Admin. for Children's Services v. Matos-Miranda

OATH Index No. 728/12 (Apr. 13, 2012), *adopted*, Comm'r Dec. (May 1, 2012)

Evidence established that respondent juvenile counselor left child unattended for approximately a half-hour and failed to take a proper headcount of the girls in her charge. Eighteen-day suspension without pay recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
ADMINISTRATION FOR CHILDREN'S SERVICES
Petitioner
-against-
ESTHER MATOS-MIRANDA
Respondent

REPORT AND RECOMMENDATION

JOAN R. SALZMAN, *Supervising Administrative Law Judge*

This is a disciplinary proceeding referred by the petitioner, the Administration for Children's Services ("ACS"), pursuant to section 75 of the Civil Service Law. Respondent Esther Matos-Miranda, a juvenile counselor ("JC"), is alleged in a single charge to have violated the agency's Department of Juvenile Justice ("DJJ")[1] Standard of Conduct (2008) (the "Code of Conduct") by failing to take a proper headcount of the girls in her charge on February 28, 2011. As a result, the agency alleges, a girl in Horizon Juvenile Facility ("Horizon"), an ACS juvenile housing and detention center in the Bronx, was left behind without supervision for a half-hour in the housing area while respondent and her co-worker took a number of other girls to school.

A hearing was conducted at this tribunal on March 16, 2012. The agency called five witnesses from the facility: Juvenile Counselor Mojisola Oronsaye; Juvenile Counselor Shelly Skinner; Associate Juvenile Counselor Vandora Pankey-Roberts; Associate Juvenile Counselor Kim Taylor; and Tahia Johnson, Director of Operations at Horizon. Respondent testified on her own behalf. The exhibits submitted by the agency were admitted into evidence pursuant to

[1] DJJ became part of ACS in 2010. *See* http://www.nyc.gov/html/acs/html/yfj/youth_family_justice.shtml.

stipulation and without objection. I find that the agency has proved the charges by a preponderance of the evidence and recommend that an 18-day suspension without pay be imposed upon respondent.

ANALYSIS

Horizon's B Hall, A Heightened Security Dormitory

The material facts of this case are not in dispute. On February 28, 2011, respondent and her co-worker, Juvenile Counselor Oronsaye, had eight girls in their charge at Horizon, in the residential area known as B Hall (Tr. 19). They worked the 7 a.m. to 3 p.m. shift (Tr. 17). Respondent has been assigned to this hall for six years (Tr. 64). Juvenile counselors have care, custody, and control of juveniles who are in detention. Horizon is a "locked down secure facility" where such youths are confined under court direction (Oronsaye: Tr. 16-17). B Hall is Horizon's only "special support dorm," meaning the residents need extra attention because they may have a variety of behavioral or emotional problems. Some may be on psychotropic medication. They need a smaller setting because they have more behavioral problems than the average child in the facility. A clinician is also housed on this hall to provide extra attention (Oronsaye: Tr. 18; Roberts: Tr. 44; Taylor: Tr. 57-58; Resp: Tr. 105). B Hall is smaller by half than other dormitories (housing 8 girls instead of 16), so that the residents can have this extra supervision (Tr. 18). The hall is arranged in a "C" shape, with all the rooms situated close to each other (Tr. 58). The girls live in small, locked rooms and are to be let out by staff for scheduled activities only under close supervision (Tr. 58, 63-65).

The Requirement that Each Juvenile Counselor Count the Children

The primary responsibility of the juvenile counselor is to count the kids: "the most important thing is they are supposed to do the count because it's a secure facility, and that's the only way we are supposed to keep up with the sisters and make sure all residents [are] accounted for in the facility" (Taylor: Tr. 63). Juvenile counselors arrive for roll call. They must then line the residents up from smallest to tallest, count them, and call security to give the count and the report of the movements whenever they arrive and depart from the hall (Tr. 55-56). The juvenile counselors must verify the headcount from the preceding tour and enter their counts in the

logbook onsite (Tr. 19, 63). They must go to the bedrooms, bathrooms, and "[w]herever the kids are" and "physically count the kids themselves" (Roberts: Tr. 45). Before leaving, if there is only one counselor on the hall, that counselor counts the residents. If there are two counselors on the hall, they both count the residents. "So whoever is assigned to whatever area, they're both responsible for the count in that area" (Tr. 45-46). When one juvenile counselor leaves the hall and one remains, the remaining counselor's primary responsibility is to "make sure that all the residents are out of the area before departing" (Tr. 46, 63-65). This means he or she must check the hall, including the rooms and the bathroom (Tr. 46).

As Ms. Taylor confirmed, a juvenile counselor like respondent must make a "dual count" when she comes on duty, when she leaves, and every time she moves the residents: "So no matter how you look at it, this JC that's left behind is accountable for the residents that's [*sic*] supposed to have been left behind with her" (Tr. 66). "Dual" means that two people do the count. The remaining counselor is "the back[-]up person to confirm that the count is accurate" (Tr. 67).

Director Johnson, a 14-year veteran of the agency, testified that the physical, visual headcount "is an essential part of our daily duties," and "[v]ery significant to the safety and security of the residents of the facility" (Tr. 77). It is the juvenile counselors who make the count (Tr. 77-78). The count must be taken with all movement inside the facility, "hall to hall, when staff arrive and depart the hall, tour change, going to the cafeteria, gym, school, or other program areas" (Tr. 78). The requirement to count is written in the Standards of Conduct and facility orders (Tr. 78). Ms. Johnson confirmed that when one juvenile counselor leaves the hall, the remaining one must "physically and visually do a count of the residents on the hall by going to each individual room and checking the day area of the room, as well, and then making a log entry in the book noting what the count is presently on the hall" (Tr. 78-79). Asked why the count is so important, Director Johnson testified without hesitation: "The count is an essential part of the duties of the staff, and it's for safety and security reasons" (Tr. 79).

The responsibility to count the residents is also featured first among respondent's Tasks and Standards, which she signed on October 28, 2010, for the relevant time period: "Maintains and knows census of residents and accounts for residents at all times" (Tr. 80-81; Pet. Ex. 5, 6). "This means that the staff member will know the count at all times during their tour, during their

shift" (Tr. 80). This is not a new task (Tr. 80). The multiple standards associated with this task include:

> - E. Prior to escorting residents to or from an area, takes count when group or individual resident is about to move or has returned to an area, and denoting in logbook the number of residents and destination.
> - F. Ensures residents are in secure, assigned area with constant visual observation.
> - G. Ensure group is moved in single, orderly line with one counselor in front and one counselor in the rear of the group, ensuring the staff member escorting the rear of the line has a visual of the whole group of residents.

(Pet. Ex. 5).

Ms. Roberts, a 25-year veteran of the agency, concisely and plainly summed up the importance of taking the headcount in a juvenile detention center:

> *On all halls, not just the special support hall, the main function of the facility, period . . . is that you all have to know your count.*

(Tr. 38, 44-45) (emphasis supplied).

One Girl Was Left Alone and Unsupervised on B Hall on February 28, 2011

Respondent is a 12-year veteran of the Department of Juvenile Justice and ACS and holds a Bachelor's degree in science (Tr. 88-89). Her account of the events of the morning of February 28, 2011, matches that of the agency's witnesses in virtually all respects (Tr. 90-123). There were eight girls in the day area (Tr. 57, 94). Two girls were due to go to court that morning (Pet. Ex. 4) and the other six to go to school. The school is located in another floor of the same building, near the dorms (Tr. 27). At 7:35 a.m., respondent and Ms. Oronsaye arrived and both took a count, the "dual count," of the residents and checked the rooms and all areas. Everything was secure at 7:55 a.m., as respondent noted in the logbook (Tr. 94, 105-06; Pet. Ex. 1).

Respondent and Ms. Oronsaye then escorted the group to breakfast at 7:59 a.m. Breakfast ended about 8:30 a.m., when the group and their counselors took them back to the dormitory. One girl named Danielle[2] went off to court without a problem. The other girl, Aliya, created a disturbance on the hall by refusing to go to court (Tr. 20, 60-61, 95; Pet. Ex. 4).

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[2] For the protection of the privacy of the children at Horizon, their full names are not published in this decision. *See* Social Services Law § 372(3) (Lexis 2012).

The girls normally leave the halls between 8:20 and 8:25 a.m. to reach the classrooms on time at 8:30 a.m. (Tr. 64). About 8:45 a.m., according to respondent, resident Aliya became very disrespectful, screaming that she was not going to court. Aliya "got out of control" (Tr. 95). The girl refused counseling from respondent and Ms. Oronsaye. The rest of the residents then joined in Aliya's behavior, so respondent and Ms. Oronsaye had to call security and a supervisor (Tr. 21-22, 60-61, 95-96). When supervisor Taylor and security arrived, the residents were placed back in their rooms for security reasons. Aliya calmed down and she, like Danielle, was escorted from the dorm to court (Tr. 21-22, 60-61, 96). That left six girls in the dorm, and they wanted to come out of their rooms and go to school; they were loud and were banging on their doors (Tr. 20-22, 60-61, 96). Respondent described the tone on the hall, with the girls locked in their rooms, as "really loud" (Tr. 96).

Supervisor Taylor directed respondent and Ms. Oronsaye to open the bedroom doors to let the residents out, and get them to school. Ms. Oronsaye let the other girls out of their rooms so they could get to school, as the morning's commotion was making them late for school. Supervisor Taylor testified that when she directed respondent and Ms. Oronsaye to get the six girls to school and left the hall, the girls were "calm" (Tr. 61). Ms. Taylor left before Ms. Oronsaye opened the rooms (Tr. 61).

When Ms. Oronsaye opened the door to resident Fantaysia's room, Fantaysia refused to go to school. As the other girls were still banging on their doors, she left Fantaysia sitting on the bed in her open, unlocked room and continued opening the other doors to gather the other girls for school (Tr. 22, 28-29). Ms. Oronsaye testified that she lined up four girls, told respondent that she was going to school, and left (Tr. 22-23). Respondent then had with her two girls, Dinah-Lee and Mariela, who were "agitated, screaming" as they ran over to the desk where respondent was situated (Tr. 98). Respondent testified that the girls were agitated because they thought they would be "assessed" or disciplined for their behavior and lose privileges like special programs, recreation, and commissary benefits (Tr. 98-99). She denied that the hall was calm after Danielle and Aliya went to court (Tr. 106). She testified on cross-examination that "[t]he girls were banging on the door because they wanted to come out of their rooms" (Tr. 106). However, respondent was unable to explain why supervision and security would have left "if the tone was still high": "They left. I don't know. They did leave the dorm" (Tr. 107). Respondent

testified that she did not call for security because the girls were agitated in reaction to being locked in, and respondent and Ms. Oronsaye agreed that Ms. Oronsaye would bring them out, and respondent would counsel them as they came to the desk (Tr. 107).

According to respondent, as Ms. Oronsaye opened the rooms, girls ran to the exit door before Ms. Oronsaye could escort them. Respondent asked Ms. Oronsaye, "[C]an you please give me a count?" Ms. Oronsaye replied, according to respondent, "I have four." Respondent replied, "I have two so, we have our count, which is six" (Tr. 99-100). Respondent continued: "'Cause we agreed to rely on each other for that particular day 'cause of the tone, and they are being late to going to the school. And we are being rushed to the school floor" (Tr. 100). Respondent had worked with Ms. Oronsaye for "a couple of years" by that point and they always relied upon each other: "Yes, yes" (Tr. 101).

As Ms. Oronsaye and the girls with her left, the two girls next to respondent "ran right after" and respondent left with those two girls to go to school (Tr. 101). If the girls are late to school, respondent and Ms. Oronsaye could be "conferenced" for that, meaning that lateness could create a problem that might affect their job performance as juvenile counselors. The five girls (whom respondent thought were six in number) were then placed in two different classrooms. Ms. Oronsaye was in one classroom while respondent was in the other (Tr. 102).

Respondent noted in the logbook that at 8:45 a.m., "Resident Aliya refused to go to court. Security was called. Tone became very loud. Residents were placed in their rooms by security, Ms. Miranda, JC Phillips [phonetic] and Oronsaye. They all were refusing to go in there [*sic*] rooms. Ms. Taylor, Starkes, Ike, [Sergeants] Ward, Tay [phonetic], and Perez assisted. Ms. Taylor stated to staff to escort residents to school" (Pet. Ex. 1; Tr. 123). Because it was 8:45 and the girls were already late for school, respondent then decided to rely on Ms. Oronsaye instead of making her own count:

> Then, me and Ms. Oronsaye agree that she'll bring out-since we are going to be relying on each other 'cause time, and we were running late. The time was on sched-you know, it was chaos. We'd rely on each other, and she said she'll let the kids, the girls, out of the room, and I'll counsel those that need the counseling 'cause of their high tone.

(Tr. 97-98).

Ms. Oronsaye testified that once she left the hall, it was the responsibility of the

remaining juvenile counselor, respondent, to check each of the rooms and make sure all residents were out and lock the door (Tr. 27). Ms. Oronsaye stated at trial that she learned that morning that Fantaysia was left behind when a supervisor told her so (Tr. 23-24).

The failure to account for Fantaysia came to light in the following way. Juvenile Counselor Skinner, who was assigned to the A Hall, went to use the staff bathroom in the B Hall because the one in A Hall was broken. Upon entering B Hall for this purpose, she happened upon Fantaysia, who was sitting alone in the day area of B Hall watching television. Ms. Skinner was so startled to find a child alone there that she "screamed" because she did not expect to see Fantaysia there (Tr. 32-33). She asked Fantaysia who was with her, and the child responded that she was with no one and had been left behind. Ms. Skinner immediately notified a supervisor. She "banged" on the door and screamed until Associate Juvenile Counselor Roberts came to the hall (Tr. 33). Ms. Skinner was required to complete an incident report about finding the girl alone, and wrote her report the same day (Tr. 33-34; Pet. Ex. 2). It was about 9:15 a.m. when Fantaysia was discovered, more than half an hour after school was to begin (Taylor: Tr. 65).

Ms. Roberts saw Fantaysia sitting in the day area on a stack of plastic chairs watching TV without supervision (Pet Ex. 3). Ms. Roberts asked Fantaysia what staff was with her, and the child gave the same answer, that she was left there alone. Ms. Roberts checked the hall to make sure there were no other residents in the area and went to check the logbook to see which juvenile counselors were assigned to this girl (Tr. 41). From the logbook, she learned that respondent and Ms. Oronsaye were assigned to B Hall, and she went to the school floor to speak to them (Tr. 42).

Ms. Roberts came to the school floor and asked respondent and Ms. Oronsaye to come out of their respective classrooms and asked them if they knew "there was a child left behind" (Tr. 103). According to respondent, Ms. Oronsaye told Ms. Roberts that Fantaysia did not want to come out of her room, and Ms. Oronsaye had left her in the room. However, respondent testified, Ms. Oronsaye never informed respondent that Fantaysia was in her room. Respondent testified that Ms. Oronsaye said she "forgot 'cause of the rush and everything that was going on" (Tr. 103).

Ms. Roberts counseled both respondent and Ms. Oronsaye about the fact that Fantaysia

was left on the B Hall alone and unsupervised (Tr. 24). Ms. Roberts completed a memorandum dated March 1, 2011, of the formal conference she had with respondent (Tr. 42-43; Pet. Ex. 3). Ms. Roberts told respondent in the conference that her conduct in leaving Fantaysia alone was "unacceptable and [i]ntolerable, and should be avoided in the future" (Pet. Ex. 3). The memorandum, dated March 1, 2011, and signed by both Ms. Roberts and respondent, recorded respondent's answer – that the "tone was high with an eight (8) count," that this was "an accident and not in any way a reflection of [respondent's] overall work ethic" (Pet. Ex. 3).

The expression "the tone was high" meant that the residents were uncooperative, unruly, defiant, physically aggressive, and disrespectful, that the girls' behavior was "inappropriate" and security may be needed by the juvenile counselors (Roberts: Tr. 44, 48, 59). That respondent used the word "accident" meant to Ms. Roberts that respondent was asserting that she did not intentionally leave the girl alone (Tr. 44).

Respondent was at times reluctant to answer directly that she had responsibility to count the residents left in her care (Tr. 114-16). However, she admitted that she knew her Tasks and Standards and could point to no provision allowing juvenile counselors to make agreements to deviate from the requirement that each juvenile counselor make her own count of the residents (Tr. 107-08). She also testified that she is responsible for conducting a visual inspection of all the bedrooms and bathrooms before exiting B Hall, which is her permanent, regular assignment (Tr. 105, 108). On close cross-examination, respondent initially evaded questions about whether she had actually conducted inspections of all the rooms on B Hall, avoiding a "yes" or "no" answer, and talking instead about giving an "eye glance" of the dorm without going to each room, and pointing to the hurry to get to school (Tr. 108-112). Agency counsel resorted to asking about each numbered room. Respondent answered that she looked into room number 1 because that one was right in front of her. But when asked about room number 2, as it became clear that counsel was about to inquire as to each remaining numbered room, 3 through 8, respondent finally had to concede that she did not go to each and every room to conduct a physical inspection: "No, no, no" (Tr. 112).

Respondent contended that Ms. Oronsaye ran out quickly with the girls, leaving respondent with no chance to make her own count (Tr. 112-15, 117-18). Respondent's math was only correct if Ms. Oronsaye really had four girls. Finally, at the end of cross-examination,

respondent conceded, only after extensive questioning, that it was her responsibility as a juvenile counselor "To know our count, of course. . . . You are correct, to know our count" (Tr. 116-17). She further admitted that it is her responsibility to conduct a physical check of each of the rooms of the dorm before exiting and that this is agency policy and is also in her Tasks and Standards: "Yes" (Tr. 117). In the rush to get to school, respondent did have a concern about getting into trouble at work if the girls under her care arrived late to school: "Yes" (Tr. 120).

In sum, respondent's defense was that "[i]t was just a stressful morning. These kids were, like, they wanted to go to school. They were upset. There was so much going on" (Tr. 122).

It was undisputed that Fantaysia was not injured as the result of her being left behind on February 28, 2011 (Tr. 26; 35; 49; 65; 103). Respondent testified that Fantaysia later apologized to her, and that the girl was "just angry of being placed in her room at that time" (Tr. 103-04). Respondent testified, without opposition, that state charges against her of neglect based on this incident "came back unfounded," and that she had no intention of harming Fantaysia (Tr. 104).

Petitioner's witnesses were credible, though it is not entirely clear how Ms. Oronsaye could have thought she had four girls with her when she knew that she left Fantaysia in her room and then sat in a classroom with her other charges. None of the agency witnesses appeared to have any personal animus towards respondent. To the contrary, it was undisputed that they all had a good rapport with her (Oronsaye: "Very cordial" working relationship, Tr. 19; Skinner: "good rapport," Tr. 34; Roberts: "It's a professional relationship;" "Ms. Miranda has always been professional in my presence," Tr. 47; Taylor: "I supervise her on a daily basis . . . . We have a good relationship," Tr. 62). Respondent also described her relationship with Ms. Oronsaye as a good one (Tr. 101). The overall impression the agency's witnesses conveyed was that they had no wish to see respondent's career harmed, but all agreed upon the high importance of keeping track of the children in their charge and they testified clearly and dispassionately about this important requirement of the job of juvenile counselor. Respondent was credible when recounting the events, but when pressed to admit that she understood her own responsibility to make her own count of the children in this matter, she was evasive and tried in vain to deny that she knew her duty, ultimately conceding that she was required to count the children even if her co-worker had done so. By contrast, Ms. Oronsaye conceded at trial that she

had left Fantaysia alone in her unlocked room and accepted some responsibility for her part in the incident (Tr. 24).

In the only factual dispute in the case, Ms. Taylor's testimony that when she left B Hall, the girls, locked in their rooms, were calm, conflicts with respondent's testimony that they were loud when Ms. Taylor left the hall (Tr. 106-107). It is possible that they are both correct, and that when Ms. Taylor left, the girls were momentarily quiet. Ms. Taylor's account was more cogent because it makes sense that security and supervisors would not leave until the residents were becalmed. Respondent could not explain why they would have left during a continuing uproar. But, even if their recollections are not in harmony, this is a distinction without a difference because, whether the girls were loud or not when locked in their rooms and upon their exit therefrom, respondent was duty-bound in either event to count them once Ms. Oronsaye let them out. Indeed, the more chaotic the conditions on this heightened-security hall, the greater the need for an accurate count by each individual juvenile counselor assigned to the hall.

I find that respondent saw Ms. Oronsaye making for the exit with a group of girls to rush them to school and called to her colleague to ask how many girls Ms. Oronsaye had. Ms. Oronsaye told respondent that she was leaving with four girls to take them to school. As she left with what must have been only three girls to go to school, Ms. Oronsaye passed by respondent, who was at the staff desk in B Hall. Respondent was left behind with two girls in her sight. Putting her faith in Ms. Oronsaye, and making a simple math calculation that if her colleague had four girls and respondent had two, all six remaining girls on the hall must have been under staff supervision, respondent hurriedly took the two girls she had with her to school. The children were late for school. But nobody had accounted for Fantaysia, who was on her own. In fact, as respondent would soon learn, she and Ms. Oronsaye had with them, collectively, only five girls. Respondent did not personally, visually inspect or check all the bedrooms, bathrooms or the day room before leaving the hall with two girls. She did not make a proper, independent, complete count of the girls.

There is no basis in this record to conclude that respondent intentionally left Fantaysia behind. However, the record does amply support a finding that respondent was negligent when she failed to make her own count of the girls and failed to search B Hall. Keeping track of each of the eight girls in her charge was respondent's primary responsibility and her failure to find and

count them all was not a minor error in judgment that can be disregarded. *See Reisig v. Kirby*, 62 Misc.2d 632, 635 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008 (2d Dep't 1969); *McGinigle v. Town of Greenburgh*, 48 N.Y.2d 949, 951 (1979), *cited in Admin. for Children's Services v. Gold*, OATH Index No. 585/05 at 9 (Apr. 13, 2005), *adopted*, Comm'r Dec. (May 11, 2005), *aff'd*, NYC Civ. Serv. Comm. Dec. Item No. CD-07-40-SA (Apr. 9, 2007) (to establish misconduct under Civil Service Law section 75, petitioner must prove either willful or intentional conduct, or negligence or carelessness). *Accord Admin. for Children's Services v. Springer*, OATH Index No. 665/05 at 8-9 (Jan. 5, 2006), *modified on penalty*, Comm'r Dec. (Feb. 3, 2006), *modified on penalty*, NYC Civ. Serv. Comm'n Dec. Item No. CD-07-17-0 (Feb. 7, 2007); *Admin. for Children's Services v. Papa*, OATH Index No. 810/06 at 3 (June 12, 2006), *adopted*, Comm'r Dec. (June 29, 2006), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD-07-13-SA (Feb. 9, 2007).

The charge should be sustained in full.

FINDINGS AND CONCLUSIONS

Respondent violated the applicable Code of Conduct when she failed to inspect the facility's B Hall special support dormitory and to count the children in her care in Horizon Juvenile Facility on February 28, 2011. As a result of this failure properly to account for a child under her care, a child was left alone and unsupervised for approximately a half-hour that day. Petitioner proved by a preponderance of the credible evidence the charge that respondent violated the following Code sections:

Department of Juvenile Justice Standard of Conduct (Code of Conduct) by Section	**Duties**
B.1.1	Employees must adhere to the rules, directives, procedures and orders of the City and the agency.
B.1.2	Employees shall not act in a manner that brings "negative criticism" upon themselves and the agency.
B.1.3	Employees must exercise due care and diligence in performing their duties and thereby contribute to the efficient and professional operation of the agency.
C.1.10 and L.1.2	Employees must be alert (watchful) at all times and maintain continuous observation of the dormitory and detention area or other place of assignment.
L.1.6	Employees must constantly monitor the conduct of juveniles under their supervision and make frequent periodic checks of all locations within areas of assignment where they may be congregating.
L.1.7	Employees must be aware of the number of juveniles under their supervision at all times.
L.1.8	At no time is any juvenile to be left alone without supervision.
O.1.1 and O.1.2	Employees must not engage in or permit any conduct which is or is likely to result in a gross breach of security that jeopardizes institutional safety or physical custody of juveniles and must not endanger the safety of staff and/or juveniles. Employees must not fail to take appropriate action to stop or prevent the occurrence of a gross security breach.
C.1.11	An employee must not engage in offenses that threaten good order and discipline or in conduct of a nature that may reflect unfavorably on the fitness of the employee or that could bring discredit upon the agency.

(Pet. Ex. 7).

RECOMMENDATION

Petitioner is seeking 20 days' suspension without pay for the case it proved (Tr. 133). Respondent requests that no penalty be imposed on the theory that respondent did not violate agency regulations or, if liability were established, that mitigating factors be taken into account (Tr. 14, 127).

Having made the above findings, I requested and received a summary of respondent's personnel file. It was undisputed that respondent received a "conditional" evaluation for the task of accounting for residents at all times in the period July 1, 2010-June 30, 2011, because of this incident (Pet. Exs. 5, 6). A conditional evaluation means that the "employee's performance did not meet one or more achievable standards" and improvement is needed (Pet. Ex. 6). Respondent had one previous disciplinary case in 2008 for the same type of charge as the one here. She accepted a five-day suspension without pay in settlement of the charge that one of the residents under her supervision at Horizon on the B Hall got off a line and was left behind in that hall on February 12, 2008, without respondent's knowledge. Significantly, respondent signed on February 24, 2008, a conference memorandum dated February 12, 2008, which detailed her failure to notice that a resident under her care had been left behind at the same site at issue here. That memorandum of 2008 is remarkably similar in content to the March 1, 2011, conference memorandum respondent received in connection with the charge here. Both memoranda quote at length essentially the same pertinent rules governing the duty to count residents (Pet. Ex. 3). Thus, the 2008 conference memorandum, in addition to the Code of Conduct and her own Tasks and Standards, placed respondent on notice of the extreme importance of keeping an accurate count of the children at all times and of avoiding any breach of security. Respondent also received three conference memoranda for lateness in 2009 and 2010.

On the other hand, there were a few mitigating facts: respondent's overall rating for 2010-2011, however, was "good" and her supervisor wrote: "JC Miranda is a good worker. Ms. Miranda has a good rapport with her coworkers. Ms. Miranda has a positive attitude and complies with all instruction and assignments from supervision" (Pet. Ex. 6). She has consistently been rated "good" on previous evaluations. Since this incident in February of 2011, Director Johnson did not know of respondent leaving any resident unattended or failing to make her count of residents (Tr. 85-86). Moreover, respondent received a letter of commendation

dated March 3, 2003, from the former Commissioner of the Department of Juvenile Justice for finding contraband during a security search.

Petitioner argued that although Fantaysia was not physically injured, "[t]he mere fact that she was left unsupervised in a secure facility, that's harm in and of itself" (Tr. 128). Petitioner conceded that there was some mitigation in the fact that there was commotion on the hall that morning (Tr. 129), but counter-argued that "the tone was not that high that you could miss this child" (Tr. 129). Petitioner further asserted that this hall was small and a physical inspection could have been done with ease and that B Hall was in close proximity to the school floor, so that little time would have been lost in following the rules (Tr. 129-130). Petitioner also contended that because B Hall is a special support dormitory where residents require special care and attention, it is all the more important to keep the count on this hall (Tr. 130). Finally, petitioner argued that 30 minutes is "a long time in the life of a resident who is locked up in a secure detention facility" (Tr. 132).

In respondent's favor, she is a longtime employee with one commendation on file. The violations of the Code of Conduct shown here, however, are serious because keeping the proper count of the children in a juvenile counselor's charge is such an important task for that job -- the most important. Respondent's misconduct is exacerbated by her refusal to accept responsibility for her part in losing track of the girl and her prior record of the same kind of failure to account for all children in her care as recently as 2008. Refusal to accept responsibility relating to a lapse of attention is an aggravating factor in corrections environments. *See, e.g., Dep't of Correction v. Reaves-Bey*, OATH Index No. 413/89 at 16 (Mar. 1, 1990) (officer found asleep on duty on high security perimeter patrol post meant to prevent escapes: "I have considered respondent's tenure with the Department, his past disciplinary record *and his failure to recognize the seriousness of his misconduct* . . . .") (30-day penalty on prior substantial disciplinary record) (emphasis supplied).

It is a fortuity that the child came to no harm and there was no damage to person or property as a result of the failed headcount here. *See generally Health and Hospitals Corp. (Metropolitan Hospital Ctr.) v. Babarinde,* OATH Index No. 1360/10 at 3 (Apr. 6, 2010), *modified on penalty*, Exec. Dr. Dec. (June 7, 2010) (fact that patient was not harmed when nurse threw pitcher was only due to fortuity because the pitcher narrowly missed the patient and injury

could have resulted). Given that the Horizon facility housed children who could be especially difficult, there could have been very serious consequences from leaving a child alone and unattended. I find little mitigation in respondent's argument that the child was not hurt.

Moreover, respondent's assertion that because there was a "high tone" and the atmosphere was chaotic on the morning of February 28, 2011, she did not complete her own count of the children and relied upon her co-worker misapprehends the import of the agency's charge against her. It is precisely when there is chaos in a juvenile detention center that it is even more important to adhere to the rules and conduct an independent count of the kids. This case illustrates the point. Contrary to respondent's assertion, her reliance on Ms. Oronsaye was not reasonable or justifiable and respondent did not have a reliable basis upon which to proceed (Tr. 12-13; Tr. 126). A relatively new employee who came to the ACS only two years ago (Tr. 15) -- only about one year at the time of the incident -- Ms. Oronsaye gave respondent an incorrect count when she told respondent she had four girls. Thus, respondent's reliance on Ms. Oronsaye was misplaced. Ms. Oronsaye should have known where Fantaysia was -- Ms. Oronsaye did not have four girls because she had unlocked Fantaysia's room and left her alone there. Respondent then compounded her co-worker's error by making no inspection or separate count of the entire hall. In this case, respondent was expected to count heads again by looking into the facility's dormitory and other areas and checking for kids. Had she done this, she would have found Fantaysia watching television. By all accounts B Hall is a very small area, about half the size of the tribunal's courtroom, for all eight residents' rooms arranged in a circle or a "C" shape, two bathrooms, a staff desk, and the day room (Tr. 24; 58). I agree with petitioner's counsel that leaving the child alone is harm in itself and that it would not have taken much time to make the count. The Code of Conduct sets up a failsafe mechanism meant to catch such errors and prevent exactly the situation that occurred here. Respondent disabled the failsafe. She seemed so fearful of discipline that she was unable or unwilling to take individual responsibility for her part in the mishap.

Although there is some mitigation in respondent's 12-year tenure, I find that the aggravating factors here far outweigh the mitigating facts. While a lesser penalty might have been warranted were this her first mistake of this nature, respondent's demonstrated reluctance to take individual responsibility here for her part in a serious mistake affecting the well-being of

children in her care, when she is expected to know better by her long tenure, training, and prior penalty for the very same type of negligence charge, warrants a stern penalty in this case. Principles of progressive discipline demand as much, particularly because the safety and welfare of children are at stake.

In cases where a City employee charged with the responsibility to watch over others neglects that duty, the penalty for a first offense has been in the range of 8-10 days' unpaid suspension, where a record of good service has mitigated the misconduct, but up to 15-30 days' suspension or more where there is a prior disciplinary record, or termination of employment, depending on the gravity of the conduct, and whether aggravating circumstances were present, such as a breach of security. *See, e.g., Health and Hospitals Corp. (Woodhull Medical and Mental Health Ctr.) v. Goodman*, OATH Index No. 1425/06 at 9 (Aug. 1, 2006), *adopted*, Exec. Dir. Dec. (Aug. 31, 2006) (security guard with 18 years of service briefly left a patient he had arrested waiting for medical attention unattended, permitting his escape from custody when patient leapt off a gurney; 8-day suspension without pay); *Dep't of Correction v. Andrejcisk*, OATH Index No. 1537/03 at 5 (Feb. 12, 2004), *adopted*, Comm'r Dec. (June 17, 2004) (correction officer with 17 years of service was negligent in failing to check an inmate for "signs of life" and did not notice for three hours that the inmate had died; 10-day suspension without pay where respondent had reason to avert his gaze from inmate on rounds); *compare Dep't of Correction v. Grandberry*, OATH Index No. 153/01 at 15 (Feb. 9, 2001) (25-day unpaid suspension recommended for failure to be alert while on duty; sleeping), *adopted*, Comm'r Dec. (Apr. 10, 2001), *modified*, NYC Civ. Serv. Comm'n Item No. CD02-56-M (June 18, 2002) (penalty reduced to 18 days' suspension without pay); *Department of Correction v. Tyrell, et al.*, OATH Index Nos. 1219-1225/99 (May 7, 1999), *adopted*, Comm'r Dec. (Sept. 16, 17, and 21, 1999), *aff'd after appeal by Lee* (1225/99), NYC Civ. Serv. Comm'n Item No. 00-95-SA (Nov. 14, 2000) (15-30 days for failure to be alert in adolescent detention center); *Department of Correction v. Gonzalez*, OATH Index No. 187/07 (Feb. 20, 2007), *adopted*, Comm'r Dec. (May 7, 2007) (15 days for inaccurate inmate count slip); *Gold*, OATH 585/05 (Apr. 13, 2005), *adopted*, Comm'r Dec. (May 11, 2005), *aff'd*, NYC Civ. Serv. Comm. Dec. Item No. CD-07-40-SA (Apr. 9, 2007) (termination of employment imposed on supervisor of group home for failing to follow agency procedures requiring that he report adolescent's two-week AWOL to police and

contact family and friends; child, who died shortly after he escaped, lay in morgue unidentified for two weeks due to negligence).

The cases of *Gonzalez*, *Tyrell*, and *Grandberry* are instructive. In *Gonzalez*, a correction officer was found to have failed to maintain an accurate count of the inmates in her care. The ALJ recommended, and the Correction Commissioner imposed, a 15-day suspension without pay where an officer submitted an inaccurate inmate count slip. Here, respondent left a child alone in a secure detention center because she failed to make an accurate inspection and count of the adolescents under her care. A somewhat higher penalty that takes account of respondent's prior disciplinary record on point, of her need to face her responsibility, of the security breach shown, and of her otherwise good, long tenure with a commendation, is warranted. In *Tyrell*, four of seven correction officers were found guilty of failing to remain constantly alert on their respective posts when an inmate attempted to escape from an adolescent detention center. The penalties ranged from 15 days' suspension without pay for officer Tyrell, who left the inmate unattended after allowing him to use the bathroom and who had no prior discipline on his long record of service, to 30 days for officer Lee, who had a prior disciplinary record. The Civil Service Commission in *Grandberry* reduced a 25-day penalty to 18 days for failure to be alert on duty, based in part on respondent's 11-year work history, which included some prior discipline.

Although it is difficult to compare the penalties imposed on different employees for the same type of misconduct with exactitude because of differing factual circumstances and individualized employment histories, I have taken into consideration that Ms. Oronsaye received a reprimand for her part in this incident (Tr. 24). I have also considered that, on the record presented here, Ms. Oronsaye was equally or arguably more at fault than respondent in losing track of Fantaysia. Noting the complexities inherent in any attempt to reconcile a suspension of respondent with Ms. Oronsaye's reprimand, I must reach a penalty recommendation based on fairness, precedent, principles of progressive discipline, the facts of record, and respondent's particular employment history. I find it most significant that respondent has a previous, recent penalty in settlement of charges that she lost track of a child at Horizon in 2008, the very same type of offense at issue here. Moreover, unlike Ms. Oronsaye, respondent was unwilling to acknowledge her error and instead sought refuge in her unjustifiable reliance on her much more junior co-worker. After full consideration of all the factors for and against respondent here, I can

recommend only a slight mitigation of the penalty.

Upon full consideration of the record of this matter, I find, based on the range of precedents, that an appropriate penalty for the negligence proved here is an 18-day suspension without pay.

Joan R. Salzman
Supervising Administrative Law Judge

April 13, 2012

SUBMITTED TO:

RONALD E. RICHTER
Commissioner

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