Dep't of Health & Mental Hygiene v. Levia-Mena

OATH Index No. 851/14 (Mar. 14, 2014)

Computer associate was discourteous and inefficient in performing her duties relating to a home day care provider, was discourteous to a colleague on one occasion, and on two occasions failed to perform work as assigned. Penalty of twelve days suspension is recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF HEALTH AND MENTAL HYGIENE
Petitioner
-against-
MAXI-MILLIE LEVIA-MENA
Respondent

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

This employee disciplinary proceeding was referred by petitioner, the Department of Health and Mental Hygiene, pursuant to section 75 of the Civil Service Law. Petitioner alleges that respondent, a computer aide assigned as a registrar to the Bureau of Childcare, was rude and discourteous to a colleague on April 4, 2013 and October 18, 2013 (charges one and three, specification B), refused to obey a direct order and performed her duties inefficiently, negligently or carelessly on various occasions in April, May, July, August, and October 2013 (charges two and four), and was rude and unhelpful to a home day care provider, and performed her duties relating to that provider inefficiently, negligently, and carelessly, beginning about September 2013 (charge three, specification A) (ALJ Ex. 1).[1]

At a one-day hearing, petitioner called four witnesses: Janet James, the registration supervisor; Jocelyn Maynard, a registrar for the Bureau's after-school programs; Julissa Cruz, a

[1] The charges more generally allege that respondent violated the agency rule prohibiting conduct prejudicial to good order and discipline. This is a duplicative charge that will not be considered separately for purposes of penalty, should any of the charges be sustained. *See Savello v. Frank*, 48 A.D.2d 699 (2d Dep't 1975)*; Health & Hospitals Corp. (Woodhull Medical & Mental Health Center) v. Ford*, OATH Index No. 2383/09 at 8-9 (July 10, 2009).

home day care provider; and Holly Strawser, the manager of the Bureau of Childcare in Manhattan. Respondent testified in her own defense.

For the reasons set forth below, I find that the charges are sustained in part and dismissed in part. For the proven misconduct, I recommend that respondent be suspended for twelve days.

ANALYSIS

Respondent is a computer aide whose office title is registrar. She has worked for the Bureau of Child Care for about seven years, and is one of five registrars who process and review applications and supporting documentation submitted by home day care providers and school-age providers (James: Tr. 12-13, 16: Levia-Menia: Tr. 132). The documentation includes: medical information; a form to be filed with the Statewide Central Register ("SCR"), which checks for indicated reports of child abuse or maltreatment; fingerprints; references; and a criminal history statement. The registrars process the applications and submit them to Ms. James, their supervisor, for final review and approval. Registrars also meet with the providers to discuss any issues; sometimes this is by appointment and sometimes providers appear without an appointment to discuss issues or problems (James: Tr. 42, 89). Respondent testified that an appointment with a provider could last an entire morning or could be as brief as 45 minutes. On some days respondent sees as many as three or four providers for appointments; many times their paperwork is not completed, for example, when they must return to a doctor to have a medical form completed (Levia-Mena: Tr. 133-34). State regulations mandate that a new application for licensing must be acted upon within 90 days and that a renewal application must be acted upon before the expiration date. However, the majority of applications take over 90 days to be completed (James: Tr. 15-17, 42).

An analysis of the specific charges follows.

April 4, 2013 – discourtesy to a co-worker (charge one)

This charge alleges that on April 4, 2013, when a receptionist went to respondent's office to tell her that a provider was sitting outside waiting to see her, respondent rudely said that she was on lunch and did not want to be bothered, proceeded to "get in [the receptionist's] face," reached for the door, and in an aggressive manner, touched her arm, causing her to back up out of the door, and closed the door in her face.

The receptionist who made this allegation is Ms. Acevedo, who is no longer employed by the Department (Tr. 127). However, Ms. Acevedo wrote a memorandum on April 11, memorializing the incident (Pet. Ex. 7). She wrote that when she was going to lunch, she saw a provider waiting for respondent. She approached respondent to inform her, but respondent "rudely" stated that she was "on lunch" and did not want to be bothered, "proceeded to get in my face very angrily," and "reached for the door aggressively, touching my arm making me back up out the door" (Pet. Ex. 7).

Ms. Strawser testified that Ms. Acevedo told her about the incident. According to Ms. Strawser, Ms. Acevedo said that as she was going to lunch on April 4, 2013, she saw a client in the lobby, waiting to see respondent. Ms. Acevedo went to the location where respondent was having lunch, knocked on the door, and said that a client was waiting to see respondent when she was available. Respondent replied that she was on lunch and "pushed" Ms. Acevedo out of the doorway, slamming the door in her face (Tr. 118, 126). Ms. Strawser clarified that Ms. Acevedo said that respondent pushed her arm (Tr. 126-27). Ms. Acevedo told Ms. Strawser that respondent did not intend to hurt her; she just wanted to remove her from the room (Tr. 126-27).

Respondent testified that on April 4, 2013, she was covering the telephones between 12:30 p.m. and 1:30 p.m., while Ms. Acevedo went to lunch (Tr. 135). The person who is covering the telephones is responsible for seeing walk-in clients (Tr. 136). When asked what happened between 12:30 p.m. and 1:30 p.m. on April 4, respondent said, "Nothing happened" (Tr. 136). When shown Ms. Acevedo's written memorandum, respondent said that she was "shocked," because "this never happened." She said that there was no door in the office, everyone has open cubicles, and they eat in an open area (Tr. 137, 159. 160). The one exception is Ms. Strawser's office (Tr. 159). Respondent said that she never touched Ms. Acevedo or slammed a door in her face (Tr. 190).

This charge rests entirely upon the hearsay statements of Ms. Acevedo, as memorialized in her memorandum and as related by Ms. Strawser. Hearsay is admissible in administrative proceedings and may form the basis for an administrative determination. *See Gray v. Adduci*, 73 N.Y.2d 741, 742 (1988); *People ex rel. Vega v. Smith*, 66 N.Y.2d 130 (1985); *Ayala v. Ward*, 170 A.D.2d 235 (1st Dep't 1991); *see also 300 Gramatan Ave. Associates v. State Division of Human Rights*, 45 N.Y.2d 176, 179-80 n.* (1978) (abolishing legal residuum rule). The hearsay, however, must be sufficiently reliable and carefully evaluated before it is relied upon. *See*

Health & Hospitals Corp. (Kings Co. Hospital Ctr.) v. Hutchison, OATH Index No. 1937/12 at 5-6 (Sept. 28, 2012); *Transit Authority v. Wong*, OATH Index No. 1866/08 at 18-19 (Aug. 28, 2008); *Dep't of Environmental Protection v. Barnwell*, OATH Index No. 177/07 at 7-8 (Sept. 18, 2006); *Human Resources Admin. v. Muniz*, OATH Index No. 445/88 at 2-3 (Nov. 17, 1988); *Dep't of Transportation v. Brown*, OATH Index No. 432/85 at 6-7 (Jan. 15, 1986). Factors to be considered in assessing the reliability and probative value of hearsay include the identity of the hearsay declarant, the availability of the declarant to testify, declarant's personal knowledge of the facts, the independence or bias of the declarant, the detail and range of the hearsay, the degree to which it is corroborated, the centrality of the hearsay evidence to the agency's case, and the magnitude of the administrative burden should the hearsay be excluded. *Barnwell*, OATH 177/07 at 7-8; *see also Richardson v. Perales*, 402 U.S. 389, 402-07 (1971); *Calhoun v. Bailar*, 626 F.2d 145, 149 (9th Cir. 1980).

Here, Ms. Acevedo provided a detailed statement about what occurred. Although the statement is not contemporaneous, the level of detail is a strong indicia of its reliability. Ms. Strawser's testimony, although hearsay, was significantly consistent with Ms. Acevedo's written statement. Further, while respondent testified that all staff members have cubicles and there are no offices with doors, Ms. James testified that the Bureau of Child Care and Information Technology ("IT") share space on the floor. In April 2013, an office was set aside for the IT Commissioner that was not yet occupied and was used by childcare staff for meetings and as a lunch room. Ms. James believed that the incident involving respondent and Ms. Acevedo occurred inside that office (Tr. 195).

In light of Ms. Acevedo's statement and Ms. Strawser's testimony, respondent's testimony that absolutely nothing occurred was not credible. Both Ms. James and Ms. Strawser stressed that while employees are not required to see providers or do other work during lunch, they are informed if a provider appears in the office during their lunch break. Some employees will interrupt their lunch to see the provider; others will see the provider immediately after lunch (James: Tr. 40-41, 63; Strawser: Tr. 120-21). Respondent stressed that she does not like to be disturbed during lunch and said that she does not feel she should have to respond in any way to a co-worker who interrupts her lunch to say that a provider has arrived (Tr. 178-79). Given respondent's expressed feelings about the issue, it is more likely than not that she acted

negatively when Ms. Acevedo interrupted her lunch to tell her that a provider had arrived and was waiting to see her.

That said, petitioner failed to prove the entirety of its charge. The charge alleges, among other things, that respondent rudely said that she was on lunch and did not want to be bothered. That statement alone would not rise to the level of misconduct. It appears that respondent was on her lunch break, not on duty. Although it would have been more polite had respondent simply thanked Ms. Acevedo for the information and said that she would see the client after lunch, section 75 of the Civil Service Law is not an etiquette code. Moreover, as Ms. Acevedo did not testify, the record contains the bare allegation that respondent was "rude," without any evidence that respondent raised her voice or used profanity in making the statement that she did not want to be disturbed during lunch. The charge also alleges that respondent proceeded to "get in" Ms. Acevedo's face and "aggressively" touched her arm. Although Ms. Acevedo's written memorandum contains these phrases, Ms. Acevedo did not indicate how and in what manner respondent "got in" her face or how respondent was "aggressive" in touching her arm. Indeed, although Ms. Strawser testified that Ms. Acevedo said respondent "pushed" her arm, she also testified that Ms. Acevedo said that respondent did not want to hurt her, but only wanted her to leave the room, which undercuts any notion that respondent was physically aggressive.

The charge is sustained insofar as it alleges that respondent walked towards a co-worker and touched her arm, causing the co-worker to back away, and then closed a door in the co-worker's face. This was discourteous and constituted misconduct.

April 2013 and May 3, 2013 – refusal to obey directives and inefficient, negligent, or careless performance of duties related to the Gonzalez application (charge two, specifications A and B).

Charge two, specification A, alleges that respondent failed to comply with a directive from Ms. James on April 18, 2013, to provide an update on Ms. Gonzalez, a home day care provider, concerning pending roles for the Assistant/Alternate Assistant. Further alleged is that respondent failed to comply with written directives from Ms. James, issued on April 26, 2013 and April 30, 2013, and further "memorialized" in a memorandum written on April 29, 2013, to provide her with the Gonzalez case folder. Charge two, specification B, alleges that respondent did not comply with Ms. James' verbal directive on May 3, 2013, to make processing of

documents submitted by Ms. Gonzalez a top priority for May 6, 2013. Allegedly, when Ms. James asked respondent on May 7, 2013, if she had worked on the matter, respondent replied that it would be next and ignored Ms. James' instructions.

Petitioner's proof rested largely upon the testimony of Ms. James. Ms. James testified that Ms. Gonzalez ran two different group home day care programs. She wanted to move assistant staff members from one program to another and had submitted an application, with documentation, for authorization to do so (Tr. 22). The agency had a 15-day deadline to approve or deny the application. Ms. James wanted respondent to process the application immediately because she did not want to place Ms. Gonzalez in jeopardy of getting a violation after an inspection (Tr. 23). Ms. James testified that respondent never processed the application, so she wound up doing it herself (Tr. 23).

Petitioner provided an e-mail chain from April 18, 2013, through April 30, 2013 (Pet. Ex. 2), which corroborated much of Ms. James' testimony. On April 18, 2013, Ms. James sent respondent an e-mail, asking that respondent provide her with an update on Ms. Gonzalez's request to transfer staff members. The e-mail asked that respondent "respond as soon as possible." Respondent sent a blank e-mail to Ms. James later that day, at 4:38 p.m. Subsequently, on April 26, 2013, Ms. James e-mailed respondent and asked her to provide the case folder before close of business. On April 29, 2013, Ms. James wrote a memorandum to respondent in which she stated that respondent had failed to provide the requested case folder on April 26. On April 30, 2013, at 9:55 a.m., Ms. James e-mailed respondent and asked for the case folder, "immediately." On April 30, 2013, at 3:30 p.m., Ms. James e-mailed Ms. Strawser, indicating that respondent still had not provided her with the case folder (Pet. Ex. 2).

Respondent testified that she worked on Ms. Gonzalez's case to the best of her ability. She testified that she does "110%" for her clients, so that they do not receive a violation if their paperwork is not approved before a field inspection (Tr. 138). Respondent acknowledged getting an e-mail on April 18 asking for an update on this case (Tr. 163-64). She testified that she put the case folder in Ms. James' in-box (Tr. 164). Respondent also testified that she had attached a checklist to the blank e-mail, showing what work was done and what was missing (Tr. 165).

Although respondent's 4:38 p.m. April 18 e-mail does not include an attachment, Ms. James wrote a memorandum about the incident on April 29, 2013, in which she noted that

respondent replied to her request for an update at 4:38 p.m. "by sending via attachment copies of approval checklist" (Pet. Ex. 1a). This corroborates respondent's testimony that she replied for the request for an update by providing a checklist. Ms. James wrote in her April 29 memorandum that a checklist was not what was requested (Pet. Ex. 1a). However, respondent's testimony that she believed the checklist served to update Ms. James, because it showed what work was done and what work was not done, was not unreasonable. Thus, with reference to Ms. James' request for an update on April 18, 2013, petitioner has failed to prove that respondent was insubordinate, that is, that she willfully failed to obey a direct order. *See Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Muniz*, OATH Index No. 1666/05 at 8-9 (Oct. 17, 2005) (insubordination requires proof that a clear and unambiguous order was communicated to an employee and that the employee willfully failed to obey). Nor has petitioner proven that respondent was inefficient, negligent, or careless in replying to Ms. James' request for an update. Accordingly, that portion of charge two, specification A, which alleges that respondent committed misconduct by failing to comply with her supervisor's request for an update is not sustained.

However, petitioner established that respondent failed to comply with multiple directives of Ms. James to provide her with the Gonzalez case folder, as further alleged in charge two, specification A. Respondent acknowledged receiving Ms. James' e-mail on April 26, requesting the case folder. She asserted that she placed the case folder in Ms. James' in-box, after receiving the e-mail. The in-box is on the side of Ms. James' cubicle (Tr. 166).

Ultimately, resolution of this specification rests upon a determination of the relative credibility of respondent and Ms. James. Factors to be considered in assessing credibility include "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 Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998). I found Ms. James to be generally credible. She has been with the Bureau for 19 years (Tr. 15), and seemed conscientious and hardworking, albeit exasperated with respondent on many occasions. Ms. James testified that she passes by her in-box to reach her seat approximately ten to twenty times a day, that she regularly checks her in-box, and that she clears her in-box every day (Tr. 196-97, 99). While she stopped short of stating that it was

impossible that she would leave something in her in-box, she declared that it would be impossible for her not to see something in her in-box. "I get in the office at 7:30 in the morning and my first task is to work on what has been put in my in-box the previous night, that's what I do" (Tr. 199). Moreover, had respondent placed the case folder in Ms. James' in-box on April 26, as she asserted, there would have be no conceivable reason for Ms. James to reiterate on April 29 and 30 that she still had not received the case folder.

As I credited Ms. James' testimony, I did not credit respondent's testimony that she placed the Gonzalez case folder in Ms. James' in-box on April 26. Perhaps respondent mistakenly thought that she did so. However, if that were the case, respondent should have been alerted by Ms. James' repeated e-mails on April 29 and 30 that her supervisor did not have the case folder. Respondent testified that she did not reply to Ms. James' repeated e-mails because she had already provided the case folder (Tr. 167-68). Respondent also testified that she feels the workplace is unfair and that her supervisors make untrue accusations against her (Tr. 155-57). However, regardless of how respondent perceives her supervisors, her actions in this instance were unreasonable. Respondent should have looked for the case folder when she learned that Ms. James was still requesting it and she should have replied to her supervisor's e-mails rather than ignoring them. Accordingly, that portion of charge two, specification A, which alleges that respondent was insubordinate and neglected her duty by failing to comply with her supervisor's request for the case folder, is sustained.

Charge two, specification B, is not sustained. Although the specification alleges that Ms. James gave respondent certain documents on Friday, May 3 and asked her to process them as a top priority for Monday, May 6, Ms. James did not testify to giving respondent documents on May 3 nor to giving her a directive to process them on May 6. Nor did Ms. James testify, as also alleged, that respondent said on May 7 that she would deal with those documents next. Petitioner attempted to establish the misconduct through cross-examination of respondent, but the testimony that was elicited was ambiguous, at best. Specifically, petitioner's counsel asked if respondent had processed the documents on Monday, May 6, and respondent replied in the affirmative and said that whenever Ms. James asks her to do something, she "usually" gets it done. But when counsel followed up by asking respondent if she had complied with Ms. James' directive, respondent replied that she thought "it was April" and that they were "talking about the e-mail" (Tr. 170), which was clearly a reference to the April e-mails concerning the update and

the case folder. When respondent was shown charge two, specification B, and asked if her testimony was "still the same," she replied yes (Tr. 170). However, given that respondent seemed confused about what petitioner was asking about, her answer to that question cannot fairly be viewed as an acknowledgement that she engaged in the particular misconduct alleged in specification B.

In sum, that part of charge two, specification A that alleges that respondent failed to comply with repeated instructions to provide her supervisor the Gonzalez case folder, thus inefficiently, negligently, or carelessly performing her duties and refusing to obey a direct order, is sustained. The remainder of specification A, is not sustained. Charge two, specification B, is also not sustained.

May 6, 2013 – refusal to obey a directive and inefficient, negligent, or careless performance of duties related to the Ortiz application (charge two, specification C).

Charge two, specification C, alleges that, as of June 11, 2013, respondent failed to comply with Ms. James' directive, issued by e-mail on May 6, 2013, to obtain a withdrawal letter from an applicant, Ms. Ortiz, and to process all of Ms. Ortiz's documents under a newly issued application number.

According to Ms. James, Ms. Ortiz had submitted an application for permission to operate a group family day care center. However, because the prospective location of the center lacked an adequate secondary means of egress, Ms. Ortiz decided to submit another application for a different location (Tr. 30). In an e-mail which Ms. James sent to respondent on May 6, 2013, she stated that a new application number had been issued for Ms. Ortiz and asked respondent to obtain a withdrawal letter from Ms. Ortiz for the first application and to process documents that did not require a signature under the new application number (Pet. Ex. 3). On June 11, 2013, Ms. James sent an e-mail to respondent that indicated that respondent had neither obtained a withdrawal letter nor processed any paperwork under the new number, although respondent had sent a checklist on May 10, 2013. Ms. James asked respondent to process all documents immediately and provide her with an update by the end of the day on June 11, 2013 (Pet. Ex. 3).

By e-mail dated June 11, 2013 to Ms. James, respondent replied that she thought that she had to wait for the withdrawal letter before she could process documents under the new

application number, and that she still did not have the withdrawal letter. Respondent also indicated that Ms. James had sent her an e-mail on May 7, 2013, indicating that if documents were not proper, they should not be submitted for closure or licensing. Respondent said she was only trying to comply with Ms. James' instructions based upon her e-mail (Pet. Ex. 3).

Ms. James testified that respondent was not required to wait for the withdrawal letter to start processing the application under the new number. She acknowledged that respondent ultimately processed the application after about six weeks, when Ms. James reminded her about it (Tr. 31).

Respondent testified that she thought that she had to wait for the withdrawal letter before she could close the old case. She testified that was a "specific inter office protocol," because without something in writing from the client, they do not close the file in case they get audited (Tr. 144). She had telephoned Ms. Ortiz once prior to June 11 to ask for the withdrawal letter. When Ms. James e-mailed her on June 11 about the issue, respondent contacted Ms. Ortiz again. Ms. Ortiz said that she had faxed the letter. Respondent replied that she had not received it, and Ms. Ortiz indicated that she would re-fax it (Tr. 172). Respondent testified that the fax machine in the office had not been working for two to three weeks previously (Tr. 186). However, on June 13, 2013, Ms. Ortiz faxed the withdrawal letter to her location (Pet. Ex. E), and respondent completed the file (Tr. 144).

It is undisputed that, as of June 11, respondent failed to obtain a withdrawal letter and to process all documents under the new application number, as instructed by Ms. James in her May 6, 2013 e-mail. However, petitioner fell short of proving that this was misconduct. Misconduct requires a showing of fault. In order to find misconduct, there must be some showing of fault on the employee's part, either that he acted willfully or intentionally (*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)), or carelessly or negligently (*see McGinigle v. Town of Greenburgh*, 48 N.Y.2d 949, 951 (1979)). "Mere errors of judgment, lacking in willful intent and not so unreasonable as to be considered negligence, are not a basis for finding misconduct." *Dep't of Environmental Protection v. Segarra*, OATH Index No. 2730/10 at 7 (Oct. 20, 2010), *adopted in part, modified in part,* Comm'r Dec. (Apr. 29, 2011), *reversed*, Civ. Serv. Comm'n Item No. CD 11-94-R (Dec. 20, 2011); s*ee also Ryan v. NYS Liquor Auth.*, 273 A.D. 576, 581 (3d Dep't 1948). Here, respondent testified that she did not complete the file under the new application number because she thought

that there was a specific protocol that a file not be closed without a written withdrawal letter. While Ms. James testified that the lack of a withdrawal letter did not prevent respondent from processing documents under the new application number, it appears that respondent simply made a mistake. A mistake, in and of itself, is not misconduct, neither insubordination nor neglect of duty.

It is unfortunate that respondent did not obtain the withdrawal letter until Ms. James reminded her to do so on June 11. However, respondent testified that she contacted Ms. Ortiz once reminded about the letter on June 11, and Ms. Ortiz faxed the letter to respondent on June 13, 2013. Moreover, respondent's testimony that Ms. Ortiz said that she had faxed the letter earlier, but it had not gone through, was plausible. Ms. James acknowledged that she sent an e-mail to her staff on June 11, 2013, notifying them that the Manhattan office had a new fax number (Tr. 46). This corroborates respondent's testimony that there was some period of time in which the old fax number was not working. Thus, although respondent could have been more diligent in obtaining the withdrawal letter and processing the new documents, petitioner failed to establish that her errors in judgment rose to the level of misconduct.

Hence, charge two, specification C, was not sustained and should be dismissed.

May 28, 2013, though August 6, 2013 – refusal to obey a directive and inefficient, negligent, or careless performance of duties related to the Ramos application (charge two, specifications D and E).

In these charges, petitioner alleges the following. On May 28, 2013, at about 10:32 a.m., Ms. James sent respondent an e-mail directing respondent to file misfiled documents and make necessary corrections in the case folder of Ms. Ramos, and to submit the case folder immediately to her for approval of a pending onsite provider. Respondent did not submit the case folder by the time Ms. James left for the day. On July 8, 2013, Ms. James returned the case folder to respondent, with a list of required corrections and told respondent to make the corrections and resubmit the case. On July 29, 2013, Ms. James sent respondent an e-mail reminding her of the assignment. When respondent submitted the case folder to Ms. James, there were outstanding items that required correction. Ms. James contacted Ms. Ramos and, within two hours, obtained the corrected documents. Ms. James then gave respondent the file to process. On August 1, 2013, Ms. James reminded respondent that she had been told to make the necessary corrections

in the database and to immediately process the SCR form. On August 5, 2013, Ms. James instructed respondent to process the SCR form immediately. On August 6, 2013, the SCR form had not yet been processed.

Ms. James testified that Ms. Ramos, who operated a licensed child care facility, telephoned her during an inspection, concerned that her program would be closed or she would receive a violation because her application for approval of her onsite day care provider was still pending (Tr. 32-33). Respondent had been assigned the Ramos application to process. Ms. James learned that some of the documents that Ms. Ramos had submitted had mistakes, for example, incorrectly listing the last name of the provider (Tr. 32). Ms. James testified that she told respondent to make the necessary corrections and resubmit the documents (Tr. 48). She testified that respondent did not complete the file because she did not obtain the documents needed to do so (Tr. 57). Ms. James sent respondent an e-mail on May 7, 2013, which did not specifically reference any case, but instructed respondent that she should not submit a case folder for final review unless all documents were filed in their "respective section" of the folder (Pet. Ex. 4). Ms. James first testified that she "honestly can't remember" which case this e-mail pertained to, but then said that she believed it was the Ramos file (Tr. 35).

Petitioner did not submit the e-mail alleged to have been sent to respondent on May 28 into evidence. Nor did petitioner submit timesheets which showed that Ms. James left for the day at 4:38 p.m., as alleged. However, respondent acknowledged that she saw an e-mail in her in-box, pertaining to the Ramos case, when she returned from lunch on May 28. There were several folders on her desk, as she had been out of the office for a few days. She worked her way through the folders, and when she got to the Ramos file, she processed the case and put it on Mr. James' desk (Tr. 145). Respondent testified by reference to a database screen for May 28 (Resp. Ex. B) that she finished working on the file at 4:41 p.m. and at that time placed the approval letter for the case in Ms. James' in-box (Tr. 146-47). Respondent testified that Ms. James approved the letter several days later (Tr. 146).

The database screen is an events screen which shows an entry for May 28, 2013, for the Ramos case, at 16:41:59 (or 4:41 p.m.), indicating "period signoff data reset." A description of the event indicates, "The period data for license/registration recommendation was reset for current period. Overall Criminal Assessment Status change." (Resp. Ex. B1). Ms. James testified that this referred only to information pertaining to the applicant's fingerprints, such as

the submission of a criminal conviction statement. It did not relate to the submission of information pertaining to "role approval," because if it had, it would have specifically noted that role approval was submitted (Tr. 69). Ms. James did not testify as to what time she left on May 28. However, she noted that she leaves work at different times, between 4:00 p.m. and 6:00 p.m., and that on May 28, respondent left before she did (Tr. 56).

It is not necessary to resolve the discrepancy between Ms. James' testimony and respondent's testimony about the meaning of the entry in the database. Specification D alleges that respondent did not submit the case folder immediately to her supervisor as instructed in a 10:32 a.m. e-mail on May 28, 2013, and that as of 4:38 p.m., when Ms. James left, respondent had not submitted the case folder. As the e-mail was not submitted into evidence, it is unclear what, if any, deadline respondent was given. Moreover, petitioner did not present Ms. James' time records for May 28. Ms. James answered "yes" when asked if the "record says you left at 4:38" (Tr. 57), but there is no record that shows that respondent left at 4:38 p.m. The only document that references this is the list of charges and specifications, but the charges are accusations only, not proof. Moreover, although Ms. James testified that she left work prior to respondent on May 28 (Tr. 56), she did not explain the basis for her recollection of her departure time, over seven months ago. Accordingly, although Ms. James testified that respondent never made the necessary corrections, as instructed, the allegation in specification D that she failed to comply with a specific directive and was inefficient or negligent in carrying out the duties outlined in that directive, was not proven. Specification D therefore should be dismissed.

Specification E alleges that respondent failed to make the required corrections in the database for the Ramos case folder and to process the SCR form that Ms. James had obtained. An e-mail chain between Ms. James and respondent (Resp. Ex. D) shows the following. On July 29, 2013, at 8:52 a.m., Ms. James e-mailed respondent, stating that the Ramos file had been returned to respondent on July 8, 2013, and directed respondent to make certain corrections, including providing the maiden name of the onsite provider and showing her child care experience. The 8:52 a.m. e-mail asked respondent to resubmit the file for final review if corrections had been made, and if corrections had not been made, to contact Ms. Ramos to make the changes and resubmit the file. On July 29, at 4:09 p.m., Ms. James again e-mailed respondent, indicating that she had received a corrected SCR form and qualification page showing the child care experience of the onsite provider, Ms. Alvarado, and asked that

respondent update the database to show Ms. Alvarado's experience and process the SCR again (Resp. Ex. D). Ms. James testified that respondent did not reply to her e-mail (Tr. 72).

On August 1, 2013, at 8:02 a.m., Ms. James e-mailed respondent, stating that she had reviewed the SCR database and that respondent had not made the corrections. In the e-mail, Ms. James asked respondent to make the necessary corrections and update her when the application was complete, and she also asked respondent to submit a change of modality form to correct a typographical error in the misspelling of Ms. Alvarado's name. Respondent replied in an e-mail at 2:35 p.m. that same day that she was waiting for photo identification from Ms. Alvarado before submitting the change of modality form. On August 5, 2013, at 1:53 p.m., Ms. James e-mailed respondent that even though respondent was waiting for the photo identification, she needed to resubmit the SCR "immediately," because the previous SCR did not include household members, as required. Respondent replied the next day, August 6, at 1:23 p.m., indicating that she was still waiting for the identification. About an hour later, at 2:21 p.m., Ms. James replied that the identification was faxed to respondent on Friday, August 2, and asked if respondent had received it. Ms. James indicated that if respondent had not gotten the identification, Ms. Alvarado would re-fax it, and she asked respondent to process the updated SCR for Ms. Alvarado. On August 7, 2013, at 9:31 a.m., Ms. James again e-mailed respondent, attaching a copy of the identification for Ms. Alvarado and asking respondent to submit a change of modality immediately (Resp. Ex. D).

Respondent introduced a checklist, prepared by the Bureau, listing each document in the case folder for the Ramos case (Tr. 60; Resp. Ex. C). The checklist shows that Ms. James did not approve the folder and returned it to respondent on July 8, 2013, and then again on July 29, 2013. Ms. James also made handwritten notations indicating the corrections that needed to be made before the file would be complete (Tr. 61, 70; Resp. Ex. C). On July 29, 2013, she wrote that respondent must re-do the SCR for Ms. Alvarado (Tr. 71; Resp. Ex. C).

Ms. James testified that she ultimately obtained the photo identification from Ms. Alvarado and made the corrections relating to Ms. Alvarado by herself because she had asked respondent to do this four or five times and respondent had not (Tr. 72-73). Ms. James acknowledged that respondent needed the photo identification to change the fingerprint status and correct the name in the database (Tr. 73, 197). However, she asserted that respondent did

not need the photo identification in order to process and submit the SCR (Tr. 73, 197). Respondent eventually updated the SCR, although Ms. James did not recall when (Tr. 74).

Respondent testified that she did not make the corrections immediately as she was waiting for the photo identification to correct the name. She was also waiting for the corrected SCR (Tr. 149). When the provider had submitted the application, she had not included all the household members on the SCR. At some point, which respondent assumed was after the provider spoke to Ms. James, the provider submitted a new SCR with the complete information (Tr. 153). Respondent believed that she could not proceed without the photo identification because the state needed the identification in order to make the fingerprint corrections, without which the SCR could not be submitted (Tr. 149).

Specification E is sustained, but only as to Ms. James' instructions concerning resubmitting the SCR. Respondent was instructed that she needed to re-process the SCR on July 29 and again on August 1. Respondent told Ms. James by e-mail on August 1 that she was still waiting for the photo identification and she credibly testified that she believed that she needed the photo identification in order to resubmit the SCR. Ms. James, however, testified that respondent did not need to obtain a photo identification to resubmit the SCR. She e-mailed respondent on August 5 at 1:53 p.m. that even though respondent was waiting for the photo identification, respondent needed to submit the SCR "immediately." At this juncture, respondent was under an obligation to submit the SCR notwithstanding her belief about the photo identification, or at the very least, to ask Ms. James for clarification. However, although respondent ultimately submitted the SCR, she had not done so by the time Ms. James sent her next e-mail on August 5, 2013 at 2:21 p.m. This was more than a day after Ms. James' instruction to resubmit the SCR immediately. Respondent's failure to follow this instruction was insubordinate and constituted neglect of duty.

The remainder of the specification, referencing instructions to make corrections in the Ramos file, is not sustained and should be dismissed. This portion of the specification alleges that Ms. James returned the Ramos file to respondent on July 8 and told her to resubmit it for final review when all the changes were made, and that when respondent submitted the case folder on July 29 there were still items that were not corrected. Petitioner did not submit an e-mail from July 8, nor did Ms. James testify as to the specific directions she gave to respondent on July 8. The sole evidence as to July 8 is Ms. James' July 29 morning e-mail, which indicated

that Ms. James had returned the Ramos file to respondent for review on July 8 and instructed respondent to make corrections relating to the provider's maiden name and child care experience. There is no evidence that respondent was given a particular deadline by which to make these corrections. Moreover, respondent was instructed in the July 29 morning e-mail that she could resubmit the file once she made corrections. Respondent apparently did so, as Ms. James indicated in her e-mail of July 29 at 4:09 p.m. that she had received a corrected SCR and qualification page showing the child care experience, but that she needed the database to be updated and the SCR processed. This record falls short of establishing that respondent was either insubordinate or neglected her duty with regard to following Ms. James' instructions on July 8 and July 29 to make corrections in the database concerning the provider's name and child care experience.

Discourtesy and inefficient performance of duties (charge three, specification A)

Charge three, specification A, alleges that respondent was unhelpful and discourteous to a provider, Ms. Cruz, to whom she was assigned in late September 2013. Respondent is alleged to have refused to accept Ms. Cruz's telephone calls and to have told Ms. Cruz, when she tried to submit paperwork but was not sure what documents were needed, to submit the documents when she figured it out.

Ms. Cruz testified at length. She and her sister have run a day care center in Manhattan for over three years. The day care center was licensed under her aunt's name and Ms. Ortiz wanted to license it under her own name. For over six months, she frequently telephoned respondent because she was having difficulty making this change and wanted help (Tr. 93-94, 104). Ms. Cruz testified that she is a native Spanish-speaker and feels her English is not very good. Often, she was unable to find the right phrase to express herself, and respondent would not help her but would instead tell her to read the instructions that came with the application package or to call back when she found the right words to say. Respondent would then hang up the telephone, sometimes without saying goodbye (Tr. 94, 97, 106). Respondent never answered her questions about what to do, even when she reiterated that her English was not so good and asked her to clarify (Tr. 97). Additionally, respondent did not return her telephone messages, sometimes for weeks (Tr. 105).

Ms. Cruz became so frustrated that she personally went to the Bureau's office to ask for help, even though the trip from the day care center to the office took over an hour, which meant hiring a person to cover the day care business (Tr. 109, 111). She testified that she was about to cry when Ms. James approached and asked who she was. She told Ms. James that respondent had been unhelpful and rude (Tr. 96). Even though Ms. James did not speak Spanish, Ms. James went through the paperwork with her, so that Ms. Cruz was able to successfully complete her documentation (Tr. 99). Although respondent had told Ms. Cruz that she needed to obtain a new medical form from a physician, Ms. James told her that she could use the medical form that was already in the application folder (Tr. 101-03). While in the office, Ms. Cruz overheard respondent saying good afternoon to a colleague, in Spanish, and realized then that respondent spoke Spanish (Tr. 98).

On another occasion, Ms. Cruz arrived at the office and dialed respondent's extension. Twenty minutes later, respondent appeared in the waiting room, briefly spoke with Ms. Cruz, told Ms. Cruz she would have to wait until respondent drank her coffee, and finally handed Ms. Cruz "15 pages of documents" that Ms. Cruz did not understand and told her to come back the following day with the paperwork completed (Tr. 109). Ms. Cruz then had to call Ms. James for help. Ms. James explained that Ms. Cruz could complete the paperwork in the office since all that was missing was her signature and her daughter's name (Tr. 109). After this, Ms. Cruz began to ask for Ms. James whenever she went to the Bureau's office (Tr. 111).

At one point Ms. Cruz was so frustrated that she told Ms. James that she would quit the day care business if she had to keep working with respondent and asked if Ms. James could assign her case to a different registrar. Ms. James told her to put her request in a letter (Tr. 104). In the letter, dated November 19, 2013, and signed by Ms. Cruz and her sister, Ms. Cruz complained that respondent had been "very unhelpful" and has "a very bad attitude" so that Ms. Cruz has needed to seek help from Ms. James instead (Pet. Ex. 6). Ms. Cruz testified that, currently, she only deals with Ms. James, because if she has to deal with respondent, she is "just going to quit the day care" (Tr. 107).

Respondent testified that she was surprised by Ms. Cruz's testimony because she helps her providers and gives "110%" for them (Tr. 154). She said that the information which Ms. Cruz was sending was incomplete, she asked Ms. Cruz to come into the office so she could help her, thought she had helped Ms. Cruz during that appointment, and was in "shock" when Ms.

Cruz filed a complaint to the contrary (Tr. 154-55). Respondent denied ever hanging up on Ms. Cruz. She testified that she had four or five telephone conversations with Ms. Cruz. Typically, Ms. Cruz calls and asks for Ms. James and when respondent says she is not Ms. James, Ms. Cruz hangs up (Tr. 175). Respondent acknowledged that she is fluent in Spanish and she is aware that Ms. Cruz is a native Spanish-speaker; however, because Ms. Cruz never had difficulties communicating in English, she never thought to use Spanish (Tr. 175).

Resolution of this charge comes down to a credibility contest between respondent and Ms. Cruz. I found Ms. Cruz to be a very credible witness. It was striking that Ms. Cruz took the time to testify at this proceeding, given her testimony that she has to hire extra personnel whenever she takes time away from the day care center. Ms. Cruz may have been a bit hyperbolic; for example, when asked if she had left messages on respondent's phone, she replied, "Not one a thousand messages" (Tr. 105). However, I had no doubt that Ms. Cruz was extremely frustrated by her dealings with respondent, both on the telephone and in-person. While respondent denied ever hanging up on Ms. Cruz, I found it more probable than not that respondent at the very least terminated multiple conversations in an abrupt and unhelpful way. Similarly, although respondent said that she gives "110%" to her providers, I credited Ms. Cruz' more specific testimony that she left many messages on respondent's voicemail to which respondent did not promptly reply, and that respondent was discourteous and unhelpful during many telephone conversations, suggesting that Ms. Cruz call back when she found the right phrases to say or figured out the correct documents to submit.

Accordingly, charge three, specification A, alleging that respondent was discourteous and inefficiently performed her duties relating to Ms. Cruz, is sustained.

Discourtesy and inefficient performance of duties (charge three, specification B)

Charge three, specification B, alleges that on October 18, 2013, respondent ignored a co-worker, Jocelyn Maynard, who repeatedly told her that a provider was waiting to see her.

Ms. Maynard, like respondent, is a registrar, and has worked in the same office as respondent for about four years. She handles after-school programs (Tr. 79-80, 88). Ms. Maynard testified that on October 18, 2013, a colleague called her to report that a provider was in the waiting room and wanted to see respondent. The client had tried unsuccessfully to reach respondent by telephone. Ms. Maynard went to respondent's desk to inform her that a provider

was waiting to see her. Respondent was sitting at her desk. She did not acknowledge Ms. Maynard at all, or make eye contact, and finally turned her back to Ms. Maynard, who repeated three or four times that a client was waiting. Ms. Maynard told respondent that respondent had to acknowledge her about a work-related matter and she reported the interaction to the Bureau manager, both verbally and in a contemporaneous memorandum (Tr. 81-82, 85-90; Pet. Ex. 5). The memorandum is detailed and consistent with her trial testimony.

Respondent acknowledged not responding to Ms. Maynard (Tr. 178). She testified that she was on lunch and that she had previously asked that she not be approached during her lunch time (Tr. 178).

This specification is not sustained. There is no dispute that Ms. Maynard approached respondent to tell her that a provider was waiting and that respondent did not acknowledge Ms. Maynard. This was without doubt rude and disrespectful to Ms. Maynard. However, petitioner did not establish that this occurred during working hours. Ms. Maynard testified that she thought the incident occurred during late morning or early afternoon, but acknowledged that she was "not sure," and when asked what respondent was doing, said, "I believe she probably was working on a case (Tr. 89). This testimony was equivocal and not persuasive. By contrast, respondent testified that she was at lunch and that she did not talk to Ms. Maynard because she has asked not to be disturbed during lunch, which she considers her time (Tr. 178-79). This is a plausible scenario as it is fully consistent with respondent's testimony that she does not talk to co-workers during lunch. Respondent is not required to work during her lunch hour, 29 CFR § 785.19(a) (Lexis 2014), ("Bona fide meal periods are not worktime . . . . . These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals."), and she could have been notified after her lunch hour that a provider was waiting. While her failure to acknowledge Ms. Maynard was not polite, it does not rise to the level of misconduct under the Civil Service Law. Hence, charge three, specification B, alleging that respondent acted discourteously and negligently performed her duties, should be dismissed.

Pena application (charge four, specification A)

Charge four, specification A, alleges that on October 17, 2013, Ms. James told respondent that a provider who had changed her organizational structure from a sole proprietorship to a corporation was required to file a new application. When respondent

questioned this, indicating that the database permits her to change this information, Ms. James reiterated that a new application was necessary. Respondent failed to disclose that she had already changed the information in the database, and when Ms. James told her a new application was necessary, respondent failed to rectify the situation by reverting the provider to a sole proprietorship in the database.

Ms. James testified that respondent had requested assistance because a provider named Ms. Pena had submitted an application as a sole proprietor, but wanted to resubmit the application as a corporation. Ms. James told respondent that Ms. Pena was required to submit a new application as a corporation. However, Ms. James learned that, prior to asking for guidance, respondent had already changed the database to reflect that the applicant was a corporation, which was improper. Ms. James acknowledged that respondent followed her direction to have the applicant submit a new application, and followed protocol in processing the second application.

Respondent testified that Ms. Pena telephoned her on September 30, 2013, to advise that she was changing her structure from a sole proprietorship to a corporation. Respondent inputted Ms. Pena's information into the database, so the system would generate a new application booklet for Ms. Pena to submit. This normally takes several weeks. In the interim, respondent changed Ms. Pena's information in the database from a sole proprietorship to a corporation. After Ms. Pena received the booklet, she came into the office at respondent's request so respondent could help with the process. Respondent then asked Ms. James how she should proceed, since she had already changed the information in the database. Respondent acknowledged that she subsequently forgot to return to the system and un-do the change, but that she submitted a new application for Ms. Pena as a corporation. When Ms. James brought this to her attention, respondent returned to the database and changed the provider's status on the old application from a corporation to a sole proprietorship (Tr. 183).

This specification is not proven. Respondent made a mistake by changing Ms. Pena's information in the database from a sole proprietorship to a corporation, while at the same time requesting a new application booklet for Ms. Pena. It appears that respondent realized that she might have made a mistake once Ms. Pena arrived in the office with the new application. Respondent acted responsibly by going to Ms. James and asking for help. She followed Ms. James' instructions by having Ms. Pena submit a new application and by processing it properly.

She should not be penalized for bringing her error to Ms. James' attention. Moreover, while respondent admittedly forgot to un-do the changes in the database, she testified without rebuttal that she made the appropriate changes when reminded to do so by Ms. James. As noted previously, mistakes are not equivalent to sanctionable misconduct.

Accordingly, this specification should be dismissed.

Uncharged misconduct

Ms. James testified that respondent frequently does not acknowledge her presence. Respondent turns her back when Ms. James approaches and either snatches documents from Ms. James or points to where she would like Ms. James to put the documents (Tr. 75). Respondent has not been receptive to attempts to offer her training or other assistance (Tr. 38). Ms. Strawser testified similarly (Tr. 117). Petitioner urged that I consider the supervisors' testimony as evidence of further misconduct, asserting that respondent is charged with "a pattern of . . . rude insolent behavior" (Tr. 84), and is alleged to have violated the agency rules against discourtesy and conduct prejudicial to good order and discipline. That argument is misplaced. Respondent is charged with discrete instances of misconduct, as set forth in the specifications. The fact that among the rule violations charged is that respondent engaged in discourtesy or conduct prejudicial to good order and discipline does not give petitioner the right to allege uncharged incidents of misconduct. Doing so would violate due process. *See Murray v. Murphy*, 24 N.Y.2d 150, 157 (1969) ("The first fundamental of due process is notice of the charges made. This principle equally applies to an administrative proceeding for even in that forum no person may lose substantial rights because of wrongdoing shown by the evidence, but not charged."); Charter § 1046 (Lexis 2013) (requiring, as a matter of due process, notice of the charges to be adjudicated, with reference to the particular sections of the law and rules involved, and an opportunity to be heard on the matters in the notice).

FINDINGS AND CONCLUSIONS

1. Respondent was discourteous to a co-worker by walking towards her and touching arm, causing the co-worker to back way, and then closing the door in the co-worker's face, as alleged in charge one. Petitioner did not establish that respondent touched the co-worker's arm in an aggressive way, or "got in" the co-worker's face, as further alleged in charge

one. Nor did petitioner prove that respondent committed misconduct by telling the co-worker that she was on lunch and did not want to be bothered, as also alleged in charge one.

2. Respondent failed to comply with multiple directives to provide her supervisor with the Gonzalez case folder, as alleged in charge two, specification A. Petitioner did not establish that respondent committed misconduct by failing to comply with her supervisor's request for an update on the Gonzalez application, as also alleged in charge two, specification A.

3. Petitioner did not establish that respondent failed to comply with a directive from her supervisor on May 3 to process documents relating to the Gonzalez application as a top priority for May 6, as alleged in charge two, specification B.

4. Petitioner did not establish that respondent committed misconduct by failing to obtain a withdrawal letter and process all documents under the new number, as alleged in charge two, specification C.

5. Petitioner did not establish that respondent failed to comply with a directive on May 28 to submit a case folder immediately to her supervisor, as alleged in charge two, specification D.

6. Respondent failed to follow Ms. James' instruction to resubmit the SCR form for the Ramos file, as alleged in charge two, specification E. However, petitioner did not establish that respondent committed misconduct by not making corrections in the file, as further alleged in charge two, specification E.

7. Respondent was rude and discourteous to a provider, in comments made to the provider during telephone calls, and by failing to respond to her telephone messages, as alleged in charge three, specification A.

8. Petitioner did not establish that respondent committed misconduct by failing to respond to a co-worker on October 18, 2013, as alleged in charge three, specification B.

9. Petitioner did not establish that respondent committed misconduct by changing information in the database related to the Pena application and not un-doing the changes until reminded to do so, as alleged in charge four.

RECOMMENDATION

Upon making my findings, I requested an abstract of respondent's personnel file. The information submitted indicated that respondent began her employment as a computer aide in July 2005 and has no history of formal adjudicated discipline. Respondent has received only one written evaluation, for calendar year 2011, which gave her an overall rating of "good."

Petitioner has requested that respondent be suspended for 30 days without pay (Tr. 9). Respondent asserts that even if the charges are proven, this penalty is excessive and that a more reasonable penalty would be in the range of ten days (Tr. 11).

I agree that a 30-day penalty is unwarranted, for several reasons. First, many of the charges against respondent were not sustained. In particular, charge two, which alleged that respondent failed to comply with supervisory directives and neglected her duty, was sustained only as to portions of two specifications. Any penalty must take this into account. Second, respondent has been on the job for almost eight years and has no history of prior discipline. Her only written evaluation rated her as good. "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." *Dep't of Transportation v. Jackson*, OATH Index No. 299/90 at 12 (Feb. 6, 1990). The theory of progressive discipline is to modify employee behavior through increasing penalties for repeated or similar misconduct. *Dep't of Health & Mental Hygiene v. Dillon,* OATH Index No. 108/14 at 15-16 (Feb. 14, 2014).

Nevertheless, a significant penalty is called for. For a period of months, respondent was discourteous and unhelpful to a day care provider who did not speak English fluently and needed her assistance. Respondent did not return the provider's telephone calls and made snide and disrespectful comments on the telephone. Respondent was also discourteous to a co-worker by approaching the co-worker in a manner that caused her to back up out of a room and then closing the door in her face. Respondent's desire not to be disturbed during lunch does not justify that behavior. Finally, respondent failed to follow through on several assignments given to her by Ms. James.

It is difficult to find an analogous case for penalty purposes. Many of the discourtesy cases involve a single charge of discourtesy and generally result in a penalty of about five days. *See, e.g., Dep't of Environmental Protection v. Onibokun,* OATH Index No. 871/07 (Apr. 4, 2007)

(research assistant who yelled at a customer and was insubordinate, suspended for four days); *Dep't of Sanitation v. Bower*, OATH Index No. 2284/04 (May 20, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-03-SA (Jan. 9, 2006) (five-day suspension for calling civilian a "fucking bitch" after she threatened to report respondent for illegally parking his truck). Here, respondent did not curse at Ms. Cruz nor yell at her, but she did make disrespectful comments and was generally unhelpful.

Along similar lines, the cases which deal with neglect of duty generally involve more egregious neglect of duty or insubordination. *See, e.g., Dillon*, OATH 108/14 (20-day suspension recommended for computer specialist who answered the telephone in a robotic voice, created and abandoned help desk requests, failed to provide complete ticket descriptions, and failed to assign tickets to the proper group); *Law Dep't v. Stanley*, OATH Index No. 1540/05 (June 15, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-08-SA (Jan. 9, 2006) (15-day suspension for clerk who failed to perform data entry on a contract database for two months, without notifying her supervisors).

Considering the peculiar circumstances of this case, a 12-day penalty seems most appropriate. This takes into account respondent's lack of prior disciplinary history but is substantial enough to place her on notice that her conduct is inappropriate and that she must modify her behavior or risk further discipline. Accordingly, I recommend that respondent be suspended for 12 days.

Faye Lewis
Administrative Law Judge

March 14, 2014

SUBMITTED TO:

MARY TRAVIS BASSETT, M.D., MPH
Commissioner

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