 14-15 (July 9, 1997)*, aff'd,* NYC Civ. Serv. Comm'n Item No. CD-99-75-SA (July 19, 1999) (crediting contemporaneous hearsay statement of victim of assault over his one-word answer, "no," on cross-examination, indicating he could not recall the role of respondent in an altercation, where previous hearsay statement was more detailed and it was not clear whether victim had understood the question on cross-examination); *Transit Auth. v. Graves,* OATH Index No. 720/91, at 4-5 (June 19, 1991) (crediting hearsay statement of bartender that respondent, his longtime friend, had been in his bar, over the sworn testimony of the bartender denying the same, where the hearsay statement was made just hours after the incident and "probably before" the bartender was aware of the consequences for respondent of being in a bar in uniform while on duty); *Police Dep't v. Pena,* OATH Index No. 692/90 (May 4, 1990) (hearsay statement in which complainant accused the respondent police officer of domestic violence was credited over subsequent sworn testimony in which the complainant offered other explanations for her injuries).

In a disciplinary proceeding, the Department "has the burden of proving its case by a fair preponderance of the credible evidence, which has been defined as a showing that the incident in issue was 'more likely than not' to have occurred as credibly described." *Dep't of Correction v. Holston*, OATH Index No. 592/04, at 11 (Sept 29, 2004) (citing *Bazemore v. Friday*, 478 U.S. 385, 400-01 (1986)). It is therefore necessary to sort through the testimony and documentary evidence to discern whether one version of the facts is more credible than the other. Often the resolution of disputed facts hinges on the assessment of witness credibility. "There is no more fundamental nor often more difficult task for a trier of fact than the resolution of a controversy between two parties based solely on an assessment of their respective credibilit[y]. No magic formula exists by which a trier of fact may separate with certainty truth from fiction in a witness' account. At best, the task remains an exercise of carefully reasoned judgment, aided by the consideration of such factors as witness demeanor; consistency of a witness' testimony; supporting or corroborating evidence; witness motivation, bias or prejudice; and the degree to which a witness' testimony comports with common sense and human experience." *Dep't of*

Correction v. Hansley, OATH Index No. 575/88, at 19 (Aug. 29, 1989), *aff'd sub nom. Hansley v. Koehler*, 169 A.D.2d 545, 564 N.Y.S.2d 398 (1st Dep't 1991); *see also Dep't of Sanitation v. Menzies*, OATH Index No. 678/98, at 2-3 (Feb. 4, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998).

Much of the testimony elicited at the trial was troubling because the atmosphere at P.S. 188 became so poisoned that a number of the employees, including cleaners, a teacher (Tr. 2069-70), and one of the cooks, filed employment or police complaints against others on the job and/or were said to have threatened each other or their family members in various ways, either with physical harm or with jeopardy to their employment. I have omitted reference here, to the extent possible, to arrests of any individual school personnel, except the one arrest alleged in specification 8, because arrest alone does not prove criminal conduct and the fact of other arrests of nonparties is not strictly necessary to this analysis, except as to credibility of those who might bear grudges where matters escalated to calling police about each other; there is no need to include their names in connection with arrest records in this report and recommendation. Tensions were so high that concerns are raised by this record about the effect this kind of dissension among the school staff may have had on the small children attending this elementary school. It was remarkable that gossip mongering among the kitchen, custodial, and teaching staff concerning respondent and Ms. L was rampant. A once harmonious workplace was upset by either sexual harassment if petitioner's version is to be believed, or by the denial of a newly opened fireman's position to one of the cleaners supposedly allied with Ms. L if the respondent's theory is credited. Either way, it is clear that Ms. L and respondent were frazzled by the tension in the workplace and many of their colleagues were drawn into this morass. It is this toxic atmosphere that permeated much of the testimony. The witnesses fell into two camps: those who favored Ms. L and those who favored respondent. Some of the witnesses professed bias, while others conceded or denied it.

I found respondent to be an incredible witness, who had a powerful motive to fabricate his testimony to avoid being disciplined. *See Human Resources Admin. v. Berkley*, OATH Index No. 631/08, at 4 (Jan. 8, 2008). In this respect, respondent was evasive and often refused to answer simple questions posed to him. When he did choose to provide answers, his testimony was often unbelievable, fraught with inconsistencies and contradictions. His answers often

appeared rehearsed and unnatural, as if he were trying too hard to make the facts fit his legal defenses.

For example, respondent was questioned by the Department in regard to extra time Harris, the fireman, may have worked off the clock during 2006, a justification respondent provided for paying Harris for hours he did not work on August 22, 2008. Respondent initially testified that he had a very specific recollection of Harris coming to work on particular days, exactly a half-hour in advance of his start time and working for that half-hour before punching in (Tr. 2508-09). On the next trial date, he retracted part of his testimony after learning that Harris did not come in at all on one of the days he had previously testified he was sure about, but remained steadfast in his assertion that Harris worked extra time on other days; he then conceded he was mistaken, but only as to one day (Tr. 2880-84). Respondent's assertion that he could remember, to the minute, the exact time his employees showed up for work before they punched in on specific days of the summer almost two years before strained credulity, and he was, by turns, combative and defensive during the recross-examination on this subject.

Respondent's late-starting attempts to restore his credibility on these subjects on re-direct, at a subsequent, continued hearing session after more than two weeks had passed, from April 16th to May 2nd, by claiming that he was "exhausted," "agitated," and "aggravated," when he testified that he was sure of every minute of unrecorded overtime his men worked "exactly," were transparent rationalizations that seemed rehearsed and were unconvincing for that reason (Tr. 2813-17). He then attempted to retract his testimony that he knew his men often worked "exactly" 30 minutes extra by saying that he really meant the opposite: not exactly 30 minutes (Tr. 2816-17). None of this testimony was persuasive.

Similarly, respondent asserted during trial that two letters addressed to Ms. L, dated October 20 and 24, 2006 (Pet. Exs. 4, 5), were actually post-dated, in that he had written the letters weeks before, rather than after, October 18, 2006, the date Ms. L lodged her complaint against him with the principal. The first time respondent claimed the letters were post-dated was at this trial, despite an extensive pre-trial investigation in which he offered no such explanation when given the opportunity to do so in the fall of 2006. When first questioned by Investigator Nagy in early December 2006 about the letters, as part of the SCI investigation, respondent failed to inform him of this important information. It is odd that respondent would omit such a vital fact, if true, and I conclude that the reason respondent did not tell Nagy that the letters were

post-dated was simple: they were not. Rather, this defense represents a reinvention of the truth, crafted after-the-fact to refute the accusation of retaliation.

Considering the record as a whole, therefore, I find the principle *falsus in uno, falsus in omnibus* -- false in one thing, false in everything -- applicable to respondent's testimony. Although respondent's counsel argued in closing that this principle should be applied to Ms. L's testimony (Tr. 2928, 2936, 2947-48), I find that it more aptly describes respondent's. Moreover, respondent was shown by the Department's proof to have been unduly preoccupied with Ms. L and acted as if he perceived and craved a more significant and personal relationship with her than that of supervisor and subordinate.

Additionally, although respondent offered many witnesses, I found much of their testimony to be largely irrelevant to the charges at issue and often vague.[5] A number of respondent's witnesses were character witnesses who possessed no personal knowledge of the events at issue in this case, and some of those who did had worked under his supervision or closely with him and professed or admitted their loyalty to him. Khadaroo, for instance, left the school in May 2006 and was not present during the summer of 2006 (Tr. 2259), when the key events at issue took place. Pamela Harris, an alumna of the school, community organizer and champion of children, and a retired New York City Correction Officer, who testified about respondent's wonderful contributions to the school and community, first testified that she was at the school often in the summer of 2006 ("almost every day") and never saw respondent intoxicated at school, but she later realized that she was not even at the school during that summer because she was recuperating from an illness that kept her out of work during the relevant period (Tr. 2622, 2652-53). Thus, this sort of testimony was simply not useful, as the witness really had no relevant knowledge about the intoxication charge. With few exceptions, respondent's witnesses were clearly heavily biased in his favor. For example, one witness, a teacher and the dean of student discipline at P.S. 188, in a failed attempt to paint Ms. L in a

[5] Their undisputed testimony of respondent's outstanding record in taking a school in poor condition and turning it into a well-maintained school and model for other school maintenance programs is generally relevant to liability to some degree, but more germane to penalty and I have considered it fully in evaluating the penalty sought.

negative light, called her "white trash"[6] (Koleci: Tr. 2133). Such demeaning language betrayed the speaker's extreme bias against Ms. L and was emblematic of the partiality of many of respondent's witnesses in this matter; it did nothing to detract from Ms. L's credibility.

Somewhat surprisingly, I also found a similar, if less blatant, bias against Ms. L and in favor of respondent, in the testimony of two of the Department's witnesses, Anthony Harris and Sonia Maldonado. These two Department witnesses turned out to be hostile to the agency and I found them so. Maldonado, the president of the PTA at P.S. 188, began crying while on the witness stand at the thought that her testimony or her prior statements to SCI about her observations that respondent was intoxicated at the school could hurt respondent. I found Ms. Maldonado's retraction of her detailed and credible, contemporaneous account of her urgent instruction to Rivera to get respondent off the floor where the principal's office was located because respondent was drunk, to be thoroughly unreliable. This was a change of heart and an obvious effort to save respondent from any adverse employment consequences of a finding that he was drunk at school (Tr. 1583, 1598). Harris expressed loyalty and thankfulness to Brust for promoting him at P.S. 188: "I'm thankful, yes. Grateful also, yes" (Tr. 1610). Harris harbored anger and resentment towards Ms. L, who appeared to have played a part in his having been removed from P.S. 188 for *seven months without pay* in 2007 after she complained about him to police. (Tr. 1631-32). Asked if he held it against her that on her complaint he was out of work, Harris said he did: "In a sense, yes" (Tr. 1632).

The other Department witnesses, particularly Ms. L and Rivera, although not unbiased themselves, presented more consistent and credible testimony than did respondent and his witnesses. Ms. L did not waver in her description of the events and the conduct of respondent during the summer of 2006. She was uncomplicated and direct. Rivera, similarly, gave

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[6] This expression is defined as "disparaging and offensive slang." *See* www.dictionary.com. On re-direct, respondent's counsel called upon the witness to give her opinion of Ms. L by following up on a line of cross-examination about a meeting between the witness and Victor E. Muallem, Esq., agency counsel, prior to trial for a witness interview. The witness had two union representatives at that meeting. On cross, Mr. Muallem asked whether she recalled Mr. Muallem asking if she had anything else to tell him at their pre-trial meeting. She answered at trial that she did not recall saying to him at that time that the tension at the school was attributable to the controversy about the fireman's job, not sexual harassment. On redirect, respondent's counsel elicited the insult from the witness when he asked her if she had told Mr. Muallem anything else when Mr. Muallem gave her that opportunity in their pre-trial interview. She answered: "I told him she's white trash" (Tr. 2096-97, 2133). If this comment was intended to induce the tribunal to subscribe to the notion that Ms. L was either untruthful or entitled to no consideration of her claims because she was promiscuous, as respondent's counsel argued throughout, the gambit failed because the credible evidence supported neither point. The defense strategy of insisting on getting this kind of slur on the record is obscure.

consistent, convincing testimony. I found him to be a trustworthy witness with nothing to gain by lying. Both, however, were at times hampered by the events at issue having taken place nearly two years prior, as they were at times unsure of exact dates of events or the exact words that might have been spoken in certain conversations. Nonetheless, I found this to be a natural consequence of the amount of time that had passed since June 2006. Indeed, the testimony of respondent and his witnesses who claimed to be able to remember exact dates and times of the events at issue was less credible, given the passage of time.

During the trial, respondent frequently sought to attack Ms. L's credibility. He asserted that Ms. L fashioned the charge of sexual harassment in order to bring a civil lawsuit against him. I find this implausible for two reasons argued by Department counsel in closing (Tr. 2971). First, Ms. L's claim is that respondent sought an intimate relationship with her and, when she refused him, persisted in his romantic pursuit. Were the complainant to have fabricated charges, as respondent contends, would she not have invented a tale of more overt sexual harassment in more explicit terms than the claims here if money damages were her prime motivation? Second, she would have to be prescient and a great deal more sophisticated than her demeanor and testimony showed her to be. She did not present herself as a complex and canny individual, and I find it unlikely that she invented her claims, given the genuine upset she exuded about her workplace when she was on the witness stand.

Respondent, along with several of his witnesses, claimed that Ms. L, with the aid of Rivera, fabricated the allegations of sexual harassment and intoxication in order to exact revenge against respondent for his not promoting Ronald McDonald, another cleaner, to the position of the school's fireman after Khadaroo, the prior fireman, left. Once respondent learned that Khadaroo was leaving, he posted an opening for the position of fireman (Brust: Tr. 2351). According to respondent, Ms. L became extremely upset by this, as she had felt the job should have been given to McDonald based on seniority and service (Brust: Tr. 2355). Throughout the job search, according to respondent, Ms. L yelled at him that he should hire McDonald (Brust: Tr. 2356, 2365). Ms. L acknowledged that she wanted McDonald to get the job of fireman and that once respondent had decided to hire Harris rather than McDonald, she told respondent that he was making the wrong decision (Tr. 766, 837-38). She denied, however, that this disagreement was a factor in her decision to file a complaint of sexual harassment against respondent. While much testimony was elicited at trial concerning this defense about the

fireman's job (Harris: Tr. 1686, 1688, 1702; Smith: Tr. 2145-46, 2157, 2213), respondent never mentioned it to Nagy back in December 2006, when Nagy interviewed him (Pet. Ex. 1). I found this defense to be highly speculative and implausible, and I reject it. *Human Resources Admin. v. Dare,* OATH Index No. 1806/99, at 7-9 (Nov. 8, 1999), *modified on penalty,* Comm'r Dec. (Nov. 23, 1999) (rejecting unproved conspiracy defense to charges of sexual harassment).

The notion that Ms. L hatched a plot to get back at respondent by concocting a sexual harassment lawsuit for herself because he did not promote Ronald McDonald, a colleague, was absurd and unsupported by the credible evidence. There was no credible proof that Ms. L was so close to McDonald that she would go to all this trouble to fabricate a claim for herself simply to settle a score for McDonald (Tr. 2960).

Further, for Ms. L to have fabricated the allegations concerning sexual harassment, she would have to be clairvoyant (Tr. 2952), to know what actions respondent was going to take before he even took them. While Ms. L admitted that she had searched respondent's desk and files to look for evidence against him (Tr. 751), such behavior seems to have been solely a response to respondent's conduct towards her (Tr. 807), as she moved to protect herself. She could not retrieve the memoranda he had not yet written at the time of her search. The charges against respondent span several months, and it is implausible that Ms. L could have known in June 2006, when their relationship began deteriorating, that respondent would send her flowers in August 2006 or try to fire her and change her work hours in October 2006.

I find, therefore, that the Department has proved all of the remaining charges,[7] with the exception of the charge of insubordination. No testimony or other evidence was elicited during the trial that would establish that respondent was insubordinate, and it would be duplicative to hold him liable for insubordination simply because he violated agency rules and regulations that reflect misconduct otherwise proved on other counts. Accordingly, this charge should be dismissed. The voluminous testimony and other evidence that was elicited fall into four general categories of proven misconduct: (1) sexual harassment of Ms. L; (2) intoxication at work, in connection with sexually harassing behavior; (3) threats of retaliation against Ms. L for filing the sexual harassment complaint; and (4) fraudulent use of Department funds.

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[7] Specification 1(a) was withdrawn in part by the Department during closing (Tr. 2948). In addition, I have found that respondent defrauded the Department, but do not reach the question of whether he has engaged in criminal conduct, which is beyond the scope of this proceeding. Specification 18(b), alleging that respondent tried to grab Ms. L to prevent her from leaving the office on October 19th, was not proved and should be dismissed.

<u>Sexual Harassment (Specifications 1, 2, 3, 4, 5, 7, 8, 9, 14, 15 & 16):</u>

Specification 1:

The Department alleges that during June 2006, respondent yelled at Ms. L to stop talking to a teacher at the school and thereafter apologized, stating words to the effect of, "That's what happens when you have feelings for someone" (ALJ Ex. 1). It is undisputed that respondent did not yell at Ms. L *in front of* the teacher, and that part of specification 1(a) was withdrawn. But the rest of the claim remains and was proved.

According to Ms. L, respondent first articulated a romantic interest in her in June 2006. She explained that after classes finish each year, she distributes garbage bags to the teachers at the school. As she was distributing bags, a new teacher, Evan Mirenberg ("Mirenberg"), asked her how he should store the things in his classroom because during the summer break the custodial staff was going to be painting the classroom. Ms. L was in Mirenberg's classroom for between five and ten minutes and at all times had her walkie-talkie on her person (Tr. 564). After she finished speaking with Mirenberg, she went down to the school's second cafeteria, where McDonald was mopping and sweeping (Tr. 564). Respondent radioed her and asked, "Ms. L, do you think you can come to the office now?" Ms. L responded that she was in the cafeteria with McDonald and respondent said, "[O]kay, can you come to my office?" She proceeded to his office. As she arrived, respondent came out of the office, followed by two women, one of whom was Pamela Harris, the community leader. Respondent said, "[Y]ou know, if you wanted to go upstairs, you know, you could have just told me." Ms. L asked him, "[W]hat are you talking about?" Respondent repeated, "[If] you wanted to go upstairs, you could have just told me" (Tr. 565). The next day when Ms. L arrived at work, respondent was putting paperwork on her desk. Neither said good morning to each other; instead there was what Ms. L described as "like an awkward silence." Respondent held out an envelope for Ms. L to take. When she grabbed it, he held on to it. Ms. L looked up at him and he said, "I'm sorry for snapping at you yesterday the way I did. That's what happens when you have feelings for someone." Respondent then walked out of the office and went down to the boiler room (Tr. 566-67).

Respondent explained that on the day Ms. L testified he reprimanded her, he was scheduled to meet with several community leaders, including Pamela Harris, to discuss the construction of a new gymnasium for the school. Respondent indicated that when the

community leaders arrived about 3:00 or 3:30 p.m., Ms. L was not in his office, where she was supposed to have been. He tried calling her using the walkie-talkie function of their phones but was unable to contact her. He then went looking for her in the school and ultimately found her in Mirenberg's classroom. The two were talking with the door closed (Tr. 2363). Respondent did not enter the classroom but instead went back to his office because he was still waiting for several more people for the meeting (Tr. 2363, 2667, 2670). Respondent then took the group to Tudda's office; Ms. L was already at Tudda's office when he got there (Tr. 2363). Respondent admitted that he was "a little loud and angry" when he spoke to Ms. L in a "rough tone" at that time because it was an important meeting and he was "mad" at her (Tr. 2363-64). Respondent testified that the next day he apologized to Ms. L for being "a little loud and angry" but denied that he said anything to the effect of his reaction being the result of having feelings for her (Tr. 2364, 2784).

Because there was no testimony that respondent yelled at Ms. L instructing her to stop talking to a teacher (Mr. Mirenberg), that specification was not proved precisely as pleaded and the Department withdrew it, I conclude, in relevant part, during closing arguments because Ms. L testified that respondent did not yell at her in front of Mirenberg (Tr. 566, 750, 2948). But Brust did concede that he "snapped" at Ms. L because of her being up in Mirenberg's classroom when he wanted her. I find Ms. L's account of her conversation with respondent in early June to be the more believable one, and the incident with Mirenberg remains in the case as part of the ongoing sexual harassment allegations even though there was no proof that respondent yelled at Ms. L in front of Mirenberg (Specifications 1(b), 3). Ms. L was detailed in her account of the day she spoke with Mirenberg. She admitted spending time in Mirenberg's classroom and not being in respondent's office. On the other hand, respondent's version of this incident is improbable. Respondent testified that he was concerned about his visitors because Ms. L was not there. It does not make sense that he would then leave his visitors alone as he wandered the school looking for Ms. L. It is equally unlikely that after taking the time to look for Ms. L, respondent would not say anything to her at the time he found her. Further, if respondent's version was accurate, I find it doubtful that respondent would have apologized to Ms. L for reprimanding her when she was not where she was supposed to be. As her supervisor, respondent would have had every right to tell Ms. L to be in his office at a certain time, and when she failed to be there, it would have been appropriate that he tell her she should have been there. I see no reason for

which respondent would apologize to Ms. L unless he had an additional agenda in doing so. In this case, that agenda was expressing his feelings for her.

I find it more likely than not that respondent did express to Ms. L his feelings for her, acting in a way that revealed jealousy of the attention she paid the teacher when she was not in the office at a time respondent wanted her there.

Specification 2:

The Department alleges that on several occasions during the summer of 2006, respondent stared at Ms. L, specifically her breasts or buttocks, while she was painting classrooms.

Ms. L testified that during the summer of 2006 through October 2006, respondent often came into classrooms where she and Harris were painting, said hello to Harris, and then stared at her buttocks or breasts "blatantly," and "for a long period of time" (Tr. 571-72). One time, respondent stood behind and stared at Ms. L while she was painting a baseboard, which required her to lie on the floor (Tr. 874-75). Respondent's staring made her feel "nervous, uncomfortable, angry" (Tr. 572). When it got "really bad," such as when respondent stared at her for periods of time more than a minute, Ms. L told him that she felt uncomfortable. She asked him, "What are you looking at? Why are you staring at me?," but he would not look away (Tr. 569, 571, 572, 650). Ms. L testified that the staring got progressively worse during the summer. She stated that at times respondent came to work drunk; on these occasions, he stared at her for longer periods of time (Tr. 573). Ms. L felt that respondent was not checking her work during these incidents (Tr. 875), that he was leering at her.

Rivera corroborated much of Ms. L's testimony, stating that he painted with her on several occasions in early summer 2006. On some of these occasions respondent stared at Ms. L; Rivera believed that sometimes respondent was drunk (Tr. 1112). Rivera described one incident where he and Ms. L were painting a classroom and he looked towards the door. He saw respondent staring in through the window in the door at Ms. L, who was on the other side of the room, for at least a minute (Tr. 1112, 1114, 1193). He said that he told Ms. L that respondent was staring at her, and she turned to look and saw him for herself (Tr. 1112). Rivera described another occasion when he witnessed respondent staring at Ms. L for at least five minutes, three or four feet behind her, while she was sitting and scraping tape from the floor of one of the cafeterias (Tr. 1114-15). Rivera was about ten feet away from Ms. L while this occurred (Tr.

1192). Ms. L told Rivera afterwards that respondent's staring had made her feel uncomfortable (Tr. 1114). Rivera added that he never observed respondent staring at him or any other male-cleaners while they scraped tape from the floor (Tr. 1116), nor did he ever see respondent stare at any of the other cleaners for a period of five minutes or more at one time (Tr. 1117). While respondent sometimes checked on Rivera as he painted, he would look for two minutes at the longest (Tr. 1230). While Rivera acknowledged that respondent could be obsessive when it came to making sure work was done correctly (Tr. 1231-32) and that there were times when he believed respondent was only checking on Ms. L's work rather than staring at her (Tr. 1112), Rivera emphasized the distinction between respondent checking work to make sure it was correct and staring at Ms. L (Tr. 1231-32).

Respondent denied staring at Ms. L (Tr. 2371-72, 2784). He testified instead that he is "hard on the workers . . . if there is something the way I want it done, it's got to be done my way." He takes new hires to classrooms to demonstrate how he wants rooms cleaned. In order to make sure painting is done to his satisfaction, he watches his staff as they paint. If something is not up to his standards, he notifies the painter and instructs him how to improve. He testified that he would sometimes stay in a classroom checking a painter's work for 15 to 20 minutes (Tr. 2331-33, 2371-72). Respondent admitted that he has stood over Ms. L while she was painting the floor and stared at her work, but stated that he did the same with all of his workers. He said that neither Ms. L nor any other cleaner ever complained to him that he was checking their work (Tr. 2333).

Harris, who was promoted by respondent and who was loyal to him, described respondent as a perfectionist, or as he put it, a "professionalist" (Tr. 1603, 1680). I find that Harris was heavily biased against Ms. L because she and McDonald had complained to police about him in 2007, alleging that Harris wielded a pipe wrench at them in the school boiler room, telling her, "your days are numbered," which Harris denied saying. This was after respondent himself had been removed from P.S. 188 pending the outcome of this matter, and Ms. L and McDonald also won temporary and final orders of protection against Harris. Ms. L's complaint caused Harris to be removed from P.S. 188 for seven months in 2007 (Tr. 1061-65, 1631-32, 1711). Harris said that when he painted classrooms with Ms. L, respondent often examined their work. After respondent left, Ms. L would tell Harris that respondent was staring at her. Harris responded that respondent was just checking her work (Tr. 1622). He testified that he never took

her accusations seriously (Tr. 1622). According to Harris, Ms. L often laughed while she accused respondent of staring (Tr. 1744-45). He explained that respondent often stared at his work as well. Respondent might come into a room he was painting or cleaning and sit or stand behind him for "a long period of time" (Tr. 1678). Respondent would stand back so as to have a view of the work and the painter (Tr. 1690). Sometimes respondent only stared, but other times he called Harris's name out and pointed to spots that were missed (Tr. 1783). Harris said that respondent did this with all of the cleaners, including Rivera and Ms. L (Tr. 1678-80). He said because Ms. L often wore an iPod, she could not hear Brust call her name or notice him pointing out work that was incorrect (Tr. 1783-84).

Lombardi often seemed torn between an almost fraternal protection of Ms. L, whom he met because he knew her older brother socially (Tr. 1555-56), and indebtedness and loyalty to respondent, even though his relationship with respondent deteriorated as respondent began to criticize Lombardi's work ("I really can't speak enough of Craig, you know, of what he's taught me over the years as an employee and as a worker that you know I have -- loyal to him," Tr. 1457-58). Lombardi explained that because he worked the evening shift from 3:00 p.m. to 10:00 p.m. and only several weeks during August, he was not present at the school while much of the complained-of activity is alleged to have occurred (Tr. 1482). Respondent and Lombardi had a rift, according to Lombardi, because Lombardi refused to "re-do" a memorandum for respondent of a statement he had given to the union about an incident involving McDonald and Tolomello (Tr. 1486-87). Ms. L testified that Lombardi had written a letter in support of McDonald, that Lombardi refused to lie about McDonald for respondent, and that respondent then proceeded to punish Lombardi by writing him up for what Ms. L said was no reason (Tr. 654-57). Lombardi recounted that Ms. L had complained to him that respondent was following her around the building while she worked and was staring at her (Tr. 1467). He said that he spoke to respondent, asking him, "I really, really wish you would leave the girl alone so that she could do her job," and that respondent replied, "I'll handle it" (Tr. 1468). At the same time, Lombardi testified that respondent would generally look at Lombardi's painting work for about two or three minutes to make sure that the building was up to respondent's standards (Tr. 1554-55).

Ms. L also described another staring incident that occurred after the school reopened on September 8, 2006. Ms. L was on a ladder painting by what the witnesses called the "terrazzo" of the school (the entrance area) while talking to Mr. Mirenberg. Anthony Harris came over to

them and asked Ms. L how long she thought it would take for her to finish. She replied that she did not know and that she would be finished when she finished. Harris then looked at Mr. Mirenberg and Ms. L, shook his head, and walked away. Soon after, respondent came over to Ms. L while she was on the ladder painting. Mirenberg was still in the vicinity, waiting for someone and talking to Ms. L about their summers. Respondent stood behind Ms. L, staring at her. After a couple of minutes, Ms. L turned around. Respondent had some papers and envelopes in his hand. Respondent asked Ms. L if she could make some phone calls for him and put addresses on the envelopes, which she agreed to do. Respondent then began walking back toward his office, but stopped and turned back, asking Ms. L in a firm, upset tone, "[D]o you think you can do that now?" Ms. L said "okay" and returned to respondent's office (Tr. 607, 739).

As she was leaving the office after making the phone calls and addressing the envelopes, respondent asked her, "[C]an I just say something to you? . . . I don't want to get involved in your personal business." She replied, "[T]hen don't." He said, "[Y]ou know, you don't have to sneak around with him," apparently referring to Mirenberg. Ms. L then stood up and left respondent's office to punch out. Respondent tried to speak to her further, but Ms. L instructed him, in front of all her co-workers, to call her phone instead and then left. Respondent subsequently called her cell phone and left a message, saying he was sorry and did not mean to have an outburst or get involved in her life (Tr. 608). Rivera overheard a part of this argument as Ms. L walked through the lunch room with Brust following; there were others present in that area. He heard Ms. L telling Brust to leave her alone, and Brust pleading with her, "just talk to me," and corroborated her telling Brust to call her on the cell phone if he wanted to discuss work. According to Rivera, the argument was about Brust expressing to Ms. L his feelings for her (Tr. 1251-52).

I find that respondent habitually stared or leered at respondent in a sexual way.

Specifications 3 & 4:

The Department alleges that from June to October 2006, respondent engaged in a continuous course of sexually harassing conduct wherein he communicated, directly and through intermediaries, to his subordinate, Ms. L, words to the effect that he was interested in a romantic relationship with her, despite being told by her, personally and through intermediaries, that she

was not interested in such a relationship. It is further alleged that sometime in June, respondent had Harris convey to Ms. L words to the effect of "Craig told me to tell you that he is in love with you, he has a house, money, and he can give you everything in the world if you give him a chance."

Ms. L testified that during the summer of 2006, respondent told Harris of his feelings for her, and instructed him to act as an intermediary and relay messages of a personal nature to her (Tr. 573, 646, 872). Harris accordingly told Ms. L on several occasions, at respondent's direction, that respondent has a house and a car and would "give her the world" if she gave him the chance.[8] Harris also told Ms. L that respondent had been divorced for a long time and has not felt the way he felt about Ms. L for a long time. Ms. L explained that she told Harris, in response, to tell respondent that she did not have any feelings for him, nor was she interested in a romantic relationship with him; she had a boyfriend and just wanted to be left alone to do her work "and be treated like the rest of the guys" (Tr. 573, 646). She also told Harris: "Craig needs to leave me alone and towards the end, Craig was making it really hard for me inside of work, outside of work" (Tr. 647). Nonetheless, respondent continued to direct Harris to convey messages on almost a daily basis throughout the summer (Tr. 574). Ms. L's testimony was very clear that respondent was bothering her every day to be his girlfriend:

> Q. What, if anything else happened, during the months of June, July and August and September of 2006?
>
> A. Craig had expressed his feelings more or less to Anthony Harris, and to have Anthony Harris relay the messages to me. He told me that Craig said he has a house, he has a car and he'd give me the world if I gave him the chance. He told Mr. Brust, on several occasions -- . . . . I would tell Anthony Harris to tell Mr. Brust that I don't have any feelings for him in that category. That I was not interested in a romantic relationship with him. I had a boyfriend, and I just wanted to be left alone to do my work and be treated like the rest of the guys.
>
> Q. How many times, if you recall, did Anthony Harris convey a message from Mr. Brust with regards to his having feelings for you or his wanting to enter into a relationship with you?

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[8] One court has referred to an IRS agent named Gray, who wrote love letters to his co-worker, a complainant, as "a modern-day Cyrano de Bergerac [a reference to the 1897 play of that name by Edmond Rostand] wishing no more than to woo [his female co-worker] with his words." *Ellison v. Brady,* 924 F.2d 872, 880 & n. 14 (9th Cir. 1991). The court found a hostile working environment where the two workers had never become friends, yet agent Gray continued to write her passionate letters after she asked another co-worker to tell him to leave her alone. Similarly here, respondent sent his messages through Harris, and Ms. L rejected respondent and told him to leave her alone, both personally and through Harris.

A. Oh, my God. It was like almost every day, it was something different. It really was.

Q. Please describe to the Court what you mean that it was almost every day it was something different?

A. Every day that [I] would come into work, Anthony Harris would have something else to tell me. Craig said he only cares what you think about him. He doesn't care what anyone else thinks about him in the building, because I made a big issue about how he's embarrassing himself.

Q. What do you mean, you made an issue about how he's embarrassing himself?

A. Because I told Mr. Brust by him to come into work intoxicated, him sitting there telling everybody and especially a 20 year old male, that he had feelings for me, was inappropriate. I told him that he should go get help. I told him that he should speak to another engineer, and hopefully they would be able to help him. But he just continued on talking to me through this 20 year old boy.

Q. When you say, 'this 20 year old boy,' who did you mean?

A. Anthony Harris.

Q Anthony Harris was 20 years old?

A. Yes.

Q. Ms. L, how old are you?

A. Twenty six.

Q. How old were you in the summer of 2006?

A. Twenty five.

Q. Do you know how old Mr. Brust is?

A Forty eight, maybe. I don't know. Somewhere around his late 40's. He's near my dad's age.

(Tr. 573-74).

Rivera testified that he heard respondent state on at least four occasions that Ms. L "deserves better, that he has feelings for her, more than just her -- more than just being her boss, that he cares about her and also that he could make her happy" (Tr. 1106-07, 1196). On at least five occasions, Rivera heard Harris convey similar messages to Ms. L from respondent (Tr. 1108), although he never heard respondent telling Harris to convey any of the messages (Tr. 1106). Rivera said that occasionally Harris told him some of the messages respondent had instructed him to convey to Ms. L. He also said that Harris told him that he did not want to be a messenger for respondent (Tr. 1109). According to Rivera, when Harris conveyed messages from respondent to Ms. L, she became upset and told Harris to tell respondent to stop, that she felt uncomfortable, that she had no feelings for him, that he was her boss, and that he knew she had a boyfriend (Tr. 1110). On a couple of occasions, Rivera saw Ms. L crying after Harris conveyed messages from respondent. He also heard Ms. L speaking with her boyfriend or her

friend over the phone, recounting to them what Harris had conveyed to her (Tr. 1110-11, 1216). While Rivera did not remember the exact date Harris first conveyed a message from respondent to Ms. L, he thought it was sometime in August 2006 (Tr. 1195-96). Rivera did not remember ever being present if or when respondent discussed his feelings directly with Ms. L (Tr. 1111-12).

Respondent denied instructing Harris or any other employee to act as an intermediary to convey messages of a personal nature between himself and Ms. L (Tr. 2372-73, 2402, 2799). He stated that the only messages he had Harris convey were work-related, including checking up on and reporting back to him the status of her work (Tr. 2798-99). He testified that he never personally conveyed or asked any employee to convey to Ms. L that he was interested in a romantic relationship with her (Tr. 2372), and stated that he was never interested in having such a relationship with her (Tr. 2372, 2659). Respondent explained that he felt sorry for Ms. L because he knew that her boyfriend was beating her, but that was the extent of any feelings for her (Tr. 2659). He stressed that Nagy did not accurately record in the SCI report what respondent told him, in that respondent did not simply say he had "feelings" for Ms. L, but rather qualified his feelings as relating to her being abused -- that he felt sorry for her (Tr. 2663-64; *cf.* Pet. Ex. 1). When pressed to answer yes or not as to whether he had feelings for her, he said, "Yes. Yes," but he was not conceding that his "feelings" were anything other than sympathy when his answer is viewed against his testimony immediately before (Tr. 2664). He further denied that Harris ever conveyed any message from Ms. L that she had a boyfriend and just wanted to be left alone (Tr. 2402).

Harris also testified that while respondent gave him messages to convey to Ms. L during the summer of 2006 (Tr. 1658), all of the messages were work-related. Nonetheless, he felt that some of the messages, in which respondent criticized Ms. L's work ethic and work as sloppy, were inappropriate for him to be conveying and that respondent should have instead told this to Ms. L directly (Tr. 1659, 1746). Harris stated, however, that he felt that when respondent gave him messages to convey, he was required to convey them as part of his job (Tr. 1661). Harris claimed he never heard respondent say that he had feelings for Ms. L (Tr. 1628), or that if he was with Ms. L she would not be treated that way (Tr. 1629). He did hear respondent ask, two or three times, during the summer, "[W]hy does a girl like her get treated the way she does?" (Tr. 1629). Although Harris heard from Ms. L that respondent wanted a relationship with her, Harris

did not take it seriously because he knew that Ms. L was not interested in a relationship with respondent (Tr. 1629-30).

Lombardi, another co-worker, testified that in June or July 2006, Ms. L told him that respondent was bothering her (Tr. 1466, 1543). Lombardi spoke with respondent on several occasions and asked him to leave Ms. L alone and let her do her job. Respondent answered that he would "take care of it" (Tr. 1466-68). During that summer, respondent told Lombardi that he liked Ms. L and that she was a great worker. Lombardi said that respondent expressed that he, Brust, wished that "he could, you know, have her," meaning, "maybe take her home, you know," and that respondent "felt for the girl" (Tr. 1468-69).

Additionally, respondent gave Ms. L a number of gifts throughout her tenure at P.S. 188, including a diamond, white gold, cross-shaped pendent necklace for her birthday in September of 2005 (Tr. 684-5),[9] perfume, a bottle of port wine with two "big wine glasses," and earrings in December of 2005 for Christmas (Tr. 686), and DVDs of *The Lucy Show* for Christmas 2004. He told Nagy that Ms. L thanked him for the DVD set at Christmas time 2004 (Ms. L: Tr. 684-86; Brust: 2335-2336; Pet. Ex. 1). It is undisputed that respondent gave no such gifts to any other cleaners on the custodial staff, who were all male (Tr. 685). For her birthday in September 2006, respondent gave Ms. L two tickets for a Yankees game, while the rest of the custodial staff gave her a card containing cash (Ms. L: Tr. 686-88, 934, 1010; Brust: Tr. 2405). Respondent had Harris hand Ms. L the two tickets because of the friction between Ms. L and respondent (Tr. 2405). He said that after she got the gifts, Ms. L kissed each of her co-workers. Respondent said he positioned himself behind a chair to avoid her, but Ms. L nonetheless kissed him on the cheek (Tr. 2406). Ms. L testified that she told respondent that she wished he had not gotten her

[9] Respondent had noticed that Ms. L liked to wear necklaces shaped like a cross. He tried ineffectively to minimize this gift, which had with it a price tag of more than $300 (Tr. 685), by testifying that he got it on sale for half-price at Macy's (Tr. 2337). This testimony was unconvincing. The intended impact of such a gift would have been, not the discounted price, which he would not have told her, but the impression it would make at full value. The pre-2006 gifts are not specifically pleaded, but do form part of the agency's general allegation that respondent committed misconduct and engaged in sexual harassment during fiscal years 2005 and 2006 and continuing through October 2006, and are, therefore, relevant. I hereby conform the pleadings to the proof and find that the gifts going back to Christmas 2004 (fiscal year 2005, beginning July 1, 2004) are part of the sexual harassment proved here. *See Dep't of Housing Preservation & Development v. Mendoza*, OATH Index No. 556/05 (Feb. 17, 2005) (conforming pleadings to the proof *sua sponte* where respondent was given fair notice and nature of claim was clear at trial). There is no prejudice to respondent here. He had prior notice of the charges and 14 trial days over a period of months to meet the proof of the gifts and his attorney conducted extensive examination and cross-examination of the witnesses about them. On direct questioning, respondent admitted giving Ms. L the gifts and gave detailed testimony about them (Tr. 2335, *et seq.*). At a minimum, the pre-2006 gifts illuminate the relationship of the principal actors in this case. Respondent began wooing Ms. L early on, but as he became more emphatic in expressing his feelings to her, their work relationship soured.

anything but that respondent told her that the tickets were not inappropriate and she accepted them. She kissed and thanked each of her co-workers, but denied kissing respondent (Tr. 686-88, 934, 1010-11). Ms. L explained that she considered not accepting the tickets but that she did not want "to be mean" to respondent (Tr. 1011). Ms. L felt that the gift of cash was not inappropriate since it came from all of the custodial staff, as opposed to just coming from one person (Tr. 932-33). She felt it was similar to when the staff would buy a cake and card for other custodial staff members' birthdays (Tr. 933).

Ms. L testified that after the baseball game, Smith, a cook at the school, asked if she went to the game and whether her boyfriend was wearing a blue jacket at the game. She told him that she had gone to the game with her boyfriend, who was wearing a blue jacket. Smith knew the color of the jacket; he told Ms. L that respondent had also gone to the game and wanted to see whom she took with her (Tr. 689). Smith, however, testified that he never spoke to Ms. L after the game or discussed her boyfriend wearing a blue jacket. He spoke to her only before the game and questioned her as to why she accepted the tickets from respondent if she felt uncomfortable. Smith did not testify as to Ms. L's answer, only that she said she was going with a friend (Tr. 2151-52). Respondent also stated that he did not go to the game: "No, I got the tickets from my sister. She got them online for me. My sister would kill me if I went to a Yankee game. She likes the Mets" (Tr. 2406).

Whether respondent went to the baseball game in pursuit of Ms. L or not, however, it was improper for respondent to purchase expensive gifts such as a pair of tickets for a Yankees game for his subordinate Ms. L. It was similarly improper for respondent to send three dozen yellow roses (Tr. 606) to Ms. L's house. And it is curious that respondent would give Ms. L three dozen roses, perfume and other gifts one might give to a steady girlfriend, when, as he acknowledged, the two were not getting along. The earlier gift-giving tends to corroborate the testimony suggesting that respondent gave Ms. L the tickets because he had romantic, somewhat obsessive feelings for her, but she felt uncomfortable around him while he continued to pursue her. That he wanted to "give her the world," even though they never even dated, also tends to show an unrealistic obsession with her and unwanted attention to her.

Ms. L was hired in August 2004 (Tr. 557), and respondent began giving her gifts shortly thereafter. She should not have accepted these gifts. Were she more sophisticated, she would have understood earlier that it was a mistake to accept them. But as a neophyte in this job and a

youngster, she likely saw no harm in taking them as a perk of the job on the theory that it is nice to receive "free" gifts and tokens of appreciation. She did not want to offend her boss, who was her father's age (Tr. 573-74, 2321), and who had the power to fire her -- until she had been on the job more than a year and the tension between respondent and her intensified to the point where he declared his feelings. Some of the gifts could not be returned: Ms. L's boyfriend "smashed" the roses on the floor: "We got into a huge fight, and he smashed them on the floor. He broke them, because I was going to return them to Craig, and we got into a huge fight, and I spent the rest of the night hysterical crying" (Tr. 606). As for the necklace, Ms. L did not open the wrapped gift box until she got home. After her boyfriend got hold of it and showed Ms. L the price tag of more than $300 attached, she called her colleagues Lombardi and Ronald McDonald and asked them if they had "chipped in for it" (Tr. 685). They had not. Jealous of the attention Ms. L was getting from respondent, Ms. L's boyfriend "fought [with her] for the rest of the night", and he broke the necklace into pieces and threw it in the garbage; in her words, "he [her boyfriend] was flipping out" (Tr. 685-86).

Respondent also kept numerous photographs of Ms. L in his desk, many of them candid (Pet. Ex. 17). She got hold of them and turned them over to Nagy as part of the investigation. This stash of photos tends to confirm respondent's obsessive, romantic interest in and pursuit of Ms. L.

I find that respondent did express his love for Ms. L and that he continued to pursue her as a girlfriend after she rejected him and asked him to stop bothering her.

Specification 5:

The Department alleges that in the summer of 2006, respondent "told Ms. L words to the effect that he does not trust her with any of the male workers, except for Harris because Harris is black."

According to Ms. L, respondent assigned her to work exclusively with Harris during the summer of 2006. He told her that he did not feel comfortable with her working with the other male members of the custodial staff, but that it was okay for her to work with Harris because he was black (Tr. 586). Respondent also instructed Harris not to let Ms. L and Rivera be around each other, because respondent held the view that the two had a relationship, which Ms. L denied (Tr. 583-84, 978-79). Harris told Ms. L and Rivera that while it was fine that they talked and

worked together whenever respondent temporarily left the school, once he returned the two should not be seen together (Tr. 584). Ms. L testified that respondent told Rivera that he was in love with her and did not feel comfortable with him or any of the other male members of the custodial staff around her. Rivera told respondent that he needed to leave Ms. L alone (Tr. 584). Rivera testified that during the summer of 2006, Brust began believing that Rivera and Ms. L had a relationship, and from then on did not want Rivera and Ms. L working together (Tr. 1309). Rivera testified that on one occasion, Harris told him that Brust had left the school and instructed him to tell Rivera to stay where he was working because he did not want Rivera around Ms. L. Rivera said that Harris was laughing when he told him this (Tr. 1136). Rivera stated that while he painted occasionally with Ms. L, most of the time she painted with Harris (Tr. 1191, 1229-30), although sometimes she painted alone (Tr. 1235). Rivera indicated that he was never instructed to stay away from any of the other cleaners, and that Harris and Ms. L worked with each other for much of the summer at Brust's direction (Tr. 1137-38). Rivera normally painted with co-worker Anthony Tolomello (Tr. 1230).

Rivera testified that Harris told both Ms. L and Rivera that Brust had said that when the two (Rivera and Ms. L) worked together, they were always kidding around and did not get work done. Rivera admitted that he would text message Ms. L during the day; he would do so even when Brust was nearby (Tr. 1254-55). Rivera later clarified his testimony, adding that any text messaging took place while they were in Brust's office not working. On one occasion, Rivera painted "[L] ♥ Cisco" on Ms. L's painting shirt while she was changing back into her street clothes as a joke (Tr. 1138-39). He acknowledged that he painted the shirt as a joke that co-workers would recognize as such after he became aware of Brust's feelings for Ms. L (Tr. 1139).

When shown specification 5, respondent stated, "That's the worst thing I ever read." He explained that Ms. L frequently worked with McDonald, who was also black (Tr. 2373). Respondent testified that the reason he did not want Ms. L working with Rivera was that they constantly texted each other and worked at "a snail's pace" (Tr. 2364). Harris similarly stated that he believed respondent did not like Ms. L and Rivera working together because when they were together they did not complete enough work for his satisfaction (Tr. 1746). On occasion, respondent testified, he asked Harris why certain work assigned to Ms. L and Rivera took as long as it did to complete, expressing dissatisfaction with their progress (Tr. 1747).

I need not and do not find that the reason respondent assigned Ms. L to work with Harris during the summer of 2006 was that Harris is African American. Instead, I find that respondent assigned Ms. L to work primarily with Harris because respondent trusted Harris, whom he enlisted to carry his personal, romantic messages to Ms. L. He used Harris as an intermediary to convey messages to Ms. L, as well as to watch over and keep tabs on her. Ms. L may have believed that race was a factor in respondent's use of Harris as middle-man, but I find Harris' race irrelevant to this case, and there is nothing else in the record to suggest that respondent harbored any racist notions. Rather, I credit Ms. L's testimony that respondent trusted only Harris around her, and find that his use of Harris was part of respondent's obsession with Ms. L. He felt he needed to follow her at all times, and he recruited Harris to help him in this. The reason respondent did not allow Rivera and Ms. L to work together was that he was jealous of Rivera and the attention she paid him. He was not jealous of Harris -- not because Harris is African American, but rather because he knew Harris to be loyal in that Harris was already serving obediently as an intermediary between Ms. L and respondent. Therefore, I reject respondent's claim that he separated Ms. L and Rivera not because he was jealous, but rather because they were not productive when they worked together. It makes little sense that separating them would decrease text-messaging between them; on the contrary, if the text-messaging was a real problem, separating them would likely only increase the amount of time they spent doing it. Harris' testimony that Ms. L often did not hear Brust call her name while he stood behind her because she was wearing headphones further belies the notion that Ms. L was a poor worker. Ms. L was engaged in the solitary act of listening to music while she worked on painting on these occasions (Tr. 1783-85), not conversing with co-workers (Tr. 1744-45).

In sum, I credit Ms. L's testimony and find that respondent told Ms. L that he did not trust her with any of the male workers except Harris. I make no finding that respondent did or did not believe the comment he made to Ms. L, but I find it more likely than not that he said the words attributed to him. The charge is sustained insofar as respondent's obsession with Ms. L is established to the extent that he trusted and appointed Harris as his messenger to Ms. L and enlisted Harris in his harassment of Ms. L.

Specification 7

The Department alleges that respondent declared his love for Ms. L after he and the staff went to lunch during the workday on the Coney Island boardwalk at an establishment called Cha

Cha's and that respondent was intoxicated when he told her this because he had been drinking alcohol at lunch. I consider this specification in greater detail below with the other intoxication charges, which are related to the sexual harassment claims, in that I find that respondent was intoxicated when he made some of the offensive comments to Ms. L, who was intimidated by respondent and had a reasonable fear of what he might do in an intoxicated state to act on his expressions of affection if she were alone with him. For the reasons set forth below, I credit Ms. L's and Rivera's testimony that respondent was intoxicated at work and issued to Ms. L this unwanted declaration of love as alleged.

Specifications 8 & 9:

Specification 8 alleges that at a barbeque he hosted at his house on Saturday, August 19, 2006, respondent discussed certain personal information about Ms. L and her boyfriend with her co-workers. Respondent allegedly remarked to her co-workers that Ms. L's boyfriend had beaten her, stated that she was arrested for domestic violence, and added that if her boyfreind "ever touches her again [respondent] would get a gun and shoot that piece of shit" (ALJ Ex. 1). Specification 9 alleges that several days later, after Ms. L confronted respondent about revealing the personal information about her, respondent called her co-workers to his office and sent them home after none would admit telling Ms. L what respondent had said about her at the barbeque. Respondent allegedly said that he spoke about Ms. L because he could not hold back his emotions. It is undisputed that Tolomello, who was not called as a witness here, stayed and worked the full day, but the others went home early, as did Ms. L.

Ms. L did not attend the barbeque. She testified that Harris conveyed "unprofessional," personal messages to her from respondent, "regarding his personal feelings, why he feels the way he does, why -- telling Anthony trying [*sic*] to get me to go to his house for the barbeque. And I told Anthony, 'I'm not going.' He had Anthony tell me on several different occasions, that he has a house. He has a car, and if I'd give him a chance, he'[d] give me the world" (Tr. 646). According to Ms. L, she learned that during a barbeque at his house[10] at the end of August 2006,

[10] Found at http://home2.nyc.gov/html/dcas/downloads/pdf/misc/eeo.pdf, the Citywide Equal Employment Opportunity Policy (2005) ("*City EEO Policy*") provides that it "extends to conduct which occurs at any location that could be reasonably regarded as an extension of the workplace, such as any . . . off-site business-related social function . . . . " *City EEO Policy*, at 3. Whether or not the barbeque was a business-related social function, respondent made an issue of the events of that function when he and the cleaning staff returned to the workplace following that weekend.

respondent told Rivera, Harris, Lombardi, and Tolomello that Ms. L had previously had a domestic dispute with her boyfriend, that her boyfriend hit her, and that she had been arrested. She testified that Lomabardi, Harris, and Rivera subsequently confronted her on this, asking her if what Brust had said was true (Tr. 576, 876). They also told her that respondent said, "[I]f I find out again that he puts his hand on her, I have a gun and I will shoot him" (Tr. 877). Ms. L believed that respondent had learned of this incident from paperwork he received from the Department (Tr. 879). After she found out from her co-workers what respondent said at the barbeque, she "was furious." (Tr. 589-90). She went to respondent's office and asked him, "[W]ho do you think you are telling anyone my confidential record regarding me and my boyfriend? That is none of your business or anyone else's. . . . [W]hat are you trying to do to me? Why are you humiliating me for? Now, all of them are going to look at me differently." Respondent only asked her who told her what he had said at the barbeque, to which Ms. L replied that it did not matter (Tr. 589-90). Ms. L emphatically and credibly denied telling co-workers her boyfriend beat her or showing them her bruises (Tr. 718-19).

Rivera, Harris, and Lombardi all confirmed that they attended a barbeque at respondent's house during late August 2006 (Rivera: Tr. 1140-41; Harris: Tr. 1609; Lombardi: Tr. 1469). Ms. L did not attend (Rivera: Tr. 1145; Lombardi: 1469). Rivera said that he saw respondent drinking both beer and mixed drinks (Tr. 1144). Lombardi believed respondent had a hard drink in a glass (Tr. 1470). Harris saw Brust drinking at the barbeque, but could not recall what respondent drank (Tr. 1610-11). According to both Rivera and Lombardi, respondent started discussing Ms. L. They remembered that respondent said, in substance, that Ms. L deserves better and that her boyfriend does not deserve her because he hits her (Rivera: Tr. 1145, 1272; Lombardi: Tr. 1471). Lombardi also recalled that respondent said that he could take care of Ms. L better than her boyfriend could (Tr. 1471), and Rivera added that respondent said that he had a gun and that the next time Ms. L's boyfriend hits her will be the last time (1145, 1272). Harris testified that he did not recall much of what respondent talked about that day (Tr. 1611-12). He said that while he was eating, he thought he overheard respondent say, "[I]t's a shame that Ms. L would get treated in such a way" (Tr. 1613). Harris subsequently changed his testimony, explaining that respondent did not say "Ms. L" but rather only used the pronoun "she," and that he inferred that respondent was speaking about Ms. L because he knew "she felt uncomfortable" that summer "because of the situation," which Harris would not explain further. He denied

seeing Brust "do things" that made Ms. L uncomfortable (Tr. 1613-15). Harris admitted telling investigators that he heard Brust say he would give Ms. L the world (Tr. 1614).

Respondent confirmed most of the events of the barbeque as described above. He stated that at some point during the barbeque, Lombardi said that Ms. L was not coming (Tr. 2385). He responded that Ms. L should not be treated the way she was being treated, that it had been going on since 2004, and that he did not know why she stayed with her boyfriend (Tr. 2385, 2602). He said that a man should never hit a woman (Tr. 2603). He denied, however, mentioning her arrest to anyone but Tudda, or saying that he had a gun and would shoot Ms. L's boyfriend (Tr. 2385, 2386, 2391, 2602-03). At the hearing and during the investigation, respondent repeatedly mentioned that Ms. L's boyfriend "was beating the shit out of her," to demonstrate his concern about her well-being (*E.g.,* Tr. 2428).

At trial, respondent indicated that he had first learned about Ms. L's domestic situation from Khadaroo, who testified at trial that Ms. L had showed him her bruises and told him that her boyfriend beat her, and that everyone at the school, including teachers and the custodial staff, knew about this (Brust: Tr. 2343-44, 2384-85; Khadaroo: Tr. 2271-72). Respondent said that during Easter 2006, Ms. L called him from her sister's phone, frantic, and told him that her boyfriend had just beaten her and that she needed to take time off, which he approved (Tr. 2345-46, 2348). Respondent said the call lasted over an hour, and submitted into evidence a copy of his phone bill showing an incoming call on Sunday, April 23, 2006, at 9:21 p.m. lasting 77 minutes (Resp. Ex. U). Ms. L, however, denied telling Khadaroo that she was being beaten or showing him bruises on her body (Tr. 717-18, 827). Ms. L also denied that she called Brust on a Sunday night sometime during her first eight months of employment; she denied that they had a 45-minute conversation in which she explained to him how her boyfriend had beaten her, and that she needed time to get away and go to New Jersey, answering "Absolutely not," when asked if she recalled making such a call to respondent (Tr. 719). She admitted that she took time off, but denied telling respondent anything specific about the reasons for which she needed the time off (Tr. 719-20). She stated on cross-examination that she did not tell anyone at the school about physical abuse until a police incident in May 2006 (Tr. 720), when she was obliged to report to respondent, as her supervisor, the arrest and the fact that the criminal case was withdrawn, so he could put her back to work (Tr. 877-78). She stated that at one time she had a scrape on her arm and bruise on her face from falling during a football game (Tr. 1009-10).

The parties closely disputed whether respondent did or did not reveal confidential arrest information about Ms. L to the staff. This charge is sustained in substantial part whether or not he disclosed an arrest to her co-workers for the first time. The witnesses who were present at the barbeque, other than Brust, gave divergent accounts of the amount of knowledge school personnel had about Ms. L personally. Lombardi denied that he knew, as of the time of trial, that she had been arrested (Lombardi: Tr. 1520). Rivera knew she had been arrested "after this whole situation," after Brust was removed from the school, and thus, after the barbeque (Tr. 1279-80). But Rivera denied that it was common knowledge at the school that Ms. L's boyfriend beat her (Tr. 1197). Harris swore that Ms. L herself had told him, Khadaroo, Brust, and Lombardi, before the barbeque, that she had been arrested (Tr. 1693-94). He did concede, however, that he heard Brust say at the barbeque that what her boyfriend does to her is not right (Tr. 1693). I find it more likely than not that Brust spoke of Ms. L's arrest at the barbeque because he alone among the cleaning staff received a confidential police report about her and her relationship with her boyfriend (Tr. 877), and Ms. L denied telling co-workers about the police matter. The testimony about whether the men were learning about her arrest from Brust for the first time, however, is a muddle. It does not make sense that she would have broadcast this highly personal and embarrassing matter to her co-workers. Whether or not respondent spoke of the police matter, he admitted that he spoke to Ms. L's co-workers of her boyfriend's maltreating her. It matters little that her co-workers may have heard bits and pieces of her domestic situation previously. The proof that respondent spoke heatedly against her boyfriend at the barbeque shows that respondent was deeply jealous of Ms. L's boyfriend and wanted her to end that relationship and be with him. The point is that respondent's feelings for Ms. L were getting so out of control that he began to humiliate her by involving the whole staff in his harassment of her. Even if he was trying to be gallant and rescue her, she did not want him to do that, and he should have known that as a supervisor, he should not ill-use her co-workers to bandy about tales of her misfortune.

For purposes of analysis, this specification is relevant to and must also be considered with specifications 9 through 13, in that regardless of whether others actually already knew that Ms. L was having problems with her boyfriend, she was mightily upset that respondent spoke of her domestic situation with her co-workers. Respondent admittedly spoke about her personal difficulties to the men at the barbeque:

> We were having drinks. And one of the guys said, yeah, Ms. L is not coming. And I believe that was John Lombardi. And I just said this lady shouldn't be treated like this. This has been going on since 2004, and I don't know why she stays with him.

(Tr. 2385). Indeed, respondent conceded, upon hearing of the barbeque conversation, that Ms. L upbraided him for his comments about her and complained to him that he was humiliating her in front of her co-workers:

> Q. Now, what happened when you went back to work on Monday?
> A. I got in the office. Then Ms. L came in, and she just totally flipped out on me.
> Q. Tell the Judge the things that she started to talk to you about on that morning.
> A. Excuse my language, okay? She told me it was none of my fucking business to let out her personal life, anything about her personal life. And she just -- I said I don't know what she's talking about. And there wasn't anything talked about, about her personal life. All I did mention at the barbeque was that this guy should not be treating her like this way.

(Tr. 2386). He then became irate ("I was goddamn pissed off") that none of the men would admit that they informed her of the conversation at the barbeque (Tr. 2388). Their silence so enraged him that he sent them home early: "I was aggravated, agitated. And I wanted to know who spoke to her and told her that I said these things at the party. And they all sit there mum. And it just got to that point where I told them, you know what you do, go upstairs, punch out and go home" (Tr. 2389). Always driven by his fixation with Ms. L, respondent carried the barbeque incident to extremes when he sent the workers home early and then took steps to have the Department pay them anyway when he realized he had been wrong to send them home in a fit of pique. Upon returning to work the next day, Ms. L berated him again, this time for punishing the workers because of his feelings for her:

> So, then I told Mr. Brust that he has to call down all of the workers, because I no longer want to speak to him without everyone present, because I don't want to deal with any he said, she said, and these guys getting in trouble for anything that is going on between him and I. And I expressed myself pretty clearly about how I felt about the whole situation.
>
> I told him he's out of control, and now these guys are suffering, because they all called me up telling me how they got sent home, and I'm tired of the crap between you and Craig. Now, we're not going to get paid for the day. We lost a

> whole day's pay, and Craig said, I know. It's my fault. I'm an asshole. And then he said, don't worry, you're all going to get paid for the day.

(Tr. 592). Respondent then directed Ms. L to complete the time cards of the men who left early and her own as if they had worked the full day and overtime (Tr. 592-97).

I find that the scenario alleged by the Department is indeed what likely happened, and Ms. L's strong reaction to his humiliation of her triggered his angry decision to send the staff home and his later, deliberate resolution to pay the staff for time they did not work, to cover his misbehavior and disruption of the workplace.

It is undisputed that respondent spoke, at a minimum, of Ms. L's being abused by her boyfriend and indicated to her co-workers that women should not be treated that way. Respondent admitted as much. The Department also proved that he made comments to her co-workers to the effect that he would come after the boyfriend if he ever hurt her again. The evidence established that there was gossip in different echelons of the school that Ms. L's boyfriend abused her, but it is not clear whether that talk preceded or followed the barbeque. But the gravamen of Specification 8 is not solely the revelation of private information to humiliate Ms. L. Rather, this charge is sustained insofar as the agency proved that respondent had designs on Ms. L and wanted more from her than an employment relationship, and that he held her up to ridicule before her co-workers when he spoke of her boyfriend to the men. This conduct created a hostile work environment when the staff returned to work and was intimidating and offensive. By initiating or even merely perpetuating discussion with Ms. L's co-workers of her problems with her boyfriend at home, respondent, as her supervisor, was causing Ms. L harm by spreading before her colleagues his increasing infatuation with Ms. L and fueling gossip about her personal life. This was not innocuous gossip. He was really doing Ms. L harm, psychologically and in her relationships on the job with her co-workers, by gossiping with the men who worked with her at the school on a daily basis about private matters concerning her home life. As a supervisor, respondent had a duty to be more circumspect. Specification 8 is also sustained insofar as it alleges the facts that triggered respondent's decision to send workers home early on August 22, 2006, and then contrive to pay them from City funds for time they did not work, to cover his emotional decision to send them away.

Given his admission that he expressed his views to the men at the barbeque about Ms. L's boyfriend maltreating her, respondent's general use of crude language and his temper, especially

when it came to his emotional reactions to Ms. L, I find it more likely than not that he did discuss Ms. L's domestic life and a police matter concerning her at his barbeque in a way she reasonably found humiliating, and that he used the alleged foul and hyperbolic language[11] to indicate that he would shoot her boyfriend if he ever hurt her again. This is not to say that he would actually shoot anyone, but rather that he was so protective of Ms. L and so fixated on her that he made that exaggerated statement, and thereby exhibited conduct tending to show that he either had deep feelings for her or wanted her as a girlfriend.

Specification 14:

The Department alleges that shortly before the barbeque incident, on or about August 4, 2006, respondent sent flowers to Ms. L's home. As prefigured in the discussion of previous charges, I find that this charge was proved.

Ms. L testified that on August 4, 2006, a florist delivered three dozen yellow roses to her house. There is no dispute, however, that August 4 was a Friday and the flowers were actually

[11] I find it unlikely that respondent, who admitted consuming six beers, who showed volatility in smashing the glass jar or bowl of pennies on hearing that Ms. L had rejected him and sent the workers home when she berated him for gossiping about her, and who often used profanity in a casual way during the trial, as if he did not even realize it, did not say at the barbeque to the workers, as alleged, that if "Ms. L's boyfriend ever touches her again he would get a gun and shoot that piece of shit" (ALJ Ex. 1). For example, in describing the importance to him of advancing one's career by obtaining certifications, he stated: "I didn't want to stay a shit house cleaner" (Tr. 2342). He also repeatedly stated on the record before me that Ms. L's boyfriend "beat the shit out of her," in various formulations (Tr. 2428: "I told them [SCI] my feelings for her were because her boyfriend was beating the shit out of her"; 2605: "Yes, I knew they were having problems when a guy beats the shit out of a woman"; 2607: "And the problems were is I don't like a guy beating the shit out of a woman"; 2609: "That's true [that respondent thought Ms. L was no longer living with her boyfriend even though he never asked her] when I see somebody with bruises that was getting the shit beat out of her, yeah"; 2842: "The reason I sent the flowers [was] because her boyfriend was beating the shit out of her again, and I never saw her so low and down in the dumps.")

In explaining the strain of this case on him and his life, respondent stated that he was removed from the school and reports to a windowless room with uncomfortable metal chairs: "You'll have to excuse me, but to me it's like a psychological mind fuck" (Tr. 2445). Respondent also described many instances in which he claimed Ms. L used the word "fuck" on the job when complaining to him about his decision not to promote Ronald McDonald and in rejecting respondent (Tr. 2417: On October 19, 2008, Ms. L "opened the door after screaming at me and calling me a two-faced fuck with the door open"). He claimed that the messages he told Harris to give her were official, that she had to pick up the pace of her work, and that she told Harris to tell respondent "fuck you" (Tr. 2365). Harris confirmed that Ms. L had refused Brust in some way on the day respondent smashed the jar of pennies. Harris said that Ms. L told him to respond to a message from Craig thus: "Out of humorism [*sic*], I said, 'Craig, Ms. L said to go fuck yourself'" (Tr. 1790). If this is true, profanity was unexceptional and freely used in the custodial office at the school and both respondent and Ms. L used it. This was not an ivory tower, and the talk was rough and inappropriate in an elementary school in any event. The point here is two-fold: (1) respondent's denials that he used profanity in the school were not convincing and detracted from his credibility, and (2) that if Ms. L used such language at all, and she likely did, based on her own testimony about how she spoke to Brust in frustration, I find that she did so in rejecting his offer to make a life with him, not in answer to his supposed direction to work faster.

delivered the following Saturday morning, August 5, 2006. Initially, Ms. L thought the roses were from her boyfriend. However, once she brought them into the house, her boyfriend became very angry and cursed at her. Ms. L opened the card, in which there was typed the message, "[T]o a very special lady, Love C." Ms. L recognized that the flowers were from Brust based upon his initial, "C," in the card (Tr. 604). Ms. L and her boyfriend got into a fight over the flowers, which Ms. L planned to return to Brust. Her boyfriend eventually smashed the flowers on the floor (Tr. 606).

Rivera stated that Ms. L showed him a picture of the flowers Brust had sent her, which she took using her cell phone (Tr. 1161, 1287). Ms. L told him that her boyfriend became angry because of the flowers and told her that Brust should not be sending her flowers when he knows she has a boyfriend (Tr. 1161, 1288).

Ms. L testified clearly that respondent was bothering her and that he sent the flowers after she told him to leave her alone, and that respondent was very deliberately trying to destabilize her home life with her boyfriend, with whom she got into a fist-fight in May 2006:

> This man had just sent, in August, flowers to my house, after me fighting with him, telling him to leave me the hell alone. I don't want gifts from him. I don't want him to talk to me, unless I'm with -- in front of all the guys. Because if he can't say it in front of all of them, then he should not be saying it to me.

(Tr. 829).

> Q. Okay. So, then what -- he harassed you from June, but he sent you flowers in August.
> A. Yeah, after I told him leave me the hell alone. Don't bother me. I'm doing my work. I want to be treated like the rest of the guys. After that to say "F" you to me, he sends flowers to my house, where I live with my boyfriend.

(Tr. 830-31).

Brust confirmed that he sent Ms. L roses. While he was unsure of the exact date, he said that he ordered the flowers on a Friday in early August and they were delivered the next day (Tr. 2379-83, 2604, 2796). Brust stated that when he sent the flowers, he believed that Ms. L was no longer living with her boyfriend, as she had previously indicated her intent to have him removed from the lease, and did not intend for the flowers to cause a conflict between her and her boyfriend (Tr. 2381-82, 2610). But he then explained that he sent the flowers after seeing bruises on Ms. L he believed were caused by her boyfriend. He believed that Ms. L "looked

down and out" and felt bad for her, so he sent her the flowers in order to cheer her up (Tr. 2379-81, 2655-56, 2842).

I find that respondent indeed sent three dozen roses to Ms. L's home on August 5, 2006, causing a domestic incident there and great upset to Ms. L.

Specifications 15 & 16:

The Department alleges further that respondent instructed Harris to convey to Ms. L that he did not like being alone and had feelings for Ms. L. When Ms. L rebuffed him by sending a message back to him through Harris that she did not want him, that she already had a boyfriend, and wanted to be left alone to do her job, respondent allegedly became loud and angry and smashed a jar of pennies against a wall in his school office at a time when children were nearby and were startled by the noise.

Ms. L testified that on one occasion during the summer of 2006, Brust instructed Harris to tell her that he felt lonely and did not have a wife or girlfriend,[12] and that he wanted to

[12] Respondent claimed on cross-examination, to the contrary, that he was dating and having sex with a number of women in the summer of 2006, implying that the did not need sex from Ms. L. He was evasive and said he could not recall his previous direct testimony denying that he wanted a romantic relationship with Ms. L (*see* Tr. 2372). He then testified irritably as he sparred with agency counsel at the April 16, 2008, hearing, that he "was dating a lot of women" during the summer of 2006, "Yeah, even one night stands. I don't even remember their names . . . . Well, there could have been a Sue, maybe Jane. Betty Lou," although he did not have a date at his barbeque of August 19, 2006 (Tr. 2732-33). Asked if he felt up to continuing when his lawyer interjected that respondent was in pain from an accident he had suffered between hearing dates, respondent said he was "All right" and could continue, but that the trial was costing him money: "I just thought we were going to be finished with this today. Because it's costing me more money and I'm just going down the financial hole" (Tr. 2733). Respondent's attempt more than two weeks later, on May 2, 2008, to soften the bravado and appear more gentlemanly -- "All I meant to say [was] that I was dating. I was taking girls out. I did have sexual relationships that summer. I didn't mean to be sarcastic. I was exhausted" (Tr. 2814) -- sounded contrived and was unpersuasive. This testimony did nothing to repair the impression that respondent was straining to defend his conduct towards Ms. L. The problem with his testimony on this point is that it is not a defense here to say that he had other girlfriends, even if that were true. He could have had any number of other girlfriends and yet pursued Ms. L at the same time. His words and actions showed objectively that he was making romantic and sexual overtures to Ms. L, whether he was sincere or not, and he had a hard time accepting that for her part, Ms. L emphatically did not want to have a personal relationship with him outside work.

give her the world if she would give him the opportunity. Her testimony was:

> At the work place, Anthony Harris would tell me all the time how Craig felt about me. How he feels lonely and he hasn't had a wife, and he doesn't have a girlfriend, and he wants to give me the world, if I was to give him the opportunity. And I told Anthony, please tell him I don't have any feelings for him. This is out of control. I can't take it anymore. I cried to him, and Anthony went back into Craig's office, and it was me, the security staff was in the front, and all we heard was this huge slam up against Craig's door, and Craig walked out with his briefcase, and Anthony Harris came out to me and he said, I can't believe him. He goes, he took a glass jar and smashed it against the door, when I told him you did not have those feelings for him. To just leave you alone and you want to be treated as an equal, and he flipped out and said, it's because of her 'f'ing' boyfriend. He slammed the jar and he left.

(Tr. 577-78, 972). I credit this testimony, as it makes sense that respondent was upset at being rejected. A children's karate class was going on nearby and the children heard the crash, as Rivera observed, because they stopped what they were doing (Ms. L: Tr. 972; Rivera: 1154-55). Ms. L proceeded to the office. She saw that there was shattered glass and change scattered around the office, including on her desk and chair (Tr. 580). The cafeteria where about 20 children were situated is nearby or adjacent to respondent's office (Resp. Ex. D; Tr. 802).

Rivera testified that he was in the lobby, at the entrance of the cafeteria, when he heard the sound of breaking glass. He stated that Ms. L, Lombardi, 15-20 students, and several security guards were in the cafeteria (Tr. 1154, 1281).

Respondent denied that he had Harris or any other employee convey to Ms. L any message to the effect that he felt lonely and did not have a wife or girlfriend, and that he wanted to give her the world if she would give him the opportunity; he further denied that he conveyed any such message to Ms. L directly (Tr. 2401-02). Respondent stated that on the day in question, he was at a conference table in his office going over work that still needed to be completed before the end of the summer. He instructed Harris to go check on Ms. L's and Rivera's work because he thought they might be on their phones text messaging rather than working (Tr. 2365, 2403). When Harris returned, he told respondent that Ms. L said "to go fuck yourself" (Tr. 2365, 2403). Respondent sent Harris out to go check on the work of the other cleaners. He said that at that point he was very upset because "it was getting to a point where [he] couldn't put up with this anymore" (Tr. 2403). He explained that he leaned back in his chair and pushed against the desk, knocking into the blotter; on the blotter, he kept on the right side of the desk what he called

a glass fishbowl of pennies. The fishbowl supposedly fell off the desk, shattering and spilling pennies (Tr. 2403). In reciting this fishbowl story, respondent was defensive, and the notion that he coincidentally and inadvertently pushed the glass bowl off the desk was not credible, given his admitted upset about Ms. L.

During the trial, while Harris confirmed that he conveyed a message from Ms. L to respondent, he claimed he could not remember the content of the message (Tr. 1771-72). Harris believed that the message probably made respondent angry ("pissed") (Tr. 1772). Harris denied being in respondent's office when the jar of pennies broke. Instead, he testified that he heard that a jar of pennies had broken and that because the jar was no longer in respondent's office, presumed that to be true (Tr. 1769-71). Harris' testimony, however, was evasive and self-contradictory, and, therefore, unreliable. He alternated between being familiar with the incident and saying that he did not know anything about it. At a minimum, he corroborated the event in substantial part: he delivered a message from Ms. L to respondent, who then broke a jar of coins. Respondent's account also lacked the ring of truth. His description of how the jar of pennies fell off the desk, rather than being thrown off forcefully by him in a rage, was vague, convenient and unpersuasive.

Ms. L on the other hand, presented a credible account of the conversation that preceded the incident, as well as its aftermath, describing how Harris came out of respondent's office shocked by what respondent had done. It stands to reason that respondent threw the jar and did not simply knock it over because the children reacted, and Ms. L observed broken glass all around the office, including on her desk and chair. I find that respondent threw the jar of pennies because he sent Harris to convey the inappropriate proposal to Ms. L and became irate when she rebuffed him. This was not the only time his emotions got the better of him, as will be shown by his fit of pique, in which he sent the workers home early because he was enraged about Ms. L's accusation that he had been gossiping about her personal life. Having taken that rash action, he was then in a bind because he could not pay the workers for time they did not work, and so contrived to pay them anyway by causing Department records to reflect that they put in not only a full day, but overtime. Those complications are discussed in detail below in the fraud section of this report.

I find the allegations that respondent conveyed his romantic interest in Ms. L through Harris, who reported back Ms. L's outright rejection of respondent's proposal of a personal

relationship, sustained. I also find that respondent smashed a glass container of pennies against the door of his office in a fit of rage because she rejected him.

Resolution of Sexual Harassment Allegations

Respondent is charged with misconduct, and the sexual harassment charge pursuant to Chancellor's Regulation A-830 (reissued April 28, 2008) is a misconduct charge in the administrative context. Thus, although respondent relies on federal and other law, my findings that respondent sexually harassed Ms. L are limited to the administrative employee discipline framework for considering claims of misconduct, and do not rest on the law of employer liability. Accordingly, this report and recommendation does not encompass findings of sexual harassment under other laws, which were not charged. However, I have considered respondent's arguments and administrative, federal, state and local precedents interpreting language similar or identical to that found in A-830 for guidance, given the paucity of case law interpreting that provision.[13] This is not a federal case. It is not a Title VII matter, which involves the complexities of employer liability where civil plaintiffs allege employer liability for the acts of a supervisor in the workplace. Rather, this matter arises as a city employer seeks to address and remediate a complaint of sexual harassment through employee discipline.

Chancellor's Regulation A-830, issued February 13, 2004 (revised April 28, 2008) explicitly prohibits sexual harassment, defined as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (3) such conduct has the

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[13] Although Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2003e-2(a) (Lexis 2008), prohibits discrimination based on sex, it does not include the term "sexual harassment," which is a type of conduct the federal courts have found to be discriminatory. "Sexual harassment" is expressly prohibited in Chancellor's Regulation A-830. The *City EEO Policy* is identical in pertinent part to Chancellor's Reg. A-830, and provides that "Sexual harassment is a form of employment discrimination which is prohibited by law," and quotes federal government guidelines defining sexual harassment in the same language used in Chancellor's Regulation A-830. The *City EEO Policy* provides that "[e]veryone who works within New York City government or its workplaces, or who seeks employment within city government, is covered by federal, state and local employment laws and this policy. . . . These protections apply to actions, whether or not intentionally offensive or directed at a particular person or group, that violate this policy." *Id.* at 2-3. In addition, the City Charter prohibits sex discrimination: "The head of each city agency shall ensure that such agency does not discriminate against employees or applicants for employment as prohibited by federal, state and local law." NYC Charter § 815(h) (Lexis 2008).

purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment" (Pet. Ex. 23). Respondent engaged in just such conduct throughout the summer and fall of 2006.

I find Ms. L's testimony concerning the sexual harassment, supported by Rivera's and Lombardi's, to be more persuasive than that of respondent and his witnesses. Ms. L credibly described a hostile work environment in which she was required to endure respondent's repeated romantic advances. During the summer of 2006, respondent acted inappropriately in repeatedly propositioning his subordinate, Ms. L, for a relationship, despite her unfaltering rejection of his advances. Respondent further used his position as Ms. L's supervisor to engage her co-worker, Harris, to serve as an intermediary for many of his communications. These messages, in which respondent professed his love for Ms. L and expressed his desire to be with her, were far from innocuous. They put Ms. L in a position where she dreaded coming to work each day. The Department showed by a preponderance of the credible evidence a hostile working environment in which Ms. L was disciplined in the summer of 2006, meaning that she was "screamed at, embarrassed and humiliated by Mr. Brust for talking to co-workers, for associating with them, for talking on [her] phone. . . . For not having the same feelings as him" (Ms. L: Tr. 870). Ms. L credibly testified that she felt "tormented" during the summer (Tr. 575), explaining that she got into almost daily fights at home with her boyfriend about what was occurring at work and that her physician prescribed for her both Paxil and Xanax for the anxiety she was feeling (Tr. 648). As a result of respondent's conduct, Ms. L refused to enter his office alone, and would instead request that Harris or Rivera go in with her (Tr. 648).

Ms. L spoke of her humiliation by respondent and the toll it took on her psychologically:

> Well, I just became extremely stressful. My doctor put me on -- I was taking Paxil and Xan[a]x for anti-anxiety, and then, as this was progressing, I was going to work every day. I was extremely stressed out, and I hated going to work. And then my doctor put me on Xan[a]x every day, rather then [*sic*], as needed. And then on top of that, I would go home. I'd have to fight with my boyfriend over going to work everyday, and then my family started getting involved in the whole situation, because on several occasions, I'd go home and start crying.

(Tr. 648). Ms. L experienced panic attacks as a result of respondent's treatment of her at work (Tr. 1066-68):

Q. Okay. When you say that it was very stressful and you hated going to work, could you tell me what made it stressful?

A. Because every time I would go into work, like I said before, I would go into work, do my paperwork with Craig in the office, and then proceed to painting. It got to the point to where I would not ever go into his office by myself. I used to have Anthony come with me, or Cisco Rivera would come with me. And I would tell him, just get a drink of water in his office. Just please don't leave me in there by myself. It got extremely uncomfortable.

And then when -- if I had gotten called down to the office by Craig, I would always ask them to make a point of coming with me.

Then on days when we would be leaving, he would say, [L], can you stay behind and wait a minute. And then he would tell me on several occasions, you know, I don't want to make you feel uncomfortable. I said 'then don't.' I said, 'just leave me alone.'

Q. Why is it that you asked someone to accompany you back to the office, each time that you were called to the office by the Respondent?

A. Because he's on -- he was presumably on the same medication I was on, and I know he was drinking. And I also know the consequences of drinking on the medication. I've drank [*sic*] on my medication. So, it made me nervous, and I was afraid. And the way he would come at me to talk to me, intoxicated, it -- I didn't know, like he was unpredictable.

Q. When he asked you to stay later on that particular day, what was your response?

A. No. But it wasn't even just he'd ask me to stay later, it was he would ask me to stay behind. And like Cisco or Anthony would have to leave the office. He would say, [L], can you stay for a minute, I want to talk to you. And oh, here we go.

(Tr. 648-49).

Q. Can you tell us whether or not, during that summer, you spoke directly to the Respondent?

A. Oh yes. On several occasions. But it got so out of control, like we would actually be having a screaming match, fighting and cursing.

Q. During that summer, after the Respondent started to let you know about his feelings for you, what, if any, conversations did you have directly with

him? Please start from the first conversation, in regards to your response to him[.]

A. Okay. Well, in the very beginning, I tried to avoid it altogether, because I was very uncomfortable. It was just a really surprising situation for me to deal with in the first place. Then it became to where, like when he was -- when I would see him staring at me, I would like give it a few seconds, until it would just get to me, until I couldn't say nothing, and I would turn around and I would curse at him, what the F are you looking at? Get away from me.

(Tr. 650-51).

The Department additionally established that respondent inappropriately stared at Ms. L's breasts and buttocks throughout the summer. It is necessary to distinguish permissible staring that may be a natural part of the supervisor/subordinate employment relationship from the inappropriate staring that betrays romantic interest and attraction. What respondent did here was the latter, and it was impermissible. A federal appellate court similarly rejected a claim that staring at a woman's breasts in the workplace was "not of a sexual nature" "We cannot reasonably accept, however, that a man's repeated staring at a woman's breasts is to be ordinarily understood as anything other than sexual." *Billings v. Town of Grafton*, 515 F.3d at 51 (1st Cir. 2008). Although I credit testimony from respondent that he would often review the painting and other work of his staff, I find that his staring at Ms. L was substantially different in that it was directed at her personally because of her gender, rather than at her work. For example, Smith testified that the first time he did cleaning work for respondent, respondent stood over and stared at him for about 15 or 20 minutes while he cleaned the first two rooms assigned (Tr. 2141-42). Smith had worked for respondent in that capacity for about four days at that time (Tr. 2142). It is reasonable that respondent would look closely at the work of a new employee to make sure it was done correctly, as he did in the case of Smith. But even there, respondent only stared at Smith's work while he was painting the first two or three rooms of his assignment of two floors in the school -- not throughout his time painting (Tr. 2142).

I further credit Ms. L's statement that she asked respondent to stop staring at her, and even demanded that he stop. Harris testified that although he himself did not take her complaints seriously, Ms. L did indeed complain about respondent staring at her. Lombardi also confirmed that he confronted respondent about staring at Ms. L, and that respondent did not deny doing so,

but instead essentially told Lombardi to mind his own business. While there probably were times when respondent was staring at Ms. L's work rather than at Ms. L, in the context of the other acts that occurred throughout the summer of 2006, including lavish gift giving and the conveyance of numerous messages of an intimate nature, I find that most of the alleged staring by respondent was inappropriate behavior, the result of respondent's apparent infatuation with Ms. L. The staring at Ms. L's breasts and buttocks, as well as the extended duration of the staring, contributed to creating a work environment that was both hostile and intimidating.

Lombardi testified that respondent "wanted" Ms. L, and clearly Lombardi meant that Brust wanted an intimate personal, including sexual, relationship: "He expressed, you know, that he did like her, that he thought that she was a great worker. That, you know, that he wishes that, you know, he could, you know, have her. You know, he -- he just, you know, I guess, You know, he felt for the girl" (Tr. 1468-69).

It was also undisputed that respondent sent Ms. L flowers and other valuable gifts. A gift of three dozen roses from a supervisor to his female subordinate, whom he treated differently from all her male co-workers, is inappropriate.[14] That respondent did so when Ms. L was living with her boyfriend made matters worse in that he caused her a tremendous amount of anxiety at home and at work as she tried in vain to get respondent to desist.

While respondent can be faulted for drawing other school personnel, from cleaners to teachers and administrators to cooks, not to mention the PTA president, into the turmoil he was creating, and for escalating the school gossip and tale carrying about Ms. L, she should have had the foresight to refuse his gifts to the extent possible. Nonetheless, Ms. L had the right to do her work without unwanted gender-based attention from her boss. It was he who burdened their employment relationship with the gift-giving. He was the superior and, therefore, in a position of power over her. Once she rebuffed him, gifts or no gifts, respondent was obliged to stop bothering her. That should have been the end of the story, but unfortunately it was not.

The Department established a pattern of misbehavior by respondent that created a hostile work environment. The agency submitted a handwritten note from respondent to Ms. L, which she found on her desk during the summer, which read, "[L] You have been a big help to me this summer. I would just like to see a little happiness in you. You deserve that. YOUR [*sic*] A

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[14] Such gifts could implicate the City's conflict of interest law and rules. *See generally* Chapter 68 of the New York City Charter, §§ 2604(b)(2), (b)(3), (b)(14) (Lexis 2008); *Cf.* City Charter § 2604(b)(5), and 53 RCNY § 1-01 (Lexis 2008). No such charges were pleaded in this matter.

VERY SPECIAL LADY! C" (Pet. Ex. 3; Tr. 694; emphasis in original). Ms. L testified that respondent left this note after she had already told him to leave her alone, in the midst, as she testified, "of him bothering me every day and me fighting with him, cursing him out, telling him to leave me the hell alone, and then he leaves me notes on my desk like that. It just told me, he's not leaving me alone anytime soon" (Tr. 695). Respondent explained that he left the note because he felt sorry for Ms. L; he did not deny that he had feelings for her when he left it, but asserted "there's a lot of meaning for feelings. And if it's the meaning for feelings, it's because she was getting beat the s-h-i-t out of her by her boyfriend" (Tr. 2659).

I find that the Department's evidence outweighed respondent's self-serving denials, which were generally aimed at making Ms. L and Rivera appear to be poor workers. Respondent's after-the-fact distinction between having "feelings" for Ms. L only because he felt sorry for her because she was being abused and having romantic feelings was thoroughly unconvincing. In common parlance, to say one "has feelings" for another is to express a romantic or love interest in that person. To say a year and-a-half later that Investigator Nagy misunderstood respondent's then candid expression of his feelings for Ms. L is absurd. Nagy testified for three days and had no trouble understanding formal English or the vernacular. Nagy was not mistaken in recording what respondent told him in December 2006. It was respondent's late-starting qualification and shading of the meaning of his original statement that made no sense. Nor do I credit Harris' denials that he had relevant knowledge and that he carried love messages from respondent to Ms. L. Harris had a motivation to lie in order to conceal his involvement as the intermediary between respondent and Ms. L, and he was by his own admission, grateful to respondent for his promotion (Tr. 1610). While he admitted that he carried messages from respondent to Ms. L, he claimed that they were about her work, yet was angry with respondent for putting him in the middle of them ("I was caught up in the middle . . . . I'm mad I was put in the middle of something that had nothing to do with me," Tr. 1657-58). He also admitted feeling that some of the messages were "inappropriate," but contended weakly that they were not personal messages; rather, he said he resented having to tell her that respondent thought her work ethic was poor, and believed respondent should convey those messages himself (Tr. 1657-60). Asked if he was required to tell Ms. L "things [he] really didn't like doing," Harris answered, "Yes" (Tr. 1702). Although Harris denied on cross-examination being Brust's "right hand man," because he did not seem to understand the import of the question, Harris then

conceded that he served as exactly that: in the summer of 2006, Harris was with Brust, spoke with him, took orders from him, "and relayed work requirements that had to be done all throughout that summer" on a daily basis (Tr. 1702-03).

This cagey testimony, taken with Harris' admitted bias against Ms. L and in favor of Brust, tends to support Ms. L's testimony that Harris did Brust's bidding and indeed carried Brust's love messages to Ms. L. As respondent's subordinate and second in command, he should not have found it inappropriate to discuss work assignments with Ms. L on respondent's behalf. Harris' wan denials that he conveyed romantic messages were not credible, but Harris' admissions that he served as respondent's intermediary, however, were significant.

Respondent argues that the evidence is insufficient to show a hostile work environment because he never had physical contact with Ms. L or used the word "sex" or other explicit sexual language in his communications with Ms. L. Respondent cites *Mendoza v. Borden, Inc.,* 195 F.3d 1238, at 1243-45 (11th Cir. 1999) (en banc), *cert. denied,* 529 U.S. 1068 (2000), in support of his oral motion at trial to dismiss the petition. I indicated that I would rule on the motion in this report and recommendation and do so here. Respondent's position oversimplifies the law of sexual harassment. In *Mendoza*, an employee sued her employer, alleging sexual harassment by a supervisor under, *inter alia,* Title VII of the Civil Rights Act of 1964. She stated that her supervisor stared at her and at her groin area, followed her around the workplace, and once brushed his hip against her hip. *Id.* at 1242-43. The court explained that under Title VII, hostile work environment sexual harassment constitutes sex discrimination only when the harassment alters the terms or conditions of employment, noting "in the cases traditionally described as hostile-environment cases, an employer's harassing actions toward an employee do not constitute employment discrimination under Title VII unless the conduct is '*sufficiently severe* ***or*** *pervasive* "to alter the conditions of [the victim's] employment and create an abusive working environment."'" *Id.* at 1245 (citations omitted) (emphasis supplied). Examining the (1) frequency and (2) severity of the supervisor's conduct; (3) whether his conduct was physically threatening or humiliating, or a mere offensive utterance; and (4) whether his conduct unreasonably interfered with the plaintiff's job performance, and the totality of the circumstances in context, the court concluded that the supervisor's conduct was not objectively sufficiently severe or pervasive to alter the terms or conditions of her employment. *Id.* at 1246-47. The facts here are distinguishable from those in *Mendoza.* Respondent here pursued and intimidated Ms. L

on a daily basis. The harassment here was frequent, pervasive, and humiliating. And here, there is ample proof that, unlike the alleged harasser in *Mendoza,* respondent treated Ms. L very differently because of her gender.

Respondent's assertion that physical contact or the explicit use of the word sex or some variation of it is necessary to establish sexual harassment is mistaken. Under the Title VII sexual harassment framework, contrary to respondent's position, the Department has indeed proved that respondent engaged in sexual harassment of Ms. L. While there is no "mathematically precise test" for hostile work environment, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993), "[t]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances,'" *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998) (quoting *Harris*, 510 U.S. at 23). The Supreme Court in *Oncale* held that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." *Id.* at 80. The test of whether there is a hostile work environment has both an objective and a subjective component. *Mormol v. Costco Wholesale Corp.*. 364 F.3d 54, 58 (2d Cir. 2004). The Second Circuit has recently explained that "[p]rior cases in which we have concluded that a reasonable juror could find that the work environment was objectively hostile do not 'establish a baseline' that subsequent plaintiffs must reach in order to prevail." *Schiano v. Quality Payroll Systems*, 445 F.3d 597, 606 (2d Cir. 2006) (citation omitted). Thus, employers are not free from liability in all but the most egregious cases. *Id.*

It is not necessary that a worker be touched offensively or harassed by sexual innuendo to establish a sexual harassment claim. *Quick v. Donaldson Co.*, 90 F.3d 1372, 1379 (8th Cir. 1996). While a supervisor's staring at the breasts of a subordinate in and isolated instance might not form a cognizable claim, staring that occurs frequently over a substantial period of time may add up to a hostile environment. *Billings v. Town of Grafton*, 515 F.3d 39 (1st Cir. 2008) (denying summary judgment to employer where supervisor may have stared at secretary's breasts regularly for a period of two and a half years). The court in *Billings* held that the district court had placed "undue weight on the fact -- undisputed though it was -- that [defendant] Connor's alleged behavior did not include touching, sexual advances, or 'overtly sexual comments to or about [the plaintiff].' As we have just explained, the hostility vel non of a workplace does not depend on any particular kind of conduct; indeed, '[a] worker need not be

propositioned, touched offensively, or harassed by sexual innuendo in order to have been sexually harassed.'" *Id.* at 48 (citations omitted). Here, the Department has established that not only did respondent engage in frequent staring at Ms. L in a sexual way over an intensive period of at least five months in 2006, but also repeatedly propositioned her for a romantic relationship, bought her extravagant gifts going back to the start of her employment nearly two years earlier and through the summer/fall of 2006, actively enlisted at least one subordinate in his pursuit of her, and imposed his misbehavior with respect to her on other subordinates, teachers, cooks, and a PTA official, who were drawn into his drama.

Respondent's inappropriate harassing conduct was clearly indeed pervasive, and, if not necessarily "extraordinarily severe," as the federal courts have defined that term under Title VII, was severe for purposes of this administrative disciplinary proceeding under section 75 of the Civil Service Law. The federal test is an "either or" analysis, meaning sexual harassment is found whether the conduct is pervasive **or** severe. Daily harassment for months is clearly pervasive. We have found much less frequent harassment sufficient to support a finding of misconduct. *Cf. Dep't of Correction v. Hansley*, OATH Index No. 575/88, at 34 (Aug. 29, 1989), *aff'd sub nom. Hansley v. Koehler*, 169 A.D.2d 545, 564 N.Y.S.2d 398 (1st Dep't 1991) (offensive and unwelcome behavior of a sexual nature lasting for a period as brief as several weeks found to be sexual harassment and misconduct for purposes of an administrative, disciplinary proceeding). Ms. L was reasonably upset by any objective or subjective standard; she suffered from depression and anxiety for which she was taking prescription medication due to Brust's treatment of her, although such injury or psychological damage is not required to support a finding of sexual harassment. *Harris*, 510 U.S. 17. Respondent's conduct caused major disruption in the school, not only to Ms. L. The distractions he generated permeated P.S. 188.

Further, even if the Department had failed to establish that respondent engaged in sexual harassment under Title VII, establishing sexual harassment for purposes of misconduct under section 75 of the Civil Service Law does not require the same showing as articulated in *Mendoza*. "In an administrative disciplinary proceeding, such as this, in which it is the employer who seeks to discipline an employee for sexual harassment, it need only be shown that the conduct complained of was sexually motivated, regardless of whether it was persistent or part of a pattern." *Fire Dep't v. McFarland,* OATH Index No. 230/86, at 13-14, 17 (Aug. 21, 1986)

(first woman firefighter in company taunted and assaulted because of her gender was sexually harassed even absent overt sexual advances or overtures). *Accord Dep't of Correction v. Andino,* OATH Index No. 492/95, at 7-8 (Dec. 13, 1994); *Dep't of Personnel v. Rago,* OATH Index No. 471/92, at 7-8 (Apr. 22, 1992); *Dep't of Parks & Recreation v. Aronoff,* OATH Index No. 366/87, at 33 (Mar. 24, 1988). While sexual harassment is cognizable under the Civil Service Law even absent an agency rule, here, Chancellor's Regulation A-830 sets the standard of conduct -- a standard conspicuously published, including online with all the Chancellor's regulations on the Department's website (http://docs.nycenet.edu/docushare/dsweb/Get/Document-45/A-830.pdf) -- which respondent repeatedly violated in 2006. *See Hansley*, OATH 575/88, *aff'd sub nom. Hansley v. Koehler*, 169 A.D.2d 545, 564 N.Y.S.2d 398 (1st Dep't 1991); *Rago*, OATH 471/92, at 7-8.

Claims that a head custodian's singling out the sole subordinate female cleaner among a staff of all male cleaners in a public school for frequent offensive comments based on her gender, without sexual advances, were held sufficient allegations of sexual harassment to survive a summary judgment motion by the employer in *Macri v. Newburgh Enlarged City School District,* 2004 U.S. Dist. LEXIS 10515 (S.D.N.Y. 2004). *Macri* is instructive. I find that the situation at P.S. 188 was likewise one in which respondent singled out Ms. L for different, offensive treatment because of her gender, and he also persistently proposed an unwanted romantic liaison with her.

Moreover, we have held that the proposal to give someone "the world," as here, has a sexual and romantic content. In *Board of Education v. Roman*, OATH Index No. 1555/97 (Sept. 30, 1997), a New York City school security guard was charged with sexually harassing a student by writing her a letter indicating that he had feelings for her that are virtually identical in language and indistinguishable in substance to respondent's proposition here: "I would be true to you and I would give you and your baby the world." *Id.* at 20-21. The security guard's comments were found to be "quite clearly . . . a romantic and sexual overture to a high school student, and as such . . . improper and inappropriate." *Id.* at 23. Judge Lewis found the letter to be a love letter. Coming from an authority figure, the letter was held "inherently intimidating." *Id*. Although the guard-student relationship in *Roman* was more unequal and inappropriate than the superior-subordinate employment relationship between respondent and Ms. L, *Roman* nonetheless demonstrates that a message from a person in a superior position of authority, such as a supervisor, to a subordinate does not have to be sexually explicit to constitute misconduct.

Harris, whose testimony was largely in favor of respondent, corroborated in this instance Ms. L's testimony that respondent said he would give her "the world," although he claimed he did not know the import of that statement (Tr. 1613-15). Respondent's communications here, including declaring his love and offering to give Ms. L "the world," adding that he could also offer her a house, money and a car (Pet. Ex. 6), were a proposal of a close, intimate and sexual relationship akin to cohabitation.

Respondent sexually harassed Ms. L in a course of continuing and vexatious conduct that constitutes misconduct for purposes of section 75 of the Civil Service Law and applicable City rules and regulations.

Intoxication (Specifications 6 and 7)

In addition to the intoxication incident in which he declared his love for Ms. L while he was intoxicated (Specification 7), the Department alleges that during the months of July and August 2006, respondent repeatedly left the school and returned in an intoxicated condition. On one of these occasions, respondent allegedly stated to Ms. L words to the effect that he loves her and she is all he cares about.

Ms. L testified that during the summer of 2006 she observed respondent leaving the school around 11:00 or 11:30 a.m., only to return later in the afternoon intoxicated, up to seven times, sliding against the wall: "[Y]ou could get drunk off his breath, because that's how strong the smell was" (Tr. 587). Rivera similarly testified that he observed respondent approximately three times in an intoxicated condition at school (Tr. 1120). They both said that when respondent returned, he had trouble walking and standing upright, his breath smelled of alcohol, his eyes were watery, his skin was red,[15] and he had slurred speech and trouble completing sentences (Ms. L: Tr. 587, 960; Rivera: Tr. 1120). According to Ms. L, respondent sometimes bragged "about how drunk he was" and there were times that respondent passed out in his office late in the day (Tr. 587). He occasionally asked the other members of the custodial staff where his "number one" was, referring to Ms. L (Tr. 587). Rivera stated all his co-workers brought

[15] There was testimony that because of a skin condition, respondent's face was always somewhat red (*e.g.*, Maldonado: Tr. 1572). Respondent did appear to have a ruddy complexion during the trial, and I have not based my decision on the observations of witnesses who described his face as red, because it was not clear whether they meant more red than usual. There is, however, independent, credible evidence providing a basis upon which to conclude that he was inebriated at the school on more than one occasion -- how he walked and spoke, and the odor of alcohol on his breath.

respondent's intoxicated condition to his attention, and that on one occasion, the president of the PTA, Sonia Maldonado, came to him while he was working in a second floor classroom and called him out to the hallway to look at respondent (Tr. 1121, 1243-44). Maldonado told him, in Spanish, "Your boss is drunk. He needs to get off this floor, because the principal is on this floor" and he could get into trouble for that (Tr. 1121, 1247). Rivera explained that Brust was walking away, using his hand to make his way along the wall, apparently to steady himself (Tr. 1243-44).

At trial, Maldonado testified that Rivera was incorrect and that she did not believe respondent was intoxicated on the occasion he described. As the President of the PTA at P.S. 188, Maldonado was often present at the school during the summer of 2006 (Tr. 1570). Maldonado admitted that she saw respondent holding onto a wall as he walked, but explained that she was only joking with Rivera when she told him, "You know Craig is drunk" (Tr. 1572, 1575, 1584-85). She said that she did not smell his breath that day (Tr. 1575). She was evasive about how certain she was that respondent was drunk -- I'm sorry to say I cannot put my hand on the Bible and say 100 percent that Craig was drunk" (Tr. 1585). She further claimed that Investigator Nagy had misunderstood or misrepresented in the SCI report what she had told him, and insisted at trial that she had never told Nagy that Brust was intoxicated, although the report says she told Nagy exactly that (Tr. 1585-86; Pet. Ex. 1). In fact, she told Nagy, on November 27, 2006, close to the time of the events, that she saw respondent on two different occasions in 2006, after noon, intoxicated in the school. She also told Nagy that her father was an alcoholic and she was familiar with the signs of intoxication. She gave detailed observations that respondent had an unsteady walk, and that the odor of alcohol was on his breath (Pet. Ex. 1). But at trial, a year and a half later, she flatly denied that she smelled his breath because he was "far away" as he held onto the wall (Tr. 1586).

Maldonado thus totally recanted her initial observation as reported in writing contemporaneously by Nagy. She dissolved into tears as she testified at the hearing that she did not want to be in court and did not want to be involved. I found her fear of testifying sincere, but her retraction of her account that she saw respondent intoxicated in the school was thoroughly unconvincing. Her testimony appeared to proceed entirely from her remorse about saying anything that could hurt respondent, not from her true observations at the time of the events at

issue. Maldonado denied that facing respondent in court affected her (Tr. 1596), but it clearly did contribute to her discomfort and highlighted her evasiveness.

Maldonado's testimony was telling in that she stated that she could recognize the signs of intoxication because her father was an alcoholic (Tr. 1572-73, 1577). She knew the signs of intoxication because of her family experience, and it is unlikely that she would have so much trouble recalling or identifying the indicia of intoxication in general. She testified that she saw "Craig coming down the hall. He was just holding onto the wall . . . . " (Tr. 1572). She added that she "probably" said to investigators, "You know, Craig is drunk," but then attempted unconvincingly to minimize this statement by adding that she was only "playing around" when she said this and really did not know if he was drunk (Tr. 1572, 1575). I find it totally incredible that Maldonado, who seemed very meek and deferential to authority, would find an interview by city investigators a context in which she would feel remotely comfortable enough to joke around about something so serious. Nor would she joke in making a comment to Rivera about Brust being intoxicated at the time. On cross-examination, she tried to explain her testimony with a different gloss -- that some other witness had reported to authorities that she had jokingly made the statement that respondent was drunk -- but at the time of trial, she did not recall saying that to investigators. She did recall saying she saw him holding onto the wall. She added: "Maybe I did say he was drunk, but I can't say he was" (Tr. 1575).

I found these ever more elaborate explanations evasive and untrustworthy. Precisely because she obviously cared about respondent ("[w]e had a nice relationship," Tr. 1569), I find it highly unlikely that she would even suggest to authorities that he was drunk in the first place if she was unsure. This was no laughing matter. Her original intention was to protect him from detection; she expressed concern that he was on the hall where the principal worked and she wanted Rivera to remove him from sight. She never intended to inculpate him, and she never foresaw that she would be called in as a witness by city investigators or in a disciplinary trial, but I believe she knew exactly what she saw at the time. One would expect her contemporaneous observations of respondent in the school to be reliable. With the passage of time and her appreciation of respondent's legal difficulties, her subsequent 180-degree turn-about is unreliable, based as it is, on an attack of remorse and sympathy for respondent. *Police Dep't v. Pena,* OATH Index No. 692/90 (May 4, 1990) (complainant's initial hearsay accusation that police officer was violent credited over retraction where complainant did not want her husband

to lose his job); *Douglas v. Constantine,* 151 A.D.2d 811, 812-13, 542 N.Y.S.2d 400, 401 (3rd Dep't 1989) (trial recantation of hearsay statement was rehearsed and was not credited). In the end, Maldonado, as reluctant a witness as she clearly was, admitted that she told investigators that she saw respondent and believed he was drunk, but limited that admission to one sighting instead of two (Tr. 1576-77).

Ms. L described a time when she was changing out of her painting clothes in a room next to respondent's office when he knocked on the door to the room (Tr. 587-88). When Ms. L opened the door, respondent first asked her to re-address some envelopes he was holding (Tr. 588). She testified that there was nothing wrong with the envelopes. He then stepped into the room with Ms. L and told her that he was in love with her and did not care what anyone else thought. Ms. L stated that she ran out of the office, hysterical, and went home (Tr. 588). Ms. L testified that respondent was intoxicated on this occasion (Tr. 587-88). Respondent denied that he was intoxicated, that he told Ms. L he loved her, and that she was all he cared about, on this or any occasion (Tr. 2374, 2376).

This incident occurred back at school, following a group trip for lunch during which Brust was drinking alcohol. It is undisputed that respondent, Ms. L, Rivera, Lombardi, and Harris went to a restaurant/bar, Cha Cha's on the boardwalk of Coney Island, during lunch one day during the summer of 2006 (Brust: Tr. 2382-83; Ms. L: Tr. 647; Rivera: Tr. 1166-67; Harris: Tr. 1606). Respondent drank at least two, maybe three alcoholic drinks while there. Brust contended he had consumed only two Corona beers (Brust: Tr. 2374; Rivera: Tr. 1167-68; Harris: Tr. 1606-08; Lombardi: Tr. 1505-06). Rivera testified that he saw respondent drinking at least two or three Long Island iced tea drinks, which Rivera said, contain a combination of seven or eight liquors, and that all those in attendance were drinking alcohol (Tr. 1167). Although Rivera believed that respondent looked "buzzed," as his face was red[16] and his eyes showed him to be "high" in Rivera's estimation, respondent denied that he was intoxicated (Brust: Tr. 2374; Rivera: Tr. 1168). Lombardi, too, described respondent as walking "a little funny," having slurred speech "a little bit"; "a little bit tipsy;" "[h]e might have been a little bit intoxicated" (Tr. 1481, 1532).

Rivera testified that after the custodial staff returned from Cha Cha's, he and Harris saw respondent standing in the bathroom next to a PTA room that Ms. L would sometimes use to

[16] For the reasons stated in note 15, above, I have discounted this observation of the color of respondent's face.

change clothing; Brust was "sticking his head out." Ms. L was in the PTA room on the phone crying about her boyfriend to a friend. Rivera thought that respondent was listening to Ms. L's conversation (Tr. 1123, 1124, 1220-22).

Harris, however, stated he never saw respondent intoxicated during the summer of 2006 (Tr. 1606, 1703-04), and did not remember this incident (Tr. 1704). He further testified that respondent never bragged to him about being intoxicated at work (Tr. 1736).

Koleci and Nieves, both teachers at the school, testified that they never saw respondent intoxicated during the summer of 2006. Nieves taught summer school for six weeks, from 8:00 a.m. to 1:00 p.m. each day (Tr. 2026-27, 2041-42, 2076). Nieves's classroom was on the third floor of the building (Tr. 2041-42). She would usually arrive at school about 7:30 a.m. and leave at 4:00 or 4:30 p.m. (Tr. 2027, 2053). While she was often in her classroom, she indicated that she still had occasion to see respondent throughout the day (Tr. 2027-28), and did not observe him in an intoxicated state at any time during the six weeks (Tr. 2028, 2053). She explained that she spoke to him during cigarette breaks and never smelled alcohol on his breath (Tr. 2028). Nieves wrote a letter in support of respondent saying as much (Pet. Ex. 28). She explained that she wrote the letter after someone had asked her whether she had seen respondent intoxicated (Tr. 2044-45). Smith, a cook at the school, also said he never saw respondent drunk at school (Tr. 2148).

Respondent denied that he ever left P.S. 188 and came back in an intoxicated condition (Tr. 2374). Respondent explained that he was on Clonazepam and either Paxil, Zoloft, or Effexor during the summer (Tr. 2374-75), and that he was not supposed to consume alcohol while on the medications and did not always listen to his doctors (Tr. 2579-81). The only times that he admittedly drank alcohol during the summer of 2006 were the one occasion at Cha Cha's and the barbeque at his house (Tr. 2574, 2590). On those two days, respondent testified, he did not take his medication in preparation for drinking alcohol (Tr. 2576, 2590-91). He did not go to Cha Cha's on any other occasion (Tr. 2575).

Ms. L and Rivera provided credible testimony that they saw respondent intoxicated on certain occasions. Neither side offered expert testimony concerning intoxication or the interplay of respondent's medications and alcohol. Nevertheless, lay persons may render an opinion as to whether or not a person appeared intoxicated. *People v. Hedges*, 98 A.D.2d 950, 470 N.Y.S.2d 61 (4th Dep't 1983); *accord Brown v. Iaconelli*, 26 Misc. 2d 194, 196, 206 N.Y.S.2d 669, 671

(N.Y. Mun. Ct. 1960). Ms. L and Rivera both described seeing the indicia of intoxication on respondent: they smelled alcohol on his breath, noted his slurred speech, and saw, as did Maldonado, that he he had trouble walking.

While Maldonado sought to abandon her statement to Nagy, asserting at trial that she had actually said she was not sure whether respondent was intoxicated and had only been joking with Rivera, I credit her contemporaneous statement as written in the SCI report over her live testimony. Maldonado made her initial statement to Nagy soon after the events she was describing and before she understood the implications for Brust of what she was saying. Now that she has had time to consider the effect of her testimony, Maldonado has retracted her statement to benefit respondent. Her demeanor at trial indicated she did not want to say anything that could even potentially hurt him. I conclude, therefore, that Maldonado saw respondent intoxicated on one of the same days Rivera did, and actually alerted Rivera to respondent's intoxication to save respondent and the school embarrassment. In 2006, she tried to protect respondent's job by asking Rivera to remove him from the principal's floor when she saw that respondent was intoxicated. At trial, she tried again to save respondent's job, but this time by denying that she saw him drunk at school.

Respondent's assertion that he never drank during lunchtime, except on the one occasion at Cha Cha's, was unconvincing. The reason he claimed he did not drink was that he was on medication. The medication, however, did not prevent him from drinking at Cha Cha's or at his barbeque, where he admitted he had consumed six beers (Tr. 2594). If respondent admitted drinking on these occasions despite being on and off prescription medication, there is no reason to believe the medication served in his mind as an impediment to his drinking on other occasions as well. He testified that he would skip a single dose of his anxiety medication if he planned to drink, believing that the drug would be out of his system. He did this without consulting his doctor as to whether missing a dose was a sound practice and would enable him to consume alcohol without side effects, even though he knew that his medicine had warning labels about alcohol and that mixing alcohol with his medications was a "no-no" and could make him appear intoxicated and enhance the effects of the alcohol (Tr. 2579- 2584).

Even if the only time respondent drank during lunch had been the one time at Cha Cha's, reporting to work intoxicated even once is improper. *See Dep't of Correction v. Mason*, OATH Index No. 2229/99 (Sept. 14, 1999). Respondent was wrong to drink during his lunch period

because he knew he would have to return to work. Exacerbating respondent's misconduct is that he works in an elementary school filled with small children. Although the events at issue took place during the summer, the evidence established that children were nonetheless in the building for summer school.

While Harris, Smith, Koleci, and Nieves testified that they never saw respondent intoxicated at work, I do not find their testimony dispositive because they were heavily biased towards respondent and could only prove a negative -- they could only testify to what they did *not* see. They were not with respondent at all times during the summer. While respondent might not have been intoxicated on the occasions they saw him, he still could have been inebriated on the occasions when they did not see him, and Rivera, Ms. L, Lombardi and Maldonado did see him clearly when he was drunk in the school.

Because I find that Ms. L, Rivera and Lombardi gave credible testimony in which they described the indicia of intoxication, and because I credit Maldonado's contemporaneous statement to Nagy over her shaky denials in court, I find that this charge has been proved.

Threats of Retaliation (Specifications 17, 18 & 19):

The Department alleges that after Ms. L filed the complaint of sexual harassment against respondent, he threatened to retaliate against her by threatening her job, changing her work hours, and changing her vacation, in effect departing from normal procedures and denying her request for vacation during the Christmas-New Year period (Tr. 667). The agency also alleges that respondent ordered her to punch out and "get the fuck out of the building," and tried to grab her shoulder to prevent her from leaving his office. Although the word retaliation does not appear in the second amended petition, counsel treated these specifications as claims that respondent threatened Ms. L in retaliation for Ms. L's sexual harassment complaints, which respondent denied.

To prevail on a claim of retaliation in other contexts, for purposes of establishing employer liability, a plaintiff must demonstrate by a preponderance of the reliable evidence that (1) the complainant engaged in a protected activity, (2) respondent was aware of that activity, (3) respondent subsequently subjected her to an adverse action, and (4) there was a causal connection between this adverse action and her protected activity. *See Macri v. Newburgh Enlarged City School District,* 2004 U.S. Dist. LEXIS 10515, at 54 (S.D.N.Y. 2004); *see also*

Gordon v. New York City Bd. of Education, 232 F.3d 111, 113 (2d Cir. 2000); *Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033, 1039 (2d Cir. 1993); *Cassidy v. Dep't of Correction*, OATH Index No. 646/98, at22 (Oct. 23, 1997), *aff'd*, NYC Comm'n on Human Rights, Dec. & Order (Jan. 28, 1998).

I have treated these claims as allegations of threats of retaliation under city anti-discrimination law and policy and the New York State Civil Service Law, in the disciplinary context, which requires less than is need to establish employer liability for retaliation. Chancellor's Regulation A-830 prohibits retaliation -- defined as "[a]ny adverse act" -- against any individual for filing complaints under available anti-discrimination laws. Similarly, the *City's EEO Policy* provides:

> It is a violation of this policy to retaliate against or harass any person who asserts his or her rights regarding employment discrimination by: 1) opposing discriminatory practices in the workplace; 2) complaining about prohibited conduct; or 3) participating in any way in the complaint, investigation or reasonable accommodation processes. . . .
>
> Behaviors which may be considered retaliatory include, but are not limited to: *threats,* reprimands, negative evaluations, *harassment,* refusal to hire, denial of promotion or job benefits, demotion, suspension, discharge, negative references to prospective employers, or other actions affecting the terms, conditions or privileges of employment.

City EEO Policy, at 5 (emphasis supplied).

In the present case, Ms. L engaged in protected activity when she leveled sexual harassment charges against respondent with SCI. Respondent admitted on cross-examination that he knew about her impending sexual harassment complaint on October 18, 2006, because, he testified, "I did get a call at home" from Gerald Smith (Tr. 2707-09). According to the proof, after learning that Ms. L lodged the sexual harassment complaint, respondent had Harris call Ms. L to tell her to enjoy her last two weeks of work. Shortly after that, respondent notified Ms. L by letter that he was changing her work hours from the day shift to the night shift and that she was required to take her vacation from November 20th through December 20th. The temporal proximity between these adverse employment actions and respondent's knowledge of the protected activity, on the same day and then again within the week, is sufficient evidence of causality to establish a *prima facie* case of retaliation. *See Cifra v General Electric Co.*, 252 F.3d 205, 217 (2d Cir. 2001). Respondent, however, asserts non-retaliatory reasons for these

actions. As explained below, I reject respondent's non-retaliatory explanations as a transparent pretext for the impermissible retaliation.

At trial, respondent testified that he had learned at the end of August or beginning of September, months before Ms. L complained, that the Department would be implementing a budget cut and concluded that it would be necessary to cut a member of his staff as a result (Tr. 2408-09). He determined that under the agreement with the union, he would have to lay off Rivera because he had the least seniority (Tr. 2410). Because Rivera worked evenings, respondent stated, he had to move the cleaner on the day shift with the least seniority, Ms. L, to evenings, as most cleaning occurred after classes let out (Tr. 2410). Respondent said that he prepared letters for Rivera and Ms. L, indicating the lay-off and change of shifts, respectively. The letter to Ms. L, dated October 24, 2006, stated: "Due to Budget-cuts by the Department of Education, your weekly hours will be changed to 3:00 P.M. to 10:00 P.M. starting November 10, 2006," and was signed by respondent (Pet. Ex. 5). Respondent contended that he is required to provide two-weeks' notice before taking such employment actions, but that he prepared the letters "weeks ahead of time" even though he dated them October 24, 2006 (Tr. 2410-12). He also prepared another letter for Ms. L at that time, dated October 20, 2006, assigning her a specified vacation period: "Your vacation will start November 20, 2006 and you will return to work on December 20, 2006" (Pet. Ex. 4). Respondent explained that he needed Ms. L back by the start of the winter break because "with the cut, [he] needed all the help [he] needed for the cleaning, one of the big cleans, which is Christmas" (Tr. 2411). Respondent said he placed all of the letters in a folder in the top drawer of his desk (Tr. 2413).

An October 5, 2006, memorandum from the Department, addressed to all custodian engineers, indicates that the Department announced reductions in custodial building allocations as of October 6, 2006. The memorandum advised custodian engineers that "this is a good opportunity to evaluate both labor and material (goods and services) expenditures in order to maximize services. Custodian Engineers, who routinely schedule discretionary overtime for their employees, may consider alternatives such as rescheduling employees or hiring part-time employees in order to reduce premium rate labor costs." (Resp. Ex. S). Because custodial earnings and reporting are based on the calendar year, and the budget cut applied to the Department's entire fiscal year, from July 1st through June 30th, and was not implemented until October, the Department required custodian engineers to "play[] catch up." Custodian engineers

had their budgets reduced further for several weeks in order to account for the cuts not occurring until after the months of July, August, and September (Wile: Tr. 1869; Resp. Ex. S).

Respondent further testified that prior to October 18, 2006, when assistant cook Smith purportedly told him Ms. L had pictures and documents from respondent's desk, both Koleci and Tolomello had told him on separate occasions that they saw Ms. L going through and making copies of his files. Respondent explained that he had spoken to Tudda about this and informed him that while he wanted first-hand knowledge that Ms. L was going through his files, if the allegations turned out to be true he would fire her (Tr. 2818, 2872-73).

Smith testified that on October 18, 2008, Ms. L revealed to him that she had gone through respondent's desk drawer and found a letter stating that her hours were going to be changed, as well as photographs of herself (Tr. 2149). She supposedly showed him the photographs, which he said were candid shots (though he also claimed that some showed her looking at the camera) (Tr. 2150-51). In fact, a number of them were candid pictures of her (Pet. Ex. 17). Ms. L told him that she was going to file sexual harassment charges against respondent (Smith: Tr. 2151). Smith told her that she should ask for a transfer instead if she felt uncomfortable (Smith: Tr. 2150-51).

Brust often took photographs of work done in the building and of children at holiday events, and Ms. L knew where he kept such photos, which he usually gave her to put in an album showing his work, for example, "before" and "after" completion (Tr. 679). She did not know he kept candid photos of her. Ms. L found an envelope respondent had placed in a spiral holder on his desk. Inside were eight photographs of her taken at work (Tr. 677, 680-81, 1005; Pet. Ex. 2). While she was taking a phone call at his desk, where the only phone was situated, and looking for a pen there, she subsequently found eight additional photographs of her in a photo envelope in a drawer in respondent's desk (Pet. Ex. 17; Tr. 679, 752, 940-41). She took the photos because she "got mad that he had them: I didn't -- just with everything going on and then finding an envelope with photos just of me, I was just -- he's a sick, man" (Tr. 682-83).[17] She denied, however, that she found the two letters relating to her hours and vacation in respondent's drawer along with the photos, before she filed her complaint (Tr. 807). She maintained that she instead first found the two letters on her desk on the afternoon of either October 25 or 26, 2006,

[17] Ms. L was subjected to ridicule from her colleagues about respondent's having kept the photos of her, and this joking was part of the abusive work environment engendered by his conduct towards her (Tr. 682-83).

"[a] couple of days after [respondent] found out I had reported him to the investigation" (Tr. 661-62; Pet. Exs. 4, 5). Ms. L also denied that she told Smith that she had found the photos. Instead, she only told him that she did not know what to do about her situation with respondent and that he advised her to go to the principal for advice, which she decided to do even though she was worried that respondent would find out (Tr. 689-90, 772).

According to Smith, after speaking with Ms. L, he called Harris and told him that he should call respondent to tell him that Ms. L was going to file a sexual harassment complaint. Harris said that he would. Smith then apparently called respondent himself, and told him about Ms. L going through his desk and that she planned to bring a sexual harassment complaint against him (Smith: Tr. 2153; Brust: Tr. 2413, 2819). Respondent admitted that Smith told him on the phone that Ms. L "briefly mentioned to [Smith] that she was thinking about bringing a sexual harassment suit against me"; he replied to Smith, in substance, "My plate is really full and my world feels like it's falling apart." (Smith: Tr. 2153; Brust: 2415). At trial, respondent explained that he had been referring to a sick neighbor and his own increased anxiety and panic attacks (Tr. 2416). He testified that he believed what Smith told him about Ms. L going through his files, which corroborated the earlier allegations made by Tolomello and Koleci (Tr. 2414, 2874).

Respondent said that on October 18, 2006, after he finished speaking with Smith, Harris and Tolomello called him and told him that Ms. L had been going through his file cabinets, making copies of documents, and bringing "stuff" to her car (Tr. 2413-15). Respondent told Harris to tell Ms. L that "she's got her last two weeks, and it was because of what she was doing with my files" (Tr. 2415). Respondent denied speaking with Tudda at all that day; he explained that he was not at the school that day and presented a Department document that indicated he had called in sick that day (Tr. 2414-15; Resp. Ex. C).

Although Harris told respondent that he did not want to call Ms. L, he called her anyway (Harris: Tr. 1632-35). Significantly, although Harris was sketchy and evasive about the call, he did corroborate Ms. L's testimony that he called her at respondent's behest to convey the message that she was fired ("Enjoy your last week or weeks at work"), and I find that the call took place almost immediately after she complained to principal Tudda of sexual harassment by respondent; Harris would not admit in court that respondent had told him that Ms. L's complaint was the reason for the announced firing and that he should convey that message to Ms. L. Harris

said that he "can never forget the three words [Brust] told me."[18] Respondent told him to tell Ms. L, "He had a long talk with the principal. He heard a lot within the past week. Enjoy your last two weeks of work" (Tr. 1634, 1643, 1648-49). When Harris told Ms. L this, she asked him why. He initially answered that he did not know ("I didn't say it distinctively it was because of sexual harassment. She misunderstood"), but then added that he told her that "it could be because of what you alleged[ly] said about the case, about the whole issue, about the sexual. I don't know" (Tr. 1634). At trial, Harris explained that he was only giving his own "opinion," speculating when he answered that the message might have been in response to the sexual harassment complaint and that respondent did not tell him that was the reason (Tr. 1634, 1643, 1649-50). Harris testified further that he did not ask respondent for a reason for which he was firing Ms. L and denied that respondent gave him one, but importantly, he admitted he had heard about the sexual harassment charges from Brust at the relevant time, and that Brust never mentioned budget cuts when Brust called Harris and instructed him to call Ms. L and deliver the notice of the termination of her employment, the same day Harris carried out the instruction (Tr. 1649, 56). Ms. L told Harris that he, Harris, was threatening her, which made him furious (Tr. 1642). He told Ms. L that he did not want to be placed in the middle of her dispute with respondent and eventually hung-up on her after about six minutes (Tr. 1636). At trial, Harris did not recall telling Ms. L that respondent had also spoken to Smith earlier in the day (Tr. 1643). When questioned by the Department, Harris admitted remembering that Ms. L said during the phone call, ". . . he did this to me the whole summer, sexually harassing me . . . staring at me, sending me flowers, writing me notes, telling the office he's going to go with me" (Tr. 1645), but could not recall whether he answered, "You know this, I know this, and Tony [Tolomello] knows this" (Tr. 1635, 1645-46). He explained that if he did say that, he only said it to placate Ms. L because he wanted to end the conversation. He said that he repeatedly told Ms. L to discuss the matter with respondent at work the next day (Tr. 1647). He admitted that portions of the tape are clear, that he recognized his own voice on it, and that he could recall "some words" he had spoken in the phone call with Ms. L because the tape refreshed his recollection in part (Tr. 1646).

Ms. L offered a more detailed account of the conversation with Harris, testifying that after she left work on October 18, 2006, she received a phone call on her cell phone from Harris at about 2:30 p.m. Harris told her, "Craig said to tell you to enjoy your last week of work."

[18] Harris said the three words (actually more than three) were, "[h]e had a talk with the principal" (Tr. 1649).

Although Ms. L asked him what he was talking about, he did not tell her at that time (Tr. 611-12, 644). Ms. L called Harris back, using the speakerphone function of her phone. Her boyfriend recorded the conversation using the voice recorder feature of his own cell phone (Tr. 613, 644). Ms. L asked Harris, "Anthony, why are you calling me threatening my job?" (Tr. 644). Harris told her, "Craig was just with the princip[al], and he said he heard a lot of things in the last hour that he doesn't need to deal with, and he heard that you put in a sexual harassment complaint against him," and "he's really pissed off" (Tr. 611-12, 644-45). Ms. L asked Harris how respondent found out about her filing a complaint. Harris explained that respondent had just come out of Tudda's office.[19] Ms. L and Harris continued discussing respondent's actions towards her and her feelings about it. At a certain point in the conversation, Ms. L asked Harris, "You know he's been harassing me, Anthony?" Harris replied, "I know it, Cisco [Rivera] knows it, Tony knows it, John knows it. He goes, [L], I know" (Tr. 645).

The Department submitted into evidence a copy of the recorded conversation between Ms. L and Harris (Pet. Ex. 10). The quality of the recording was extremely poor. Ms. L played the recorded conversation over the phone to Investigator Nagy, who then recorded it. While portions of the conversation were discernible, most were not; static and inaudible voices rendered the recording largely unintelligible. I have not considered it, except to show that Ms. L attempted to record the conversation and promptly reported the call to Nagy, and that Harris, upon having the tape played for him at trial, was able to recall portions of the conversation,[20] specifically that he had used the words "sexual harassment" to Ms. L in that conversation (Tr. 1643). I credit Nagy's testimony that Ms. L reported to him her phone conversation with Harris of October 18, 2006, by the very next day, October 19, 2006, as he noted in his contemporaneous memorandum of his in-person interview with Ms. L, dated October 20, 2006 (Pet. Ex. 1; Tr. 128). Nagy's subsequent recording of the cell phone conversation, played aloud from Ms. L's cell phone to Ms. L's boyfriend's cell phone recorder, and then recorded by telephone to Nagy's SCI office phone recorder was not audible in this third generation copy (Tr. 128-29). I find the recording unnecessary, however, to establish that Harris conveyed the message from respondent

[19] Even if respondent was not at school that day, both Harris and Smith called him and alerted him to Ms. L's complaint to the principal. I find it likely that Harris and Ms. L did not know at the time the venue of Brust's discussion with Principal Tudda, but they both learned the gist of it, and, most importantly, the timing of it -- just before Brust instructed Harris to carry out his orders to fire her.

[20] SCI also placed a recording device on Ms. L on October 31, 2006, for purposes of recording her interactions with respondent. I have not considered the contents of that recording either, because only Ms. L's voice is audible; Mr. Brust's is not (Pet. Ex. 9).

to Ms. L that she should enjoy her last two weeks at work because the testimony in court credibly established the content of the conversation.

Respondent's asserted defense to the charge that he retaliated against Ms. L for asserting her rights, therefore, hinges on whether he wrote the two letters dated October 20th and October 24th "weeks ahead of time." If he did not post-date these letters, then his defense to the charge that he retaliated collapses. Respondent contends that it was these letters, allegedly written before Ms. L filed a complaint, that Ms. L found prior to her filing a complaint that were the reason he told her that she was being given two weeks' notice. As I do not find that respondent actually wrote these two letters before Ms. L filed the sexual harassment complaint against him, the letters did not even exist on October 18th and Ms. L could not have found them in respondent's desk at that time. Thus, respondent did not have a non-retaliatory reason for threatening Ms. L's job. While respondent testified that he was also informed by Smith that Ms. L had found photographs, I credit neither respondent's nor Smith's testimony on this matter. Both testified to Ms. L's supposedly having found letters that did not yet exist. Both presented unreliable testimony on this score.

At trial, respondent testified that he told Harris specifically that the reason for which he was terminating Ms. L was that she had gone through his files (Tr. 2415). Yet, not only did Harris not tell Ms. L this reason when she asked him for one, he gave her a completely different reason: that she had filed a sexual harassment complaint against respondent. Harris repeatedly asserted that respondent did not give him a reason for terminating Ms. L, an assertion I find dubious because it does not make sense, given that respondent relied upon Harris and often had him carry his messages involving respondent's personal feelings to Ms. L. I find that respondent indeed told Harris that respondent was terminating Ms. L because she filed a sexual harassment complaint against him and that as a loyal employee whom respondent had promoted to fireman, Harris took respondent's part during the trial. There is no reason Harris would say that respondent did not give him a reason for the firing if what respondent had actually told him was that Ms. L had been going through his desk. The inconsistencies in respondent's and Harris' testimony on this important issue cast doubt on this defense. Their stories did not line up.

Further, I find it implausible that respondent was more concerned with finding out that Ms. L went through his desk and found the photographs and the two letters than that she had lodged a sexual harassment complaint against him with the head of the school. According to

respondent's testimony, he had no response to learning that she planned to file a complaint. This testimony too was unconvincing. It would be natural and even expected that upon learning such news, one would become distressed or worried or at least concerned. I find it incredible that respondent simply had no reaction at all, not even to protest his innocence, upon learning that a subordinate had complained about him to the authorities about a matter that could affect his job and his standing. Respondent's contentions defy common sense and are inconsistent with human experience.

In addition, respondent's assertion that the vacation and hour-change letters were written pre-sexual harassment complaint is critically undermined by his failure even to mention this post-dating defense to Nagy during the initial SCI investigation in December 2006, when Nagy confronted him with the fact that he had a recording of the Harris-Ms. L conversation. When presented with the allegation that he retaliated against Ms. L, it would have been unreasonable for respondent to hold back such vital exculpatory information. Respondent clearly understood that Ms. L was accusing him of retaliating against her for complaining to SCI. Although respondent told Nagy that he fired Ms. L "because she went through a file about time change" (Pet. Ex 16), respondent was utterly unable, at a time when his memory would have been fresh, to explain why the letters were dated after she complained to Nagy, who memorialized her complaint as of October 19th. The letter at issue was dated October 24, 2006, and was a notice to Ms. L that her hours would be changed to the night shift.[21]

Nagy testified that respondent "really didn't have an explanation" for the operative hour-change letter being dated after the telephone call: Respondent "kept saying, 'Well, I never told Anthony Harris to call her and say anything about sexual harassment.' He insisted it was because of this letter." Nagy wrote and testified that he "must have told [Brust] three times" that

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[21] If Ms. L was going through respondent's files (to which she said she had access as his secretary), respondent's defense also suggests that respondent tried to fire Ms. L for pursuing her rights to complain against him for sexual harassment and fraud on the agency. She claimed, in essence, that he was so governed by his feelings for her that he paid workers from City funds for time they did not actually work. Among the papers she produced to Nagy from respondent's office were the time records for August 22, 2008, the date on which respondent sent the staff home early, but then paid them for a full day, plus overtime they did not work. She also produced to Nagy numerous photographs of her that respondent kept in his desk, many of them candid. These photos also supported the sexual harassment allegations in that respondent's attachment to Ms. L led him to keep such mementos of her. Thus, his own defense that there was an innocent explanation (her going through his files) for his attempts to fire her and change her hours itself might suggest retaliation because she was doing this to report fraud and sexual harassment to SCI. However, I need not squarely decide whether respondent's assertion that he was going to fire Ms. L for going through his files formed a separate basis to find retaliation because the agency did not raise it, and because I do not credit this defense as a matter of fact -- I find that her searching his papers was not the real trigger for his actions against her.

the date of the hour-change letter did not line up with respondent's story because the letter is dated six days *after* the call, and Nagy knew about the phone call by October 19th, when he interviewed Ms. L (Tr. 203; Pet. Exs. 1, 5). Respondent replied, not that he had post-dated the letter at a time before Ms. L complained, only that he wanted to hear the recording of the phone conversation (Tr. 203). Nagy said that he showed the letters (concerning the vacation change and the shift to night work) to respondent and respondent "did not say they were post-dated" (Tr. 329).

I find that respondent's October 20 and 24, 2006 letters (the vacation change and shift change notices) give the lie to the defense that the basis for the firing decision was Ms. L's going through respondent's files because it is not believable that respondent post-dated those letters, and he could not have been upset with her for finding letters that did not yet exist. Respondent's silence, in the face of an accusation he had the opportunity to and would be expected to deny, amounts to an admission by respondent. *See Taxi & Limousine Comm'n v. Baig*, OATH Index No. 1115/00, at 17 (Mar. 31, 2000), *modified on penalty*, Comm'n Dec. (July 25, 2000); *Dep't of Finance v. Smalls*, OATH Index No. 316/94, at 8-9 (Jan. 27, 1994); *Dep't of Parks & Recreation v. Aronoff*, OATH Index No. 366/87, at 29-30 (Mar. 24, 1988). That respondent did not even mention to the investigator shortly after the events that the letters were post-dated in preparation for those cuts belies this late-starting defense. Throughout his testimony, respondent appeared to be trying too hard to fit the facts into a set of legal defenses superimposed for him on reality, and he was unable thus to transform history. In this instance, as in others, he was struggling to deliver legalities instead of facts and his story did not ring true. The defense seemed manufactured and the legal construct wobbly.

Moreover, Ms. L's response to receiving the letters serves to confirm that she received them after she complained. On October 25th, Ms. L wrote a letter to respondent while she was in the office, which she left on his desk (Pet. Ex. 7; Tr. 670). The letter contains explicit references to the letter about the forthcoming shift change:

> "I have your letter reguarding [*sic*] my work hours being changed to 3pm → 10pm. I gave you a letter to remind me of what you did to me over the summer up to date from begining [*sic*] to end. Your [*sic*] being spiteful and ridiculous w/your actions. Everything you ever asked I did. . . . You sure the hell harassed me, humiliated me and caused me grief beyond belief. The letter I wrote was intended to remind you of what you did to make me uncomfortable. You called Ms. [Koleci] and told her about the note [Pet. Ex. 6, an earlier handwritten

> statement by Ms. L about Brust's behavior] that it involved her, B/c of you telling Everyone about your "feelings you involved everyone when you should have spoke [*sic*] to someone outside the work place to avoid where we are now. . . . I'm not the bad guy here and those who matter know it. You backed me into a corner and left me no choice. I talked, pleaded, rationalized and cried, you just don't care about anyone but yourself. You acted out your feelings not giving a shit of how terrible you made me and the guys feel. . . . You used me to do double the work, took advantage of me and made my job a nightmare. . . . You crossed lines to no end so I have no choice but to defend and protect myself. . . . I can't work nights and you know that. I request a transfer. I no longer want to work with you since you think I'm a liar, can't be trusted and be treated the way you treat me. . . . P.S. If you hired me as a cleaner you should have made me a cleaner not a secretary under fake title! PPS. If I was such a horrible person, I'd have had you arrested, used you for your $ or taken advantage of you and your feelings. I'm not like that. Sorry!

(Emphasis in original.) At trial, Ms. L explained that she wrote the letter after she received the letter informing her of the shift change because she was "furious": "He was changing my hours, and putting me out on my vacation, because he was mad at me, because he knew I was -- I went to the princi[pal]. He knew I went to the investigators" (Tr. 670-71). Indeed, the tenor of her letter is impassioned and emotional; it is written by a person who was livid. One would expect such a letter to be written immediately upon learning that one's work hours are being changed involuntarily. It defies logic that Ms. L would have sat on the two letters for about a week, as respondent alleges she did, before responding to him about them. If respondent and Smith are to be believed, Ms. L found the letters on or before October 18th and then said nothing about them to respondent until October 25th, when she wrote him an impassioned note. Given her upset about respondent's treatment of her, both in court and at the time, it is unrealistic to posit that Ms. L found respondent's letters to her in his desk and did not express her anger to respondent immediately. It is more likely than not that she responded in writing the day after the letter was accurately dated. Moreover, upon receiving Ms. L's lengthy letters accusing him of maltreating her, he said nothing to her. He admitted on cross-examination that he never wrote back to defend himself against her detailed writings of his misconduct towards her and never went to her and asked her what on earth she was talking about or expressed to anyone that she had written a pack of lies about him (Tr. 2765-66). This peculiar silence on his part is stunning and tends to show that she had not falsely accused him. His job was on the line and he did nothing to discredit her claims at that time. As a manager in a position of responsibility, he could be

expected to craft a written response and set the record straight if Ms. L was wrong. Here, however, the record stood as Ms. L wrote it. As counsel for the Department argued in closing, Ms. L was not so sophisticated that she would be likely to concoct sexual harassment claims such as these or to withhold her letter response for weeks after respondent tried to change the conditions of her employment.

Moreover, respondent's multifaceted retaliation against Ms. L continued into the spring of 2007. He tried another way to push her out of P.S. 188. On March 28, 2007, he wrote a letter to Ms. L stating that he had set up an interview with Mike Peluso, the Custodian Engineer at Boys and Girls High School. He wrote that Mr. Peluso was looking for a secretary: "I spoke to him and told him that you can do payroll, PO#2s and Good Filing . . . . He will Interview you TUESDAY, APRIL 3, 2007 at 2:00 P.M. It is totally up to you if you want to interview. Your decision will not affect your position here" (Pet. Ex. 33). On cross-examination, respondent admitted that he had testified minutes before that Ms. L "did a lousy job with P.O. 2's and with filing" (Tr. 2772), and that he "want[ed] this court to believe . . . that throughout the summer of 2006, she did a terrible job in regards to her doing her secretarial duties and P.O. 2's" (Tr. 2773). Ms. L was no longer performing secretarial duties from September of 2006[22] to the date of this letter (Tr. 2772-73), because she did not want to be near Brust. She told the union she was fearful of him (Tr. 653). Yet, he told another custodian that she could perform well as a secretary, and even went so far as to set up an interview for her to take another job (Tr. 2773). Ms. L refused, however, to be so manipulated by respondent. She realized that if he placed her with a colleague in another school, she would lose her seniority (Tr. 652), and feared that all respondent had to do to get back at her for complaining was to call Mr. Peluso and tell him to fire her (Tr. 652-54). As a probationary employee, she would have no tenure and could rapidly find herself jobless. She had seen this happen to Lombardi (Tr. 654). Not only did this episode lend support to the Department's retaliation charge, it also showed that respondent was willing to bend the truth (either to say her work was good or bad, depending on his goal at the time) to rid himself of the problem, his messy relationship at work with Ms. L, that now threatened his own job.

[22] Ms. L filed a grievance with the union in October 2006 and asked for a transfer, but the union could not help her. She spoke of her fear of Brust to the union: "They told me that they don't do transfers. And I said, 'well, I'm telling you that I feel unsafe in that building, with Mr. Brust. I feel like I'm in danger. That man is coming at me intoxicated.' I said, 'what is it going to take for me to get out of this building'? They put me out on all my vacation and all of my sick time" (Tr. 653).

While respondent did not actually terminate Ms. L as he had threatened to do on October 18th, or change her hours or vacation, the threats alone were inappropriate and render him liable for misconduct. In any event, there was no explanation of why respondent did not change Ms. L's hours or fire her. Perhaps he was afraid to do so because she complained. Unfulfilled threats to take a tangible adverse employment action are evidence of a hostile work environment. *Schiano,* 445 F.3d at 603-04. At a minimum, these threats are additional aspects of the sexual harassment proved here. Irrespective of whether respondent's threats would be held to constitute retaliation under federal or state anti-discrimination law, and more to the point, this tribunal has previously held that "it would be misconduct for a supervisor to threaten a subordinate with disciplinary action simply because the supervisor was angered about a negative remark by the subordinate." *Dep't of Sanitation v. Rizzo*, OATH Index No. 1423/06, at 20 (Sept. 26, 2006). Respondent made just such a threat. *See Department of Correction v. Andino*, OATH Index No. 492/95 (Dec. 13, 1994) (supervisor who threatened correction officer with marking her late if she did not succumb to his advances was terminated).[23]

The two letters threatened adverse employment actions against Ms. L, even if the actions were never actually taken. Ms. L explained during the trial that she had told respondent that she was attending evening classes at college, which would have conflicted with her working in the evening (Tr. 664). Ms. L also explained that prior to the letter assigning her a specific vacation, neither she nor other members of the custodial staff had vacation days assigned -- instead they chose their own vacation time off (Tr. 667). There was no reason for respondent to assign Ms. L a specific vacation period. If his objective was to make sure that all of his cleaners were available to work over the winter break, it would have been more practical to inform all of them that no vacations would be granted for that time. Instead, I find that the primary reason for

[23] Ms. L testified that respondent did not change her vacation or force her to go out on vacation (Tr. 672). Respondent's unfulfilled threats of firing Ms. L, changing her hours to an undesirable night shift and forcing her to use vacation when she did not want it, render him liable for misconduct. It is noteworthy, however, even if not deemed a separate basis for liability here, that when Ms. L complained to the union in October 2006, the result of her grievance was that she took all of her vacation and sick time, just to get away from respondent, whom she feared (Tr. 653; Resp. Ex. H). She agreed in a union grievance procedure, feeling pressure to resort to self-help, to take vacation from November 8 to January 2, 2007. This agreement, to which the Department was not a party, does not bind the agency, but does show that Ms. L suffered a loss of her leave balances, indirectly because of respondent's retaliatory conduct. In this respect, respondent's threat of retaliation (changing her vacation) was realized, albeit indirectly, when Ms. L went to the union to report him.

assigning Ms. L a vacation period, as with changing her work hours and threatening her employment, was to threaten retaliation for her filing of the sexual harassment complaint.

Ms. L testified on cross-examination that she never said respondent touched her (Tr. 1076). Respondent denied grabbing her shoulder or preventing her from leaving his office (Tr. 2706-07). I find that specification 18(b) was not proved. He did, however, admit that he ordered her out of the building the day after she filed her sexual harassment complaint, claiming that he did so because she bothered him about Ronald McDonald not getting the fireman's job (Tr. 2705). I reject the reason respondent cites for ordering her to leave the school and sustain specification 18(a), the allegation that he ordered Ms. L to leave the building upon learning of her complaint.

The threats of retaliation charges are sustained, with the exception of specification 18(b).

Fraudulent Use of Department Funds (Specifications 10, 11, 12 & 13)

The Department alleges that respondent engaged in misconduct when, on or about August 23, 2006, respondent told Ms. L, Harris, Rivera, and Lombardi that he was going to change their time sheets for August 22, 2006, to reflect the times they had been scheduled to work rather than the times they had actually worked because he had sent them home early that day. Respondent admitted that the time records said they worked hours they did not actually work (Tr. 2398). Respondent then allegedly defrauded the Department of funds by falsely recording their hours or caused their hours to be falsely recorded, and causing the Department to pay these workers for hours they did not work. This fraud claim is sustained.

As noted, respondent held a barbeque at his home the weekend before that Tuesday, August 22, 2006. Ms. L was not in attendance at the barbeque, but she heard that respondent had spoken to her co-workers about her personal life with her boyfriend. She subsequently confronted respondent about what she had heard. According to Ms. L, after she left respondent's office on August 22nd, respondent instructed Lombardi to tell the custodial staff to come to his office for a meeting (Tr. 590). Respondent wanted to know who had told Ms. L about the conversation at the barbeque. When Lombardi told Ms. L that respondent wanted her to return to his office, she refused, explaining that she did not want to be "put on the spot" or forced to name which co-worker had told her what respondent had said at the barbeque (Tr. 590). She instead

decided to go home, although she did not clock out, and did not return to work until the next day (Pet. Ex. 11; Tr. 590).

Respondent explained that when Ms. L confronted him in his office after the barbeque, she "just totally flipped out on" him (Tr. 2386). She told him "it was none of [his] fucking business to let out [anything about] her personal life" (Tr. 2386). Respondent said that Ms. L then started complaining about Ronald McDonald not getting the fireman's job, saying it was not fair and McDonald deserved the job (Tr. 2386-87). Respondent testified that after Ms. L yelled at him, he was "goddamn pissed off," both because he felt he did not say anything about her personal life at the barbeque (except that she should not be treated the way she had been by her boyfriend), and it was none of her business whom he hired for the fireman's position (Tr. 2388). He called Lombardi, Harris, Rivera, and Tolomello to his office (Tr. 2388-89, 2391). He explained at trial that he was aggravated and agitated, and wanted to know who had told Ms. L he said things about her personal life (Tr. 2389, 2526). He said that no one confessed and "it just got to that point where I told them, you know what you do, go upstairs, punch out and go home" (Tr. 2389, 2392, 2526). According to Rivera, who was credible and very clear about this point, respondent told the men that if they would not tell him who told Ms. L about the barbeque: "Go punch out and get the fuck out this building" (Tr. 1146). Respondent denied telling his crew that the reason he said things at the barbeque about Ms. L was that he could not hold back his emotions. He also denied using foul language at the barbeque or at work, even though he had consumed at least six beers on the day of the barbeque (Tr. 2392, 2526-27, 2603), and was wont to use coarse language. He admitted that he has used foul language in his life, but denied ever cursing around either his employees or in a school with children (Tr. 2527).

Lombardi testified that respondent instructed him to bring the custodial staff, including Ms. L, to his office. When Lombardi then told Ms. L to come to respondent's office, she refused and left the building (Tr. 1474). Respondent questioned the men, but no one admitted being the one who told Ms. L what he had said at the barbeque (Rivera: Tr. 1146; Lombardi: Tr. 1475). At trial, Harris said that he thought respondent was furious because no one would confess to having told Ms. L that respondent had said "personal things" about her (Tr. 1617-18). Harris confirmed, however, that "[s]omebody said that Mr. Brust said these things about Ms. L to everybody, her personal things . . . . As far as my knowledge, she said that personal, about how she was arrested, personal information about her, how she felt it shouldn't have been said." Pressed to elaborate,

Harris said Ms. L was complaining to the men that Brust had spoken to them about "[h]er relationship with her boyfriend . . . . Ms. L was the topic of conversation. . . . Basically, she didn't want her name mentioned at his barbecue at his house, being referenced to everybody at his barbecue . . . [t]he personal information about Ms. L" (Tr. 1617). Thus, Harris confirmed that Ms. L was complaining instantly about Brust's embarrassing her by speaking about her personal life to her co-workers.

Harris thought that respondent sent everyone home because of a "matter of trust." In Harris' words, respondent was "was furious of how . . . someone would say" that he spoke about Ms. L (Tr. 1618). Harris said that respondent told them, "Everybody go home and punch out" (Tr. 1618-19). Although he remembered respondent speaking in a loud voice, he did not remember him using any profanity (Tr. 1619). Lombardi similarly described respondent as being "a little, how should I say, irate, a little upset" (Tr. 1475). Harris punched out at 12:05 p.m. (Pet. Ex. 11), Rivera punched out at 12:06 p.m. (Pet. Ex. 11; Tr. 1147), and Lombardi punched out at 12:25 p.m. (Pet. Ex. 11; Tr. 1492-93).

After Ms. L arrived home, Harris, Rivera, and Lombardi each called to tell her that respondent had sent them home early because no one had confessed to him about telling her what had happened at the barbeque (Tr. 590, 603). Ms. L initially told Lombardi that she was not going to go to work the next day, but was convinced by him that she should and that the problems at work could be solved (Tr. 592).

According to Ms. L, she confronted respondent the next day at work, instructing him that he needed to gather the custodial staff because she did not want to speak to him without everyone present. She told him that he was "out of control" when he sent the custodial staff home because of private issues between the two of them. She complained to respondent that she, Harris, Rivera, and Lombardi were not going to be paid for the hours they did not work when they left early (Tr. 592). Respondent told them that he sent the staff home because he could not control his feelings (Tr. 602-03), and said, "I know. It's my fault. I'm an asshole. . . . Don't worry; you're all going to get paid for the day" (Tr. 592). Respondent then instructed Ms. L to write in 5:00 p.m. on her time sheet as the time she left the day before, even though she had left at 11:00 a.m. (Tr. 592), as well as to write in the scheduled finish times for the other members of the custodial staff (Tr. 697).

Ms. L explained that she is responsible for maintaining the payroll records and inputting data into each employee's Employee Daily Hour Report, which is essentially a pay stub reflecting hours worked, overtime, and deductions. At respondent's instruction, Ms. L calculated the hours of the custodial staff on August 22 as if each had worked a normal 10-hour day, which included two hours overtime, even though everyone except Antonio Tolomello left early (Tr. 593, 604, 697). Respondent wrote checks to the custodial staff based on the calculations Ms. L made at his direction and he actually "put the payroll into the computer" (Tr. 602, 697).

Ms. L subsequently prepared a Division of School Facilities Plant Operations "PO1" form showing the compensation to be paid to each worker reporting to respondent based on the recorded hours worked for July 29 through August 24, 2006, which included hours she, Rivera, Lombardi, and Harris did not actually work on August 22, 2006 (Pet. Ex. 12; Tr. 704). Respondent signed the PO1, certifying that the PO1 was "correct to the best of my knowledge" (Tr. 1052-53; Pet. Ex. 12). At trial, respondent insisted that the PO1 was correct, because it reflects the hours the cleaners were paid, and that the cleaners had been paid the amount indicated in the PO1 for hours they worked in the month covered, although they did not work the hours for which they were paid on August 22, 2006 (Tr. 2795-96, 2828).

Irrespective, however, of whether the PO1 form accurately reflects what the cleaners were actually paid for the relevant month, the transaction in which respondent submitted time sheets and payroll documents which generated salary overpayments for the workers, as a whole, was fraudulent because the PO1 contained false hours tallied from the time cards at respondent's sole direction. Thus, respondent knowingly caused false information to be entered on Harris', Ms. L's, Lombardi's, and Rivera's Employee Daily Hour Reports, which, in turn, caused the Department to approve payment for the four cleaners for regular hours and overtime they did not really work. Ms. L's Employee Daily Hours Report shows she was paid for ten hours, two of which were overtime, even though she only worked approximately three hours on August 22, 2008 (Tr. 597; Pet. Ex. 13). Ms. L's timecard indicates that she clocked in at 7:03 a.m. and left at 5:00 p.m., a departure time Brust told her to enter on her time card (Pet. Ex. 11). Tolomello was paid for ten hours, two of which were overtime, all of which he reportedly actually worked (Tr. 597; Pet. Ex. 13). Lombardi's Employee Daily Hours Report indicates that he was paid for ten hours, two of which were overtime, even though his timecard indicates that he only worked approximately five and-a-half hours, from 6:41 a.m. to 12:25 p.m. (Tr. 597-98; Pet. Exs. 11, 13).

Harris' Employee Daily Hours Report indicates that Harris was paid for ten hours, two of which were overtime, even though his timecard indicates that he only worked approximately five and-a-half hours, from 6:25 a.m. to 12:05 p.m. (Tr. 598-99; Pet. Exs. 11, 13). Rivera's Employee Daily Hours Report indicates that Rivera was paid for ten hours, two of which were overtime, even though his timecard indicates that he only worked approximately five hours, from 7:03 a.m. to 12:06 p.m. (Tr. 599-601; Pet. Exs. 11 & 13).

Respondent does not deny that Ms. L, Rivera, Harris, and Lombardi were paid their day's salaries in full plus overtime on August 22, 2008, even though they did not work the full day or overtime. They worked, at most, only five or six hours that day, but were paid for eight hours plus two hours of overtime each (Tr. 2499-2503). Instead, respondent denies that he sought to defraud the Department, claiming that he lacked the intention to commit a fraud. Respondent asserts that (1) each worker at issue had previously worked additional, unreported hours during that month or the school year that added up to at least the extra hours for which they were paid for August 22nd; and (2) at the time he caused Ms. L, Rivera, Harris, and Lombardi to be paid for that day, he believed that he was in a deficit and that their salaries would be coming out of his own pay, and, therefore, he is not liable for misconduct. I reject respondent's assertions, however, as I believe that both defenses are additional rationalizations, *post-hoc* constructions devised to excuse his blatant misconduct. As such, these defenses have zero to do with the events as they really happened or with his intentions or state of mind at the relvant time. Further, even if I were to credit respondent's stated reasons for paying the four cleaners for fabricated regular hours, plus fictitious overtime to boot, purely as a factual matter -- and I do not -- neither explanation serves as a legitimate legal defense to the charged misconduct.

Respondent explained that after he had sent his crew home, he began thinking about how hard they all worked and the extra time they put in over the course of the year and decided that they deserved to be paid for the time they missed because he had sent them home early (Tr. 2393). Respondent first stated that each of the staff had put in many more than four to six hours over the course of the year that they had not been paid for (Tr. 2394, 2399). He later narrowed the time period and added that each of the four employees worked an additional seven hours that were not reflected on their time cards during month between July 29, 2006, and August 24, 2006 (Tr. 2477). He cited times when the staff would punch out and there would be garbage that had to be moved, which could take 20 to 25 minutes (Tr. 2340). Respondent's testimony was

inconsistent on this point, however. At trial, respondent seemed arbitrarily to cite times when his staff came to work early or stayed late. The Department's attorney conducted an exhaustive cross-examination, questioning respondent as to the exact dates and times that Ms. L, Rivera, Lombardi, and Harris supposedly worked extra time off of the clock. When asked when Harris arrived at work on August 18, 2006, respondent initially prefaced his answer with, "I'm going to say half an hour," an indication that he was not certain about the time. He then proceeded repeatedly to assert that he knew it was exactly 30 minutes early, not 25, 28, 29, 31 or 32 minutes, because, he said, he had also worked that day (Tr. 2508-13). When asked how he knew he worked that day, approximately a year and a half earlier, respondent took his right hand, pointed to his head, and said, "From here" (Tr. 2509). He claimed, incredibly, that he was certain of Harris' 30 minutes of off-the-clock work on particular dates, including August 19, 2006, nearly two years before, but then was shown to have given unreliable testimony because Harris was not even at work that day (Tr. 2880-81; Pet. Ex. 11). At other times, respondent's answers were evasive. When asked whether Lombardi worked any amount of time before punching in on August 23rd, respondent answered, "If it's before 7:00, yes" (Tr. 2517). Respondent's answer made little sense: If Lombardi clocked in before 7:00 a.m., his scheduled start time, then he worked extra time off the clock? But if he clocked in after 7:00 a.m. then he did not work extra time? The question was clear, but the answer, like many others, vague and muddled.

Respondent contradicted himself in important ways as to this extra time defense that the staff made up time that was neither recorded nor verifiable. He testified on direct that Ms. L generally put in many more hours than were reflected on her time cards (Tr. 2397). But he seemed to forget his purported defense at one point, and, out of what appeared to be resentment towards Ms. L, contradicted himself on cross-examination and asserted that Ms. L did not punch in early on August 22nd and that "most of the days she was late" (Tr. 2513), thus defeating his own legal position, and seriously undermining his credibility.

Even if it were true that some of the cleaners may have put in extra time that was not documented throughout the year -- and several employees testified that they would occasionally do work before or after they punched in or out (Harris: Tr. 1742; Khadaroo: Tr. 2254-56) -- I do not accept that respondent had this in mind when he decided to pay Ms. L, Harris, Lombardi, and Rivera for a full day on August 22, 2008. Instead, respondent realized that he was wrong in

sending them home without a legitimate reason and simply sought to cover his error. Once charged with misconduct, respondent found the fact that the cleaners had worked extra hours a convenient excuse for overpaying them for August 22nd. Significantly, he did not pay them for all those supposed extra, off-the-clock hours on other occasions, nor did he pay Tolomello, who apparently did work the full day on August 22nd, for unrecorded hours in addition to payment for his actual work that day.

However, even if respondent had paid the four cleaners for hours they did not work on August 22nd in order to make up for other hours they did work at other times, but did not record, respondent would have still violated the Custodial Rules. It is improper for a custodian engineer to list on a timecard hours an employee did not actually work, even if the custodian engineer feels that the employee had previously worked time that went undocumented (Estelle: Tr. 1439-40). Section 2.2.5(d) of the Custodial Rules provides:

> **Keeping of Time.** Complete records must be kept of the *actual* hours worked by the helpers employed by Custodians. Time records must be kept of the *actual* hours worked by every employee who receives payment from the custodian. The only acceptable time records are time cards reported on a time clock. . . . No employee is to be excepted from recording his time.

(Pet. Ex. 20, emphasis supplied.) The key word in this section is “actual.” Respondent, as custodian engineer, had a duty to record correctly the “actual” hours worked by his staff. If an employee who was scheduled to start work at 8:00 a.m. actually came to, and started, work at 7:30 a.m., respondent should have ensured that the employee’s timecard reflected that the employee started at 7:30 and not 8:00. The custodian engineer could not, however, add half-an-hour to the employee’s timecard for the following day, when the employee did not work it, in order to make up for not entering the half-hour the day before. This defense that respondent was making up for time the staff worked on the other days fails.

Respondent additionally claims that when he paid Ms. L, Harris, Rivera, and Lombardi, he believed that he would end up paying them from his own salary rather than from the Department’s money. If respondent had some vague intention to make up their overpayment at year-end, he never did that and the deficit argument simply does not have any basis in reality. He never did pay for his error from his own pocket, and I find that he never intended to. He did not pay the staff with his own personal check; such a procedure was not allowed in any event under fundamental accounting and labor rules. A custodian engineer’s annual budget is

determined based upon the size and use of the school building. The annual allocation, which is comprised of funds necessary to pay the custodian engineer's salary, the salaries of other custodial staff, and all other expenditures, is paid in equal biweekly installments (Wile: Tr. 1858). The custodian engineer does not earn a guaranteed salary, however. Instead, he is allowed to keep what is known as a retainage; while there is a contractual maximum that a custodian engineer is allowed to earn, there is no contractual minimum (Wile: Tr. 1858). For example, if a custodian engineer with an annual budget of $100,000 and a permissible retainage of $20,000, spent $79,000 for expenses, including the salaries of the other custodial staff and miscellaneous operating expenses, there would be $21,000 left. Because the custodian engineer is only allowed to earn $20,000, $1,000 would be left over (Wile: Tr. 1858-59). This leftover is known as "excess," and must be returned to the Department (Wile: Tr. 1858-59; Estelle: Tr. 1417). On the other hand, if, under the same scenario, the custodian engineer had spent $81,000 over the course of the year, there would be only $19,000 left for the custodian engineer's earnings. The custodian engineer would be considered to be in "deficit" and would have made $1,000 less for the year than his maximum retainage (Wile: Tr. 1858-59).

It is in this second scenario, allegedly finding himself in or anticipating a deficit, where respondent supposes another defense to the charge that he defrauded the Department of the funds he paid subordinates for August 22, 2006. Respondent asserts here that in August 2006, he believed that he was already in a deficit, although the fiscal year had just begun. As a result, he was operating under the assumption, he claims, that any further expenses, such as paying the cleaners for extra hours, would come out of his salary. While there was much testimony concerning whether or not respondent actually believed he was in a deficit in August 2006, such testimony was largely irrelevant, as respondent's defense rests upon a misstatement of the way the Department's budget process operates. As a 31-year veteran of the Department, respondent was very experienced with a City custodian's budget. He knew the agency's accounting rules very well. The principal relevance of his statements is that this testimony that respondent lacked intent to commit fraud was a sham; he admitted later in the trial that he acted inconsistently with such an innocent intention to pay wages from his own pocket. For example, he admitted at trial after a lengthy cross-examination at the end of re-cross that, "At the end of December is when I'll know if I'm in deficit or excess" (Tr. 2869), so he would not be able to say truthfully that he was not using City funds to pay the workers as of August, whether he was figuring a calendar

year or a July 1 fiscal year. Most tellingly, when it came to paying himself for the month including August 22, 2006, respondent paid himself *in full:*

> Q. And how about in that month that was in issue of July 29 to August 24 of '06 when you paid the staff that works for you, did you also pay yourself the full amount?
>
> A. I did because my mortgage was due.

(Tr. 2569). Finally, he admitted that he did not even know the true status of his accounts until October, when he asked a fellow custodian, Mr. Drach, to have his wife audit respondent's books (Tr. 2569). Although he at first denied getting his full pay for the year, he seemed to indicate that he did take the full pay or very nearly full pay for the calendar year. If he netted less, that was not because he believed himself in deficit in August, or because he paid the workers full pay and overtime on August 22, 2006, but rather, by his own admission, "[b]ecause there have been times when I've taken my own money *after* getting paid and spent it on some extra things for the school" (Tr. 2568-69, emphasis supplied). Here the defense completely fell apart. Even if respondent were in deficit as of August, most of the Department's fiscal year still remained, and four months remained through the end of the calendar year in December (on the theory that custodians did their accounting on a calendar year basis). Respondent acknowledged that the fiscal year ran from June 30 to July 1 (Tr. 2868), and the calendar year was far from over. During the remaining months of either accounting period, he might have found ways to build an excess that would have balanced out any supposed deficit (Estelle: Tr. 1374). Thus, the defense proceeds from a fallacious argument.

Ultimately, however, deficit or no deficit, custodian engineers are required to maintain all Department funds separate from their personal accounts, in an account containing only Department funds. Commingling is not permitted by Department policy or by the collective bargaining agreement. *See Dep't of Education v. Honan*, OATH Index No. 2231/07, at 12-13 (Mar. 14, 2008) (misconduct for custodial engineer to pay himself monthly allocations higher than his approved monthly retainage, even though engineer claimed he was repaying himself for an advance he put in the custodial account). All funds in the custodial account are therefore the Department's funds. *Id.* When respondent paid Harris, Lombardi, Rivera, and Ms. L for August 22nd, he paid them with a check drawn from the custodial account. Even if respondent believed at the time that he was in a deficit -- even if respondent were correct in his stated belief -- respondent was not paying the cleaners out of his own pocket. He was paying them with

Department funds. It is not until respondent writes himself a check for his biweekly salary that funds once in the custodial account become his. The evidence, therefore, establishes that respondent's conduct was fraudulent because he knowingly used Department funds to pay Ms. L, Lombardi, Harris, and Rivera for regular and overtime hours they did not actually work on August 22, 2006, and he knew it because he directed this to be done and signed the false certification necessary to the Department's issuance of their paychecks in inflated amounts.

Respondent consistently asserted that because the Department deposits funds biweekly into an account in his name and social security number, the funds in the account are his money, adding that he was responsible for the way they are spent (Tr. 2869). When the Department's counsel questioned respondent as to whether he would have to return any money that he could not account for, respondent was at first evasive before conceding that he would have to do so (Tr. 2869-72). Nonetheless, even after this concession, respondent maintained that once the Department deposited funds into the custodial account (Tr. 2871-72), it was his money. Respondent's refusal to admit the most basic fact, that the funds deposited into the custodial account remain the Department's monies until properly accounted for, was unreasonable and further undermined his credibility.

After making the mistake of sending Ms. L, Lombardi, Harris, and Rivera home, respondent did not have the option of paying them out of the custodial account for the time they were scheduled to, but did not, actually work that day. Instead, if Ms. L, Lombardi, Harris, and Rivera felt respondent was not justified in sending them home and wanted to be paid for that time, they were required to file a grievance (Estelle: Tr. 1440-41; Wile: Tr. 1876-77). Only after a finding that they were unjustifiably sent home would the employees be paid (Estelle: Tr. 1441; Resp. Ex. R, Local 891 Collective Bargaining Agreement, Art. 9).

Having sent the staff home early without justification, respondent then had to cover the gaffe. He did so by certifying false payment records that caused the Department to overpay Ms. L, Harris, Rivera, and Lombardi for time that they did not actually work on August 22, 2006. Thus, he knowingly and intentionally took money belonging to the Department and appropriated it to third parties based upon fraudulent time records that he directed be completed by Ms. L and additional payment records he personally certified. This action was not innocent and did not in fact proceed at the time from a theory that the workers made up the time in unrecorded efforts they made off the clock; he knew that this was improper accounting and never once took

responsibility for it. Had he said he was enamoured of Ms. L and that his emotional upset about his feelings towards her led him on an isolated occasion to engage in false accounting to cover his mistake in sending the staff home in a fit of pique about his relationship with her, he would have done a better job of explaining this anomaly and might have inspired some sympathy for human frailty. Instead, he chose to twist the facts, implausibly deny wrongdoing, and offer faulty defenses in an attempt to avoid this charge. In the course of attempting to justify the false time-keeping and payroll records he directed and signed with such tortured explanations, however, he damaged his credibility in this tribunal.

This charge is sustained in full.

FINDINGS AND CONCLUSIONS

Respondent committed misconduct within the meaning of Civil Service Law section 75, Chancellor's Regulation A-830, and the City's and the Department's rules and regulations prohibiting conduct unbecoming a member of the custodial force and prejudicial to the good order, efficiency and discipline of the Department of Education, and neglect of duty, in violation of section 2.1.6 of the Rules and Regulations for the Custodial Force in the Public Schools of the City of New York (1977) (the "Custodial Rules") (Pet. Ex. 20); section 9.18 of the Rules and Regulations Governing Non-Pedagogical Administrative Employees (Jan. 30, 2004) (Pet. Ex. 21); and Article 5 of the By Laws of the Department of Education (June 20, 2001) (Pet. Ex. 22), as follows:

1. Respondent caused to be submitted to the Department fraudulent time cards and falsely signed and certified that the amounts paid employees and their reported hours for the month including August 22, 2008, were correct, even though he knew that the hours were inflated for four of the workers, who did not actually work the full day or the overtime for which he caused the agency to pay them for August 22, 2008. Respondent thus committed a fraud on the Department.

2. Respondent sexually harassed Ms. L in violation of Department rules and regulations, and thereby committed misconduct in pursuing a romantic and intimate relationship with her after she told him she was not interested and asked him to stop.

3. Upon learning that Ms. L had complained to the principal of P.S. 188 that respondent had sexually harassed her, respondent threatened to retaliate against Ms. L by threatening to fire her, change her hours from day to night, and change her vacation, and, in so doing, committed misconduct.

4. Respondent was intoxicated during working hours in P.S. 188 on more than one occasion in 2006.

5. Respondent's conduct was unbecoming a member of the custodial force in the public schools of City of New York and prejudicial to the Department.

6. The Department failed to prove that respondent was insubordinate or that he grabbed or attempted to grab Ms. L by the shoulder.

RECOMMENDATION

After making the above findings and conclusions, I requested and received a summary of respondent's personnel history. Respondent's personnel record reveals an employee generally well-liked and highly regarded as a custodian engineer. However, he did settle a prior sexual harassment complaint against him from a different woman with whom he worked at a different school, P.S. 134K, in April 2002, with a two-page Chancellor's Regulation A-830 conciliation agreement reciting that respondent and the earlier complainant "agree to respect each other. From now until the end of the school year, both parties will not interact with each other. Work responsibilities will be adjusted for the above to take place." By 2003, respondent had transferred to P.S. 188 (Tr. 2329). The personnel file does not contain the third page, an attachment to the conciliation agreement, which is the complainant's explanation of what happened. Upon a request to the Department from OATH's law clerk for clarification, agency counsel confirmed that the attachment is not part of respondent's personnel record. Thus, there is limited information available about this earlier matter, but it is clear that respondent settled a previous complaint of sexual harassment in the workplace, not long before the instant matter arose. Also submitted after the hearing were four additional pages of reports about respondent's great work in P.S. 213 in 1997, from staff who did not want respondent transferred out of that school when he was placed on a transfer list; an unsigned letter of praise from December 1998 stating that he is "a caring dedicated professional," and a January 24, 2005 letter of praise from Principal Tudda to respondent thanking him and his staff for "all of your hard work in making sure we were able to open up our doors this morning. I know that your custodial crew worked around the clock during the blizzard, which occurred over the weekend. When I arrived to the school this morning, it was quite difficult to believe that it snowed here at all . . . . Thank you for your dedication to our students, staff and community."

Respondent submitted into evidence performance evaluations dating back to 2003 (Resp. Exs. A, N, O, Q). Respondent was consistently rated as "excellent" or "good" in all performance categories, by both the principals of the schools where he worked and by his plant manager. A number of glowing testimonial letters, written by Tudda, other principals and assistant principals and a superintendent in schools respondent served, staff members of schools where respondent worked, parents and union officials, attest to respondent's outstanding work (Resp. Exs. T, P). Additionally, much testimony elicited during the hearing recounted the many improvements to

P.S. 188 for which respondent has been responsible: air-conditioning throughout the building, painting, even the addition of fountains that have reportedly beautified the building. Respondent has been generous with his own money, buying gifts (bicycles) to be raffled off to the children of the school. There is no dispute that respondent has in the past shown himself to be a valuable asset to P.S. 188.

Respondent's unblemished record and past service to the Department, however, cannot offset the gravity of the misconduct proved here. Respondent holds a position of trust. He is entrusted with public funds and is responsible for supervising a staff of cleaners. Respondent's refusal to acknowledge that any aspect of what he did was wrong and take responsibility for it strongly suggests that he would likely repeat such conduct the next time he feels pressured or his emotions get the better of him. *Dep't of Education v. Halpin*, OATH Index No. 818/07, at 30 (Aug. 9, 2007) (lack of contrition as indicative of likelihood respondent would not conform to required procedures in the future). At no time during the trial did respondent show contrition for his actions. Instead, he expressed the belief that purchasing roses and expensive gifts for his subordinate was proper behavior for a supervisor. He presented himself as a supervisor who believed it was acceptable for him to have a couple of beers during lunch and then return to work at an elementary school. He believed he was within his rights to pay employees for time they did not actually work with Department monies entrusted to him. In each of these examples, and more, respondent is sadly mistaken.

Respondent has been found to have committed a number of forms of serious misconduct: sexual harassment of a subordinate, threats of retaliation against that subordinate for exercising her right to complain, defrauding the Department of funds, and being intoxicated at work. Each of these proved charges alone warrants the penalty of termination.

The Appellate Division has accurately described sexual harassment in the workplace as "among the most offensive and demeaning torments an employee can undergo." *Petties v. N.Y.S. Dep't of Mental Retardation & Developmental Disabilities*, 93 A.D.2d 960, 961, 463 N.Y.S.2d 284, 286 (3d Dep't 1983). In light of the gravity of the misconduct proved, it would be inappropriate for the Department to retain respondent in a position where he would have the opportunity to harass Ms. L or other female employees in the future, or misuse his authority over public funds because of emotional upset about his relationship with a member of his staff in similar circumstances.

In *Ellison v. Brady,* 924 F.2d 872 (9th Cir. 1991), the court found a hostile working environment created by an IRS agent who was a mere co-worker of another agent whom he pursued romantically with love notes. The court applied a "reasonable victim" standard to find conduct sufficiently severe or pervasive to support a claim of sexual harassment. *A fortiori,* here, the conduct is worse because respondent was Ms. L's supervisor, who pursued her with declarations of love, enlisting others in the workplace to participate in his messages, burdening subordinates with his obsession, and unreasonably interfering with Ms. L's working environment. *Cf. O'Dell v. Trans World Entertainment Corp.,* 153 F. Supp. 2d 378 (S.D.N.Y. 2001), *aff'd,* 40 Fed. Appx. 628, 2002 U.S. App. LEXIS 14446 (2d Cir. 2002) (no hostile working environment found where co-worker of victim doggedly pursued her by repeatedly asking her out, sending her emails declaring his love for her, calling her at work and at home, and giving her three gifts; court noted that he was not her supervisor throughout the period of time during which he pursued her and found that conduct was exasperating, but did not alter the conditions of employment).

Moreover, a finding of sexual harassment does not require requests for sexual favors. Rather it is enough if the incidents proved can reasonably be interpreted as having been based on the victim's gender. *Giamundo v. Shevell,* 2006 U.S. Dist. LEXIS 67880 (E.D.N.Y. 2006) (citing, *inter alia,* Chancellor's Reg. A-830) (Sifton, D.J.). Here, respondent's mistreatment of Ms. L was based on her gender. He sent no gifts to the male workers; he leered at her breasts and buttocks because she is a woman; and he singled her out because he found her attractive and made her life miserable at work because she rebuffed him.

The City's *EEO Policy Handbook, What You May Not Know* (2003)*,* at page 9, found at http://nyc.gov/html/dcas/html/eeo_booklet.html, tells city workers that unwelcome sexual advances occur when "you did not initiate it, encourage it, provoke it or request it, and you feel that you are being ridiculed or that the conduct is demeaning, insulting, offensive, undesirable, hostile, intimidating or threatening." In addition, repeated requests for a date (here requests to share a life together), causing "negative job consequences or an uncomfortable work environment," and "leering" may be sexual harassment. *Id.* at 9-10. Under city policy, the conduct need not involve sexual advances to constitute sexual harassment, nor need the conduct be sexual in nature: "The City's EEO Policy prohibits not only harassment of a sexual nature --

that is, involving sexual activity or language -- but also harassment that involves . . . hostility . . . intimidation, or unequal treatment that is related to a person's gender." *Id.* at 10.

Respondent cites a number of OATH cases for the proposition that termination is too extreme a penalty for an employee found to have engaged in sexual harassment: *Dep't of Parks & Recreation v. Aronoff*, OATH Index No. 366/87 (Mar. 24, 1988) (demotion); *Dep't of Correction v. Andino*, OATH Index No. 492/95 (Dec. 13, 1994) (termination); *Dep't of Parks & Recreation v. Muller*, OATH Index No. 303/85 (Oct. 9, 1985), *aff'd,* N.Y.C. Civ. Serv. Comm'n, Item No. CD86-72 (Oct. 2, 1986) (two-month suspension); *Fire Dep't v. Heaney*, OATH Index Nos. 207/84 & 208/84 (Oct. 3, 1984) (both respondents suspended); *Human Resources Admin. v. Dare*, OATH Index No. 1806/99 (Nov. 8, 1999), *modified on penalty*, Comm'r Dec. (Nov. 23, 1999) (60-day suspension); *Dep't of Correction v. Skeete*, OATH Index No. 254/04 (June 3, 2004), *aff'd*, NYC Civ. Service Comm'n Item No. CD05-66-SA (Sept. 14, 2005) (45-day suspension). Determining an appropriate penalty is specific to the facts in each case, however, and the cases cited by respondent either do not involve the ongoing, continuous pattern of sexual harassment by a supervisor that occurred here or support the penalty of termination of employment, as in *Andino*, which treats sexual harassment and threats of jeopardy to the victim's job similar to the fact pattern in this case.

Skeete and *Aronoff* both concerned singular, albeit serious, incidents of sexual harassment -- a correction officer rubbing his groin against a female correction officer's buttocks, and a supervisor calling a subordinate at her home and propositioning her for sex in exchange for assistance in her job search, respectively. *Skeete*, OATH 254/04; *Aronoff*, OATH 366/87. In *Muller*, likewise, a Department of Parks and Recreation employee was found to have committed a single act of sexual harassment when he grabbed and kissed a co-worker whom he was driving home. These cases all differ from this one in that respondent here engaged in a continuous, pervasive course of sexually harassing conduct over the period of nearly half a year and really going back nearly two years earlier, beginning with gifts in December 2004, when Ms. L was new to the job. Respondent has shown no remorse for his actions and there is no reason to conclude that his feelings for Ms. L have dissipated such that the sexual harassment would cease if he were to be returned to the school.

In *Dare*, an HRA fraud investigator was suspended for 60 days for his comments with sexual overtones directed towards several female investigators, gestures, and unwanted physical

touching. As serious as the misconduct in *Dare* was, it was also distinguishable in that respondent and complainants there were mere co-workers, lacking the power dynamic of the supervisor/subordinate relationship that was abused here. *Cf. Dare*, OATH 1806/99.

The last case cited by respondent, *Andino*, involved a DOC supervisor who propositioned a subordinate officer, and when she rebuffed him, threatened her. Contrary to respondent's attempt to distinguish the case, the supervisor there was terminated for what was called "utterly unacceptable and among the worst forms of misconduct a supervisor can commit." *Id.* at 9. Additional OATH cases have reached identical results. In *Board of Education v. Roman*, OATH Index No. 1555/97, at 23-24 (Sept. 30, 1977), Judge Lewis explained that a school security guard "showed extremely poor judgment," and placed the recipient of his improper advances, a student, "in a position of vulnerability such that she considered dropping out of school," and as such "should not be permitted to continue his employment at a school." *Id.* OATH has also recommended termination for a supervisor who sexually harassed three women security guards under his direction, calling his actions "a gross abuse of authority." *Human Resources Admin. v. Allen*, OATH Index No. 212/06, at 38 (June 28, 2006).

Respondent's treatment of Ms. L was likewise a gross abuse of authority. In response to Ms. L's filing a complaint, respondent threatened her employment and sought to impose radical changes in her working conditions. Irrespective of the fact that respondent never followed through on these threats, that he made them in the first place indicates his willingness to abuse for his personal benefit the authority the Department invested in him as custodian engineer, to punish the victim of his harassment for filing a complaint. Such conduct, wrong in its own right, exacerbates respondent's sexual harassment of Ms. L. It further creates an environment in which other employees become afraid to assert their own rights. The Department cannot approach such sexual harassment and retaliation in a nonchalant manner. Termination is the appropriate penalty in this situation.

Similarly, the standard penalty for time theft and falsification of time records alone is also termination. *See Dep't of Education v. Jochems,* OATH Index No. 345/02 (Aug. 5, 2002), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD03-68-SA (Sept. 16, 2003) (noting in case of supervisory carpenter that termination of employment is warranted for false or inaccurate time records); *Office of the Comptroller v. Nieves,* OATH Index No. 962/04 (Oct. 29, 2004) (termination for falsifying arrival time at work on 26 occasions for a total of 445 minutes,

insubordination, making extended non-business related phone calls, and excessive lateness); *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) (termination recommended for falsely reporting time on 39 occasions during three-month period); *Dep't of Transportation v. Castellano*, OATH Index No. 1176/01 (July 11, 2001), *modified on penalty*, Comm'r Decision (Oct. 5, 2001), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD03-34-SA (Apr. 2, 2003) (laborer terminated for knowingly altering his time cards on five occasions to receive $600 in compensation); *Human Resources Admin. v. Golden*, OATH Index No. 2441/00, at 9-10 (Nov. 8, 2000), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD01-53-SA (July 27, 2001) (termination of employment for intentional deceit, despite 27-year tenure, in light of respondent's "disturbing refusal to accept responsibility for his actions").

"False reporting of time is one of the most serious offenses of moral turpitude which a civil service employee can commit, and . . . most public employees found to have falsely reported their hours have been terminated." *Golden,* OATH 2441/00, at 9-10. Under this reasoning, this tribunal has held that "falsification of time records . . . has been held to warrant the most severe penalty available, even though small amounts of money are at issue." *Transit Auth. v. Caruso*, OATH Index No. 685/92, at 23 (Jan. 28, 1993) (falsifying time card resulting in two hours of leave time and other false statements, together with defiant attitude, led to termination of employment) (citing *Pell v. Bd. of Education*, 34 N.Y.2d 222, 234-35, 356 N.Y.S.2d 833, 842 (1974)); *see also Dep't of Sanitation v. Chaudhuri*, OATH Index No. 1674/08, at 13 (May 21, 2008) (altering another employee's sign-in time to cover up respondent's own lateness led to termination, although there were only two instances of false reporting totalling 24 minutes and thus an "insubstantial amount of money"); *Dep't of Education v. Halpin*, OATH Index No. 818/07, at 28-29 (Aug. 9, 2007).

While respondent falsified his employees' time sheets rather than his own, the same principle applies here, particularly because he falsified the record to cover up his own improper conduct in dismissing the workers early without a valid reason. *See Dep't of Environmental Protection v. Martinez*, OATH Index Nos. 734/06 & 1486/06, at 9-10 (May 24, 2006) (termination appropriate for sewage treatment worker who intentionally gave false and misleading statements to his supervisors about federally mandated wastewater samples he was supposed to collect, even though he gained no personal benefit from the falsification, because of

his "deliberate attempt to cover up his actions"). As explained in *Honan*, "[c]ustodian engineers are charged with an elevated level of managerial and fiscal independence not shared by any other category of civil servant." *Honan*, OATH 2231/07, at 26. Custodian engineers are charged with administering bank accounts set up in their names, but containing Department funds, as well as paying both their own and their employees' salaries from these accounts. While the Department has implemented certain safeguards, the opportunity for intentional abuse is high. *Id. See generally Bd. of Education v. Arena*, OATH Index No. 437/82 (Dec. 2, 1982). Because custodian engineers are responsible for school funds, it is imperative that custodian engineers can be trusted to manage and administer those funds honestly and properly. Respondent can no longer be entrusted with that important task.

Finally, respondent engaged in serious misconduct when he came to work intoxicated. While being intoxicated at work is always unacceptable, *see In re Gaiser*, 82 A.D.2d 629, 630, 442 N.Y.S.2d 829, 830 (3d Dep't 1981) ("It has long been settled that one who reports for work in an intoxicated state or becomes intoxicated while in his course of employment is guilty of behavior rising to the level of misconduct"), respondent's misconduct was aggravated by the fact that he works in an elementary school, where there were young children present. Although not a teacher, respondent still had a responsibility to present himself professionally. His intoxication in the school during the school day was detrimental to the students at P.S. 188. *Cf. McBroom v. Bd. of Education*, 144 Ill. App. 3d 463, 494 N.E.2d 1191 (Ill. App. Ct. 1986) (teacher was properly dismissed for stealing a check from a student because her conduct was harmful to the students, the faculty, and the school and, thus, was irremediable). Respondent was intoxicated more than once at an elementary school. His continued employment at P.S. 188 on this record would be inappropriate.

Although this tribunal recognizes the concept of progressive discipline, *Dep't of Transportation v. Jackson*, OATH Index No. 299/90, at 12 (Feb. 6, 1990) ("it is a well-established principle in employment law that employees should have the benefit of progressive discipline wherever appropriate, to ensure that they have the opportunity to be apprised of the seriousness with which their employer views their misconduct and to give them a chance to correct it"), particularly persistent and pervasive or egregious conduct, such as that here, warrants termination for a first offense. *Id.; see also Keith v. New York State Thruway Auth.*, 132 A.D.2d 785, 517 N.Y.S.2d 334 (3d Dep't 1987) (upholding termination for first offense

where incident was egregious); *Health & Hospitals Corp. (Kings County Hospital Center) v. Wright*, OATH Index No. 467/02, at 22 (Mar. 22, 2002); *Health & Hospitals Corp. (Kings County Hospital Center) v. Brown*, OATH Index No. 802/00, at 9-10 (Feb. 28, 2000); *Latimer v. Dep't of Health*, NYC Civ. Serv. Comm'n Item No. CD 84-77 (Oct. 5, 1984) (upholding penalty of termination for first offense despite policy of progressive discipline, where proved misconduct was intentional and obstinate). As noted, this is not respondent's first disciplinary problem with sexual harassment.

I have considered the remaining arguments of respondent and found them to be without merit. I have also considered the extensive record, including respondent's record of accomplishment and I do not make this recommendation lightly. Given his undisputed, long record of service to the school system and to P.S. 188, respondent's situation is very nearly tragic. This tribunal has recommended termination of employment for sexual harassment despite an employee's record of recognition for good or outstanding work. *Dep't of Correction v. Hansley*, OATH Index No. 575/88, at 34-35 (Aug. 29, 1989), *aff'd sub nom. Hansley v. Koehler*, 169 A.D.2d 545, 564 N.Y.S.2d 398 (1st Dep't 1991). I find that respondent's actions and proposals to Ms. L objectively gave rise to a fair inference that he was enamoured of Ms. L, though he denied it here, and that his fixation with her led to his downfall. In important ways, all of the misconduct proved here stemmed from respondent's obsession with Ms. L. But his undue attentions towards her were unwanted and inappropriate. That he wanted to "give her the world" even though they never dated tends to support the Department's theory that he was harassing her. As a supervisor with heavy responsibility for a staff of workers and for public funds in a school with small children, he was required to take no for an answer. Indeed, Chancellor's Regulation A-830 expressly places responsibility on its supervisors to set the example: "Employees are expected to be exemplary role models in the schools and offices in which they serve. Supervisors are required to maintain an environment free of unlawful discrimination or discriminatory harassment." That respondent received a relatively recent sexual harassment complaint, and settled it in a document entitled "Chancellor's Regulation A-830 New York City Board of Education Request for Conciliation Form," in another school is an aggravating factor, which indicates that he had knowledge of the prohibitions against sexual harassment and nonetheless has been unable or unwilling to conform his conduct to the rules of the workplace.

Notwithstanding his record of achievement, he can no longer be entrusted with the duties of custodian engineer, and I recommend that his city employment be terminated forthwith.

Joan R. Salzman
Administrative Law Judge

September 29, 2008

SUBMITTED TO:

JOEL I. KLEIN
Chancellor

APPEARANCES:

VICTOR E. MUALLEM, ESQ.
Attorney for Petitioner

RAPHAEL F. SCOTTO, ESQ.
Attorney for Respondent

Dep't of Education Chancellor's Decision, October 22, 2008

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF EDUCATION
Petitioner
-against-
CRAIG BRUST
Respondent

JOEL I. KLEIN, *Chancellor*

I have received and reviewed the Report and Recommendation dated September 29, 2008, issued by Joan R. Salzman, Administrative Law Judge ("ALJ") of the City of New York Office of Administrative Trials and Hearings ("OATH"), the transcript of the hearing held before the ALJ and the exhibits introduced at the hearing. I have also reviewed the comments on the report and the argument submitted by Respondent's attorney. In the Report and Recommendation, the ALJ recommends that Respondent Craig Brust ("Respondent") be terminated. The ALJ concluded that Brust engaged in misconduct by sexually harassing his subordinate, a female cleaner at the school where he was employed as the custodian, creating a hostile work environment for the female cleaner. The ALJ further concluded that Respondent attempted to retaliate against the same female cleaner after she made a complaint about Respondent's conduct to the principal of the school and an investigator from the Office of the Special Commissioner of Investigation. Moreover, the ALJ determined that Respondent was intoxicated at the school on days when students were present and that Respondent submitted false records to the Department of Education which caused the Department's Division of School Facilities (DSF) to pay employees for hours they had not actually worked.

As the Chancellor of the New York City Department of Education ("Department"), I have the authority, pursuant to Section 75 of the New York State Civil Service Law, to accept or reject the recommendation. I have decided to accept the ALJ's recommendation that the Respondent be terminated from his employment with the Department.

A hearing at OATH on the charges against the Respondent was held on December 6, 7, and 13, 2007, January 15, 16 and 29, February 12 and 29, March 6, 7, and 27, April 16 and May 2, 2008. Closing arguments were heard on May 12, 2008. I concur with the ALJ that the hearing record amply proves the charges against the Respondent. I also concur with the ALJ's reasoning in her determination that, even though the Respondent had been employed by DSF for a number of years, termination would be the appropriate penalty for any one of the charges proven at the hearing, including Respondent's time theft and falsification of time records, the Respondent's intoxication while working at a school when students were present, and Respondent's acts of sexual harassment and attempts at retaliation against the victim once she complained.

On September 29, 2008, the ALJ sent a letter to the Department and to Respondent's attorney, informing him that he is entitled to comment on the OATH report and recommendation prior to my final action and that the Department should notify him of the time period permitted for such comment. The Department complied, and Respondent's attorney submitted comments for my consideration. He also argued that I should reject the ALJ's recommended penalty.

Respondent's attorney asserts that the Respondent is an excellent and longstanding employee.[24] He also argues that the proven conduct does not rise to the level of sexual harassment, but that even if it does, Respondent was not aware of the requirements of Chancellor's Regulation A-830. Further, Respondent's counsel argues that the charges claiming that Respondent was intoxicated at the school, threatened retaliation against his subordinate and defrauded the Department of funds were likewise unproven. I do not find Respondent counsel's arguments persuasive.

There is substantial evidence to support a finding that Respondent is guilty of serious misconduct. Moreover, Respondent's actions involved deception and moral turpitude, and he has neither displayed remorse nor taken responsibility for his actions. I find that the penalty of termination is appropriate and not shocking to one's sense of fairness.

Respondent's employment shall be terminated effective immediately.

JOEL I. KLEIN, *Chancellor,* Dep't of Education

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[24] The Report and Recommendation states that Respondent has been a Department of Education employee for 3 I years. This is incorrect, as for approximately 20 of those years Respondent was in direct employ of custodians who were in turn employed by the Department of Education. Respondent was first hired by the Department of Education in September of 1997.