Human Resources Admin. v. Wise

OATH Index Nos. 1679/13, 1680/13, 1681/13 (Jan. 3, 2014)

Two job center directors and a deputy director alleged to have improperly transferred cases from other job centers in order to increase placement statistics. Based upon employees' admissions and documentary evidence, charges against all three employees sustained. Despite employees' tenure, penalty of termination recommended due to egregiousness of misconduct.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
HUMAN RESOURCES ADMINISTRATION
Petitioner
- against -
IRIS WISE, ADRIAN WILLIAMS, AND STEPHEN SPEZZAFERRO
Respondents

REPORT AND RECOMMENDATION

JOHN B. SPOONER, *Administrative Law Judge*

This disciplinary proceeding was referred to me in accordance with section 75 of the Civil Service Law. Respondents Adrian Williams and Stephen Spezzaferro are job center directors, and respondent Iris Wise is a deputy job center director, employed by petitioner, the Human Resources Administration. Respondents are charged with improperly completing electronic transfers of cases from other job centers in order to increase placement statistics.

A hearing on the charges was held before me on June 27, July 1, August 27, August 28, and September 19, 2013. Respondents admitted improperly transferring cases electronically from other centers. Petitioner offered ten witnesses and introduced a large volume of records to show the quantity of cases transferred, employees' use of overtime to process the transfers, and the effect of the improper transfers upon the agency and clients. The parties submitted post-hearing closing arguments on October 23, 2013.

For the reasons explained below, I find that the charges should be sustained and recommend that respondents be terminated from their employment.

FACTUAL BACKGROUND

The three respondents are long-term employees assigned to two City job centers. At the time of the charges, Mr. Spezzaferro was the director and Ms. Wise was the deputy director of the East End Job Placement Center. Ms. Williams was the director of the Rider Job Placement Center. These job centers provide benefits and job placement assistance to Administration clients. The charges allege that the respondents engaged in a scheme to improperly transfer cases from other centers to their own center, without the other center's knowledge or consent, in order to inflate their own center's job placement statistics. The cases being transferred were identified by a regional manager named Mr. Nenner, who e-mailed respondents case numbers just as the cases were about to close because the clients had recently found employment. Respondents and their subordinates then filled out paper turn-around document forms (TAD's) and entered the transfer data into the computerized Welfare Management System ("WMS") in order to process the transfers, reassigning the cases to their own centers. The cases were then registered by the computer system as successful job placements for respondents' centers rather than for the centers that initiated the placements.

In addition to participation in the transfer scheme, the charges allege one act of related misconduct by each respondent. Specification II against Mr. Spezzaferro (ALJ Ex. 3) alleges that he removed TAD's without logging them out, destroyed TAD's with an unauthorized shredder, and deleted e-mails from Mr. Nenner. Specification II against Ms. Wise (ALJ Ex. 1) alleges that she, along with Mr. Spezzaferro, destroyed several thousand "fraudulent TAD's" with "an unauthorized shredder." Specification II against Ms. Williams alleges that she made two inaccurate statements to investigators on July 11, 2012: (1) that she never signed any TAD's and (2) that she received some e-mail lists from Mr. Nenner for transferring cases to the Fordham Center but did not complete the transfers. The improper transfers and related misconduct were alleged to have violated approximately ten agency rules and penal laws.

The Investigation

The improper transfers first came to light in August 2011, when Ms. Johnson recalled receiving complaints about cases being processed in one center and then closing in another center. She conducted a conference call with the center directors, including Ms. Williams, and with Mr. Nenner. During the call she asked Mr. Nenner if such improper transfers could have occurred, as some of the center directors were claiming. Mr. Nenner denied that unauthorized transfers were possible and Ms. Johnson "took him at his word" (Tr. 629).

The transfers came under further scrutiny in May 2012, when a director of one of the job centers complained to an Administration regional manager that some of the cases her center should have been given credit for were "disappearing" (Tr. 50). Executive Regional Manager Gomez examined the data of transfers between centers and observed a high number of case transfers into the East End and Rider Centers, just as the clients' employment was about to be recognized by the database as a job placement (Tr. 52, 104). Soon afterward the investigation was turned over to the Department of Investigation (Tr. 104).

Upon being referred to investigate the transfer issue, Administration investigators, including Ms. Rosete, Mr. Poli, and Ms. Hernandez, were dispatched in early June 2012 to search the offices of the East End Center. The investigators searched Job Opportunity Specialist Ovwasa's office and found paper copies of e-mails from Mr. Nenner to Mr. Spezzaferro with lists of cases (Tr. 133, 136; Pet. Exs. C and BBB). Ms. Rosete recalled finding black bins of paper documents designated to be shredded. These bins contained many TAD's and at least one e-mail from Mr. Nenner to Mr. Spezzaferro (Tr. 112, 116-17). Mr. Poli also found a number of TAD's in a black bin (Tr. 449-50). Mr. Poli indicated that 30 to 40 of these TAD's were connected to the Nenner e-mails (Tr. 457; Pet. Exs. A and B). The investigators then visited the Rider Center in July 2012 and seized several batches of Nenner e-mails and corresponding TAD's (Tr. 176; Pet. Exs. P and BBB). The originals of all of these documents were admitted into evidence at the hearing.

The investigators then interviewed a number of employees at the East End Center in June and July 2012, including respondents. Respondents and several other employees admitted to effectuating the transfers.

According to a report prepared by Mr. Gomez (Pet. Ex. III), Mr. Nenner's e-mails to Mr. Spezzaferro, sent between May and November 2011, identified a total of 1,068 cases from other

centers which were about to close. Mr. Spezzaferro and the East End staff completed TAD's to transfer 545 of these cases into the East End Center so that it would receive credit for the final job placements. Another report (Pet. Ex. CCC) found that, in e-mails sent to Ms. Williams and her staff at the Rider Center between July 2011 and January 2012, Mr. Nenner identified 1,123 cases about to close. Of these Ms. Williams's staff prepared TAD's to transfer some 777 cases into the Rider Center so that it received credit (Tr. 333-35).

Mr. Gomez indicated that, according to a chart (Pet. Ex. JJJ) he prepared, the East End Center's job placements increased from 2068 placements in 2010 to 3183 placements in 2011. For 2011 East End Center ranked first in the City for job placements (Tr. 356). Rider Center increased its job placements from 3845 in 2010 to 6535 in 2011 (Pet. Ex. KKK).

Additional Evidence on the Improper Transfers

Petitioner produced evidence on the scope of the improper transfer scheme and the job placement reporting through several witnesses, in addition to respondents. Principal Administrative Assistant Owens estimated that it took approximately 30 to 45 minutes to batch and process 20 TAD's (Tr. 655). Clerical Associate Green, who has worked at East End since 2010, testified that she was asked by her supervisor, Ms. Wise, and Mr. Ovwasa to work overtime processing TAD's, but she declined to do so because she was unable to stay late (Tr. 556).

Ms. Thomas, the control clerk from Rider, recalled that beginning in 2011 or 2012 she was suddenly given large numbers of TAD's to process. Many of the TAD's were done while Ms. Thomas was being paid overtime (Tr. 674). Usually her direct supervisor gave her the TAD's, but one day Ms. Williams called her into the office, asked her if she was staying late, and instructed her to batch and process some TAD's (Tr. 670). Ms. Williams told Ms. Thomas not to tell anyone about working on the TAD's and to return the TAD's when she was done (Tr. 681).

Mr. Poli testified that, based upon his familiarity with the investigation, between mid-2011 and mid-2012, East End staff processed between 1000 and 1300 improper placement transfers (Tr. 516, 541, 544; Pet. Ex. III). He estimated that there were around 800 improper transfers at the Rider Center during 2011 and early 2012 (Tr. 537). He stated that some of the East End TAD's selected for destruction lacked the two required signatures and some had improper duplicate authorization numbers (Tr. 463). Mr. Poli also noted that the agency

retention rules required records such as TAD's to be kept for at least six years on site before being stored or otherwise disposed of (Tr. 490).

Petitioner offered time records and WMS records, as summarized in a post-hearing spreadsheet (Pet. Ex. VVV), showing that several employees at the East End Center, including Mr. Ovwasa, Ms. Jones, and Ms. Owens, worked overtime on seven dates in 2011 and early 2012.[1]

Ms. Flaum testified that, in 2012, after the Nenner scheme was exposed, "many of the other center managers were very upset over it and demoralized because they felt that their work had been stolen and they weren't being given credit for the work that their centers had really done" (Tr. 57). Ms. Johnson noted that the improper transfers of cases could have resulted in clients having to travel to centers in far away boroughs for non-emergency servicing, such as recertification for food stamps (Tr. 590). Ms. Flaum and Mr. Gomez testified that, because agency management used the rankings of the centers to allocate resources, with lower ranking centers receiving more resources and higher ranking centers receiving fewer resources, some centers may have been short-changed while others were given more than their share (Flaum: Tr. 57; Gomez: Tr. 360).

Testimony of Respondents

All three respondents submitted written statements, at the commencement of the hearing, admitting to directing the processing of the transfers, based upon the Nenner e-mails, in order to "falsely improve" their center's placement ranking and meet their placement goals. According to Mr. Spezzaferro and Ms. Williams, they entered into the scheme with Mr. Nenner so that their centers would be able to meet job placement goals which their regional managers were pressuring them to make (Spezzaferro: Tr. 805-06; Williams: Tr. 968-69). Ms. Williams was also worried about being promoted from her acting director title to permanent director (Tr. 969). They were both told by Mr. Nenner that his motive in undertaking the scheme was to embarrass another regional manager named Johnson, who Mr. Nenner disliked (Spezzaferro: Tr. 812; Williams: Tr. 1038; Pet. Ex. I at 361). Ms. Wise also admitted that she participated in the scheme because as deputy director of East End she was being "hammered" at meetings about the

[1] Counsel for respondents confirmed the general accuracy of the summary (Pet. Ex. VVV) of the overtime hours spent on processing the improper TAD's and accessing WMS at the East End Center (Tr. 951).

center failing to meet its job placement goals (Tr. 871). All three respondents denied receiving any "benefit" from the transfers (Spezzaferro: Tr. 817; Wise: Tr. 890; Williams: Tr. 971) and insisted that they were assured by Mr. Nenner that none of the other centers would be harmed by the transfers (Spezzaferro: Tr. 854; Wise: Tr. 892; Williams: Tr. 989).

In their statements and testimony, respondents each offered further explanations as to why they participated in the illegal transfer scheme. In Mr. Spezzaferro's statement (Resp. Ex. 3), he admitted that his staff processed these transfers from July 2009 until May 2012. Mr. Spezzaferro also admitted that he "removed an unknown number of TAD's from Control without logging them out" and that he "destroyed an unknown number of TAD's with a shredder."

In his testimony, Mr. Spezzaferro testified he had Mr. Ovwasa and Ms. Wise complete the transfers, with Mr. Ovwasa completing most of them and Ms. Wise's involvement being "minimal" (Tr. 826). Mr. Spezzaferro did not "twist either of their arms" to participate – Mr. Ovwasa "welcomed" the practice, while Ms. Wise was "reluctant" but "agreed" (Tr. 826). He recalled Ms. Wise telling him that they had to stop the practice because it "isn't right." Nevertheless, at some point Mr. Spezzaferro indicated that he provided Ms. Wise with his user ID and password which she used to access his e-mail and the WMS whenever he was unable to do so (Tr. 834). Mr. Spezzaferro stated he didn't know how to stop participating in the transfer scheme because "this thing had gotten so out of hand that the numbers we were pulling in was [sic] more than half our placements" and the placement goals had kept increasing (Tr. 827).

In her statement (Resp. Ex. 1), Ms. Wise admitted that, from late 2009 through January 2012, she signed off on numerous TAD's "at the instruction of" Mr. Spezzaferro. She wrote that she "did not want to sign TAD's related to this practice." She also indicated that Mr. Spezzaferro instructed her to destroy TAD's relating to this scheme.

In her testimony, Ms. Wise recalled that she told Mr. Spezzaferro "numerous times" that she "didn't want to be involved" (Tr. 892). Nonetheless she acknowledged that she assisted Mr. Spezzaferro with the transfers from Mr. Nenner because Mr. Nenner held a "very high power job" and she was obliged to follow any directives from her supervisor (Tr. 892). She acknowledged writing instructions to Mr. Ovwasa on one of the TAD's (Tr. 877-78), giving Mr. Ovwasa instructions to process TAD's through another employee (Tr. 904), and receiving an e-mail from Mr. Nenner with a list of cases to transfer (Tr. 910). In her testimony she stated that

she often used Mr. Spezzaferro's computer because "Spezz is not good with spreadsheets" or "Word" (Tr. 885).

In Ms. Williams's statement (Resp. Ex. 2), she admitted that her staff processed the Nenner transfers from July 2011 until January 2012. She admitted that she "sometimes" signed off on TAD's herself. After Ms. Williams was transferred from Rider to the Fordham Center in April 2012, she continued to transfer cases on lists received from Mr. Nenner "on a few occasions."

In her testimony, Ms. Williams testified that, in 2011, when the Rider Center was struggling to meet its job placement goals (Tr. 962), Mr. Nenner called and explained the transfer process involving cases about to close and, in July 2011, began sending cases to her. Ms. Williams agreed to Mr. Nenner's proposal because she felt she was being "harassed" about job placement by her superiors and felt her job was "in jeopardy" (Tr. 978-79). The transfers were done by two of Ms. Williams's subordinates, including one who told Ms. Williams that a previous director had done the same thing (Tr. 970).

Although Ms. Williams's statement (Resp. Ex. 2) indicated that she stopped the improper transfers in January 2012, she admitted receiving e-mails (Pet. Ex. I) on February 24 and March 8, 2012, from Mr. Nenner containing case numbers to be transferred (Tr. 983-84). She also acknowledged that, after being transferred in April 2012 to the Fordham Center, she attempted to transfer more case numbers received from Mr. Nenner (Tr. 987).

ANALYSIS

As summarized above, the overwhelming quantity of evidence presented, including respondents' written and testimonial admissions, showed that respondents were responsible for directing improper transfers of hundreds of job placements to their assigned centers. Based upon this evidence, I find that, in an effort to boost the job placement statistics at their job centers, Mr. Spezzaferro and Ms. Williams, and on occasion Ms. Wise, received lists of cases from Mr. Nenner, used these lists to generate TAD's, and processed the TAD's to transfer the cases from other centers into their own.

While the participation of Ms. Wise was less extensive than that of the other two respondents, it was undisputed that she was an active and knowing manager of the process. She

acknowledged giving subordinates direct instructions to process the improper transfers on at least three occasions.

Specification I against each of the respondents, alleging that they collaborated with Mr. Nenner to knowingly direct improper transfers of job placements, must be sustained.

I further find that, in an effort to conceal the scheme, Mr. Spezzaferro removed folders of TAD's from the files and destroyed them either by using a "shredder," as he admitted in his written confession (Resp. Ex. 3), or by placing the TAD's in a bin where they would be shredded at a later time. Ms. Wise also admitted in her statement (Resp. Ex. 1) that she "was instructed by [Mr.] Spezzaferro to destroy certain TAD's" and did not deny in her testimony assisting Mr. Spezzaferro to destroy records. Based upon Mr. Spezzaferro's and Ms. Wise's admissions and the discovery of TAD's in the black bins at the East End Center, I find that, after processing the transfers, Mr. Spezzaferro and Ms. Wise placed some of the TAD's in black bins where they believed they would be destroyed. Specification II against Mr. Spezzaferro and Ms. Wise must be sustained.

The allegations against Mr. Spezzaferro and Ms. Wise that they used "an unauthorized" shredder cannot be sustained, since no evidence was adduced that shredders were generally unauthorized or that the shredder used by Mr. Spezzaferro was unauthorized.

Specification II against Ms. Williams alleges that, in her interview, she inaccurately told investigators that she "had never signed a TAD that was used to transfer in a placement case" and that she did no improper placement transfers after being reassigned to the Fordham Center. As to the signing of the TAD's, the only proof offered at the hearing of Ms. Williams's interview statements was the summary contained in Mr. Kaufman's investigation report (Pet. Ex. BBB at 13-15). This report indicates that during her July 11, 2012 interview, Ms. Williams, admitted to investigators that she received lists of cases from Mr. Nenner and "would transfer them in" so that Rider could take credit for the placements. She instructed her clerk to effectuate the transfers without TAD's, did not believe that TAD's were used, and denied that she signed any TAD's to accomplish these transfers. In her testimony, Ms. Williams acknowledged that this summary was accurate (Tr. 1020).

There was insufficient proof to demonstrate that Ms. Williams's interview statements about TAD's not being used were false. These statements were made in the context of Ms. Williams admitting to the investigators that she knowingly directed her subordinate to process

the improper transfers, based upon lists of cases received from Mr. Nenner. She had no motive to deny signing TAD's since, whether she signed TAD's or not, she was taking responsibility for the scheme. It seemed at least as likely that Ms. Williams's statements about the TAD's were based upon a faulty recollection, rather than a deliberate attempt to deceive the investigators.

Ms. Williams's statements about not completing transfers at Fordham, however, seem to have been intentionally false. She admitted in her written statement (Resp. Ex. 3) that, after she was reassigned to Fordham, she transferred lists of cases received from Mr. Nenner "on a few occasions." It seems likely that Ms. Williams's denials about doing improper transfers at Fordham were intended to conceal a portion of her wrongdoing from the investigators. It did not seem plausible that she would forget continuing the improper transfer scheme at a new center with new staff. Ms. Williams's false interview statements were in violation of Administration Code of Conduct section III (1) regarding "good order and discipline" and as well as Mayor's Executive Order No. 16 section 4 (c), requiring all City employees to "cooperate fully" with Department of Investigation investigations.

It was also not contested that respondents' deceitful transfers and cover-up, undertaken secretly for the purpose of falsely elevating the job placement statistics for East End and Rider Centers, as conceded by the three respondents, constituted flagrant violations of fundamental Administration rules: Administration Code of Conduct section III (1) (employees prohibited from engaging in conduct "prejudicial to good order and discipline"); section III (4) (employees prohibited from making a "false entry" or submitting a "false document"); and section III (11) (employees prohibited from committing "an act relating to the employee's office which constitutes an unauthorized and abusive exercise of the employee's official functions"); *see* section III (37) (employees prohibited from engaging in conduct which would "undermine the effectiveness of the employee in the performance of his/her duties"). Mr. Spezzaferro's and Ms. Wise's actions also violated Mayoral Directive 81-2, which states that "City owned or leased computer systems must be for officially authorized purposes only." The misconduct charges must be sustained on these grounds.

Respondents' belated effort to dismiss a portion of the charges due to the statute of limitations must fail. This request was made several weeks after the hearing in the closing argument by the attorney for Mr. Spezzaferro, who noted that some of the conduct occurred more than 18 months prior to the service of the charges, which occurred in October 2012. The

charges here were served on respondents in October 2012 and, in the case of Ms. Wise and Mr. Spezzaferro, allege misconduct going back to 2009. Civil Service Law section 75(4) prohibits prosecution of disciplinary charges for actions more than 18 months prior to the service of the charges. There are exceptions, however, to the 18-month time bar: where the conduct charged would constitute a crime (Civil Service Law § 75(4)); where the conduct is a continuing wrong *(Cintron v. Bowen,* 51 A.D.2d 569, (2d Dep't 1976); *Fire Dep't v. A. G.*, OATH Index No. 771/12 at 2-3 (July 5, 2012), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 13-02-SA (Feb. 6, 2013)); or where a respondent is estopped from asserting the time bar because wrongful concealment delayed the bringing of charges *(Matter of Steyer*, 70 N.Y.2d 990 (1988); *Transit Auth. v. Middleton*, OATH Index No. 258/05 at 7 (Jan. 13, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-26-SA (Feb. 17, 2006)).

Ms. Wise's and Mr. Spezzaferro's misconduct was both a crime and also actively concealed, making the statute of limitations inapplicable. First, Ms. Wise and Mr. Spezzaferro's actions constituted the crime of official misconduct. A public servant is guilty of official misconduct "when, with intent to obtain a benefit or deprive another person of a benefit[,]" he or she either (1) "commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized;" or (2) he or she "knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office." Penal Law § 195.00 (Lexis 2013). The Penal Law defines "benefit" as "any gain or advantage to the beneficiary and includes any gain or advantage to a third person pursuant to the desire or consent of the beneficiary." Penal Law § 10.00(17) (Lexis 2013).

All three respondents admitted that the transferring of cases was done to "falsely improve" the ranking of the East End Center and Rider Center in various reports by showing their placement goals were met (Resp. Exs. 1-3). Ms. Flaum testified that much of the management of centers was done by reviewing periodic job placement reports, which show the numbers of job placements of each center (Tr. 28-29). Respondents admitted knowing that these job placement reports, containing false data, would improperly credit their centers with job placements (Resp. Exs. 1-3). Respondents' admissions demonstrated that the transfers of cases based upon the Nenner e-mails were not authorized and, indeed, undermined the entire purpose of the job placement reporting, which was to generate accurate data to assist the agency in managing the job placement program.

The increased job placements for respondents' centers resulted in favorable consequences to all three employees: the pressure to meet their placement goals ceased and the harsh criticisms from their supervisors changed to praise, as described by both Mr. Spezzaferro and Ms. Wise. Ms. Flaum confirmed that improved placements could help directors' chances of securing a promotion to regional manager (Tr. 93). In Ms. Williams's case, Ms. Williams stated that she believed that the higher placement counts made it more likely she would be promoted from acting director to permanent director. Ms. Williams also indicated that a center's job placements were reflected in directors' evaluations (Tr. 972).

These numerous professional advantages to respondents were benefits sufficient to sustain a finding of official misconduct, which "can encompass political or other types of advantage." *People v. Feerick*, 93 N.Y.2d 433, 447 (1999) (citations omitted) (police officers convicted of official misconduct for unlawfully entering an apartment in order to retrieve their lost radio); *People v. Lucarelli*, 300 A.D.2d 1013, 1014 (4th Dep't 2000) (where defendant's official function was to receive suspect's report and refer it to a detective, "defendant's transmission of that information to the suspect's mother with the intent to benefit the suspect" was an unauthorized exercise of his official function); *Dep't of General Services v. Englander*, OATH Index No. 242/84 (July 12, 1984) (electrical inspector engaged in official misconduct by recommending a temporary service authorization be issued, knowing the work did not comply with the electrical code, so he could avoid having to re-inspect the premises).

For these reasons, respondents' unauthorized actions of improperly transferring placement cases, intended to obtain work-related benefits, constituted the crime of official misconduct.

Mr. Spezzaferro and Ms. Wise's actions also constituted the crime of computer tampering in the third degree.[2] The Penal Law defines computer tampering in the third degree as using a computer "without authorization" and intentionally altering or destroying "computer material." Penal Law §§ 156.20 and 156.25. Penal Law Section 156.00 (5) (b) defines "computer material"

[2] The petitions mistakenly cite Penal Law section 156.20, defining computer tampering in the fourth degree rather than computer tampering in the third degree. Despite this confusion, I find that petitioner sufficiently notified respondents that they faced a charge of computer tampering in order to prepare a defense. *Dep't of Correction v. Cross*, OATH Index No. 1109/95 (Aug. 9, 1995) (even though petition erroneously alleged that the date of occurrence was one day before, notice to respondent of petitioner's claim was sufficient and respondent afforded adequate opportunity to prepare a defense).

as any computer data or computer program which contains government records with personal data.

The evidence here established that the transfers of the job placement cases to the East End Center were unauthorized in that they were intended to falsely give the center credit for the placements. By making the transfers and either doing the related data entry in the WMS computer system, or directing that it be done, both Mr. Spezzaferro and Ms. Wise were intentionally "altering" personal client data. By later destroying the Nenner e-mails, Mr. Spezzaferro was intentionally "destroying" data. Ms. Wise's and Mr. Spezzaferro's actions therefore constituted computer tampering. The WMS computer system falls within the definition of "computer material," since it is maintained by the City and State government and contains a great deal of confidential personal financial information about benefits clients. Mr. Spezzaferro's and Ms. Wise's processing of the improper transfers, using the WMS system, constituted computer tampering in the third degree, while Mr. Spezzaferro's subsequent deletion of the Nenner e-mails in order to conceal the scheme constituted computer tampering in the fourth degree.

Finally, Ms. Wise's and Mr. Spezzaferro's actions of actively concealing the transfers by destroying agency records must preclude them from availing themselves of the 18-month time bar of section 75(4). Respondents' motion to dismiss the charges based upon the 18-month time bar of section 75(4) must therefore be denied.

Petitioner charged an odd array of other duplicative violations for which little evidence was offered. Two of these allegations were clearly meritless. The petitions alleged that the transfers violated Code of Conduct III (31), which states that "[e]mployees shall not steal, misappropriate, convert or cause to be stolen, misappropriated or converted the property of the City or the Agency nor shall any employee steal, misappropriate, or convert the property of another." There was no evidence offered at the hearing to show that any property was stolen or otherwise misappropriated.

Petitioner alleged that the improper transfers violated Code of Conduct III (12), stating that "[e]mployees shall not engage in any non-Agency activity during working hours, nor use any Agency premises to conduct non-Agency matters." The hearing evidence established that respondents' actions constituted agency activity, albeit improper activity, in that the transfers were effectuated using agency forms by employees authorized to perform such actions. While

respondent's motives in processing the TAD's were undeniably improper, it cannot be found that these actions were "non-Agency activity during working hours."

The petitions also alleged that respondents' conduct violated sections 2604(b)(2) and (3) of the New York City Charter and section 1-13(b) of the Conflict of Interest Board's rules.[3] Both sections 2604(b)(2) and (3) of the City Charter require a showing that the respondents used their position as a public servant for a private or personal advantage. City Charter § 2604(b)(2) (Lexis 2013) ("No public servant shall engage in any business, transaction or private employment, or have any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties."); City Charter § 2604(b)(3) (Lexis 2013) ("No public servant shall use or attempt to use his or her position as a public servant to obtain any financial gain, contract, license, privilege or other private or personal advantage, direct or indirect, for the public servant or any person or firm associated with the public servant.").

While the evidence showed, and respondents admitted, that they used their positions to obtain a work-related benefit, no proof was offered to demonstrate that the improper transfers gained respondents any private or personal advantage from their conduct. *See, e.g.*, *Conflicts of Interest Bd. v. McNeil*, OATH Index No. 1790/10 (June 11, 2010), *modified on penalty*, Bd. Chair's Dec. (Oct. 28, 2010) (respondent used his Department email account to send and receive emails relating to his outside employment in violation of section 2604(b)(2) of the City Charter and section 1-13(b) of the Board's rules); *Dep't of Correction v. Rodriguez*, OATH Index No. 792/09 (July 27, 2009), *modified on penalty*, Comm'r Dec. (Sept. 1, 2009), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 10-23-M (Apr. 26, 2010) (a correction officer used her official position to try to gain a favorable court outcome on behalf of a friend, in violation of section 2604(b)(3), and to expeditiously enter a courthouse, in violation of sections 2604(b)(2) and (3)). Respondents' actions were therefore not shown to have constituted violations of section 2604(b)(2) or (3).

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[3] Paragraph X of the charges states that respondents' conduct violated "section 2604(b)(B3)" of the New York City Charter, but then tracks the language of section 1-13(b) of the Conflict of Interest Board's rules. Moreover, section 2604 of the City Charter does not include subsection (b)(B3). Petitioner includes the language from section 2604(b)(3) of the City Charter in the charge, albeit without indicating its source. As section 1-13(b) of the Board's rules requires a finding that there is a violation of section 2604(b)(2) of the City Charter, I also consider whether respondent's conduct violated that section of the Charter.

Similarly, respondents' actions were not violations of section 1-13(b) of the Board's rules, which must be read in conjunction with section 2604. *See* 53 RCNY 1-13(b) (Lexis 2013) ("Except as provided in subdivision 3 of this section, it shall be a violation of City Charter §2604(b)(2) for any public servant to use City letterhead, personnel, equipment, resources, or supplies for any non-City purpose."); *Conflicts of Interest Board v. Brenner,* Conflicts of Interest Bd. Case No. 2008-716 (Jan. 23, 2009) (Deputy Director for the Department of Parks and Recreation used a city-owned vehicle and E-Z Pass without authorization to conduct personal errands on the weekend in violation of City Charter § 2604(b)(2) and Board Rule § 1-13(b)).

In sum, based upon respondents' admissions as well as the documentary evidence admitted at the hearing, I find that all of the specifications must be sustained, although some of the legal grounds finding the specifications to be misconduct must be rejected, as explained above.

FINDINGS AND CONCLUSIONS

1. Specification I against Ms. Wise should be sustained in that, from late 2009 through May 2012, she participated in a scheme to improperly transfer cases into the East End Center, in violation of Administration Code of Conduct sections III (1), III (4), III (11), and III (37), as well as Penal Law sections 195.00 (official misconduct) and 156.25 (computer tampering), and Mayoral Directive 81-2.

2. Specification I against Ms. Williams should be sustained in that, from late July 2011 through April 2012, she participated in a scheme to improperly transfer cases into the Rider Center, in violation of Administration Code of Conduct sections III (1), III (4), III (11), and III (37), as well as Penal Law section 195.00 (official misconduct).

3. Specification I against Mr. Spezzaferro should be sustained in that, from late 2009 through May 2012, he participated in a scheme to improperly transfer cases into the East End Center, in violation of Administration Code of Conduct sections III (1), III (4), III (11), and III (37), as well as Penal Law sections 195.00 (official misconduct) and 156.25 (computer tampering), and Mayoral Directive 81-2.

4. Specification II against Ms. Wise should be sustained in that, in 2011 and 2012, she assisted in destroying East End Center records to conceal improper transfers of job placement cases, in violation of Administration Code of Conduct sections III (1), III (4), III (11), and III (37), as well as Penal Law section 195.00 (official misconduct).

5. Specification II against Ms. Williams should be sustained in that, in July 2012, she made false statements to City investigators concerning the improper transfer of job placement cases at the Fordham Center, in violation of Administration Code of Conduct sections III (1) and Mayor's Executive Order No. 16 section 4.

6. Specification II against Mr. Spezzaferro should be sustained in that, in 2011 and 2012, he destroyed East End Center records to conceal improper transfers of job placement cases, in violation of Administration Code of Conduct sections III (1), III (4), III (11), and III (37), as well as Penal Law section 195.00 (official misconduct)

RECOMMENDATION

Upon making the above findings, I requested and received further personnel information about respondents in order to make penalty recommendations. All three respondents have been employed with the City for over 25 years. Ms. Wise has been employed by the Administration since 1987 and has no prior disciplinary history. In 2007 she received a certificate of exemplary management performance. The only evaluation provided, from 2010, rated her job performance as "good" and noted that she should take more management training classes. Mr. Spezzaferro was first hired in 1984. He was disciplined in 2001 for failing to ensure that applicants were timely serviced and accepted a 15-day suspension. He received a professional accountability award in 2002.[4] Ms. Williams was hired in 1988. In 1998 she was reprimanded for being absent without leave. She received a professional accountability award in 2002.

In this case petitioner has requested that all three respondents be terminated for the misconduct found to have occurred. The dishonesty and deceit demonstrated by respondents' actions here clearly demands a severe penalty. Respondents were relatively high level managers entrusted with the operations of job centers. Their participation in the scheme with Mr. Nenner to transfer cases and falsely report that these transfers constituted job placements attributable to their centers was an egregious violation of the trust placed in them as managers, as well as their fundamental responsibility as civil servants. In facilitating this scheme, all three directed their subordinates to process the transfers and, on occasion, approved overtime to complete the

[4] Both Mr. Spezzaferro and Ms. Wise also received certificates of achievement in 2012, after East End Center met its job placement goals. Since these awards were obtained based upon the improper placements, these cannot serve to mitigate the penalties.

transfers rapidly so that the job placement would not be credited for the center where it belonged. Making false statements in official government records is a serious form of misconduct that typically results in termination of employment. *See, e.g.*, *Dep't of Finance v. Jones*, OATH Index No. 1044/13 (July 3, 2013) (deputy sheriff who made false entries on Department records terminated); *Dep't of Environmental Protection v. Freeman*, OATH Index No. 166/09 (Jan. 5, 2009), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 09-69-SA (Nov. 12, 2009) (water inspector, with a prior disciplinary record, who made false entries on report, used agency vehicle for unauthorized purposes, and was insubordinate terminated); *Dep't of Correction v. Roman*, OATH Index No. 1026/05 at 29 (Feb. 10, 2006) (officer who "engaged in a deliberate pattern of fraud and deceit which is inimical to his obligations" terminated); *Transit Auth. v. Davila*, OATH Index No. 369/93 at 6 (Feb. 18, 1993) (police officer who "demonstrate[d] a fundamental irresponsibility and dishonesty" terminated); *see also Kelly v. Safir*, 96 N.Y.2d 32 (2001) (upholding termination of employment for police sergeant, with 29 years of service, who issued false training certificates to security guards); *Ansbro v. McGuire*, 49 N.Y.2d 872 (1980) (upholding dismissal of police lieutenant who filed false overtime claims).

Respondents' false reporting practices were extremely damaging. The reputation of the entire agency was tarnished and the morale among other center directors was severely damaged. Petitioner's witnesses testified that the unauthorized transfers of job placement cases would likely have inconvenienced some clients who would be required to travel to a different borough to obtain non-emergency servicing, such as recertification of food stamps. While petitioners produced no proof that this occurred, largely because no clients complained, the mere prospect that it could have happened is an aggravating factor in demonstrating the egregiousness of respondents' irresponsible conduct. I also agree with petitioner that it seems likely that at least some of the clients, out of the hundreds whose cases were illicitly transferred, were inconvenienced in some way, by either having to travel to a far-away center or having to navigate the system to have their cases transferred back to the center close to where they resided.

Respondents argue that termination would be unfair given their lengthy service and the various sympathetic issues raised by their testimony. I can, however, find no mitigation in any of the issues raised by respondents in their lengthy testimony. Their suggestions that they were driven to stealing cases from other centers by the pressures of meeting agency-wide goals were unconvincing. All three respondents portrayed themselves as victims of tyrannical superiors,

berated and humiliated at meetings for their failures and forced to take defensive action. This depiction rings false. The evidence here showed that job placement goals were given to all of the job centers and that the centers' performance was monitored at monthly meetings. Respondents were accountable for meeting these goals and standards. The fact that directors of poorly performing centers may have been criticized at meetings and encouraged to improve does not persuade me that respondents were being treated unfairly or vindictively. In fact, the only vindictive behavior displayed by the hearing evidence was that of Mr. Nenner, who sought to embarrass another regional manager based upon false reporting of job placements. Mr. Nenner was assisted in this effort by the knowing collaboration of all three respondents. Thus, respondents' portrayal of themselves as victims, rather than schemers, is unpersuasive. No matter how emphatically respondents may have been exhorted by regional managers to meet their goals, the notion that these managers, rather than respondents themselves, were responsible for respondents' fraudulent transfers and month upon month of false reporting does not bear serious discussion.

Respondents also sought to minimize the seriousness of their wrongdoing by insisting that other centers were not harmed by their actions because they only transferred cases from centers that met their job placement goals. Respondents' sole source for this information was Mr. Nenner, who also told respondents in the same breath that the reason he was spearheading the scheme was to make the centers under another regional manager appear to be failing. Respondents' hypocritical insistence that they believed no other employees would be harmed, when they had been told by Mr. Nenner that his goal was to do just that, must be rejected.

I did not credit Mr. Spezzaferro's testimony that he was driven by concern for his center's clients (Tr. 814). His insistence that the improper transfers would give his staff more time to service clients made very little sense since it was undisputed that low-performing centers were actually given greater resources to serve clients, while higher performing centers were denied extra resources. By falsely representing that East End Center was successful at finding jobs for clients, it seems more likely that Mr. Spezzaferro was causing the center's clients to receive worse service by depriving them of extra resources.

I also found little mitigation in respondents' admitting to the misconduct charged. Respondents' admissions occurred only after the transfers had gone on for years, in the case of Ms. Wise and Mr. Spezzaferro, or for many months, in the case of Ms. Williams. In the case of

Mr. Spezzaferro, his admissions came only after he had provided false denials to Mr. Gomez and Ms. Flaum (Tr. 54, 823). Respondents admitted wrongdoing during the Department of Investigation interviews because they had little choice, because the investigators had in their possession both the Nenner e-mails and the TAD's showing the processing of cases identified in these e-mails. Faced with this evidence, respondents could not plausibly continue to deny their participation in the Nenner scheme. The fact that they admitted to misconduct that was demonstrated so clearly by the agency records does not demonstrate candor, as it might in other cases.

I am also struck by the extended amount of time that respondents continued the improper transfers. Mr. Spezzaferro and Ms. Wise began the transfers in late 2009 and continued until they were caught in May 2012. Ms. Williams began later, in mid-2011, but continued the practice even after being transferred from the Rider Center to the Fordham Center in April 2012. The persistence with which respondents pursued this unscrupulously dishonest course strongly suggests that they should not be trusted to fulfill the obligations of a City employee.

Both Ms. Wise and Ms. Williams showed little contrition for their actions.[5] Instead, they were indignant that the Administration was being so harsh in seeking to terminate them for actions that they saw as relatively harmless. Only Mr. Spezzaferro demonstrated any real remorse for what he did. He testified that he realized that the transfers were "a stupid thing to do." His embarrassment and humiliation in the wake of the disciplinary charges had "aged" him. He knew what he had done was "wrong" and regrets it "every day of my life and I wish I never did it" (Tr. 835-36). He believed his actions "destroyed my life" and each day he asks God for forgiveness for what he has done (Tr. 836). These regrets about the consequences of his actions, while doing Mr. Spezzaferro credit, cannot outweigh the other factors demanding a maximum penalty.

[5] Ms. Williams complained that the investigation of the improper transfers was limited to East End and Rider and suggested that other centers were involved (Tr. 979). She acknowledged that what she did was wrong but contended that her actions did not warrant "the punishment that they are trying to give me" (Tr. 980).

Considering all of these factors, I conclude that the only appropriate penalty for respondents' misconduct is termination and I so recommend.

John B. Spooner
Administrative Law Judge

January 3, 2013

SUBMITTED TO:

ROBERT DOAR
Administrator/Commissioner

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