Health & Hospitals Corp. (Gouverneur Skilled Nursing Facility) v. Jones

OATH Index No. 1100/10 (June 30, 2010), *modified on penalty*, Hospital Dec. (Oct. 28, 2010), **appended**, *modified on penalty*, HHC Pers. Review Bd. Dec. 1404 (May, 24, 2011), **appended**

Respondent, a clerical associate, refused to talk to the hospital's child protective coordinator about an incident which she witnessed unless her union representative was present. Because the attempted interview was investigatory rather than disciplinary in focus, respondent's refusal to speak without representation was not protected. Respondent's subsequent refusal to speak to her supervisor and director without a union representative present was, however, protected activity, which did not constitute misconduct. Given all the circumstances, a penalty of 30 suspension days is recommended, with credit for time served.

The Hospital imposed the penalty of termination of employment. On appeal, the Personnel Review Board reinstated the ALJ's recommended penalty, a 30 day suspension with credit for time-served.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
HEALTH AND HOSPITALS CORPORATION
(GOUVERNEUR SKILLED NURSING FACILITY)
Petitioner
-against-
KAREN JONES
Respondent

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, the Health and Hospitals Corporation (Gouverneur Skilled Nursing Facility), pursuant to section 7:5 of the Personnel Rules of the Corporation. The charges allege that on December 1, 2008, respondent Karen Jones, a clerical associate in the registration area at Gouverneur, refused to cooperate with an official investigation and provide information necessary for an incident report (charge one),

failed to comply with a directive to provide information concerning a patient (charge two), failed to report suspected child abuse or mistreatment (charge three, specification one), and provided false and misleading responses when questioned during an investigation into suspected child abuse (charge three, specification two).

During a two-day hearing, petitioner presented four witnesses while respondent testified on her own behalf and also presented the testimony of one witness. For the following reasons, I find charges one and two sustained in part. I find that charge three was not sustained and should be dismissed. I recommend that respondent be suspended for 30 days, with credit for time served.

ANALYSIS

At about 10:30 a.m. on December 1, 2008, respondent was working in the registration area of Gouverneur Hospital. She was asked to register a baby who had been brought in by his mother. The mother also had an older child, an eight-year old boy, with her. Respondent admitted that in the course of processing the registration, she saw the mother (who remained unnamed throughout these proceedings) strike or push her older child. It was undisputed that she told her immediate supervisor, Ms. Espada, what she had seen when Ms. Espada asked why she looked upset. It was also undisputed that respondent refused to answer questions regarding the incident from the hospital's child protection coordinator, Ms. Rubin, and from Ms. Espada and Mr. Khan, the assistant director for registration and finance, unless her union representative was present.

Respondent testified that during the registration, the mother and baby were seated at her desk, while the little boy, for whom a seat was not available, was sitting on the floor. The mother became upset when she asked for income information. Respondent calmed her by explaining that the hospital did not charge for medical appointments for children. The older child began to get impatient and asked for a pen and paper. His mother reacted by becoming angry, and loudly threatening, "If you don't fucking stop I'm going to fuck you up" (Tr. II. 82).[1] Alternatively, respondent described a slightly longer dialogue where the mother told the boy,

[1] The transcripts of multiple days' worth of testimony were not numbered consecutively from one day to the next. Therefore, they are denoted as Tr. I. and Tr. II.

"Would you please pick up your fucking big book bag, you're getting on my fucking nerve. If you don't pick it up right now, I'm going to fucking hurt you" (Tr. II. 77). The little boy was motionless. In response, his mother, who was holding the baby, got up from her chair and pushed or hit him so hard that he fell over backwards and hit the back of respondent's cubicle. Respondent described the force variously as pushing very hard, walloping, smacking, or whacking (Tr. II. 80, 81, 82, 101). She explained that she was typing at the time and was not sure of the precise type of force, but knew it was either a push or some type of hitting motion (Tr. II. 81). Once the child fell, his mother told him, again using profanity, to pick up his book bag, which was in the middle of the hallway (Tr. II. 82).

According to respondent, other people heard the profanity, including a coworker who was about 12 feet away (Tr. II. 78, 79). Mr. Khan, who was in the general area, approached, picked up the boy's book bag, handed it to the boy, and quickly left. Respondent testified that she and Mr. Khan looked at but did not talk to each other. According to respondent, Mr. Khan "looked" as if he did not want to help even though she believed that she had communicated by the look on her face that she needed help (Tr. II. 82, 83, 84, 114). Mr. Khan left the area and the mother and her children went upstairs for the baby's medical appointment.

Respondent testified that after the family left, she approached Mr. Khan and said that she was concerned because it seemed as if there was "some kind of abusive situation" (Tr. II. 87). She testified that Mr. Khan did not answer but simply looked at her and went back into his office (Tr. II. 88). Mr. Khan testified that respondent did not say anything to him about what had occurred after he had picked up the child's book bag (Tr. II. 19). Asked if respondent had "ever" said anything to him about the incident, he replied that she had not (Tr. II. 19).

By respondent's account, as well as that of her immediate supervisor, Ms. Espada, Ms. Espada approached her and asked what was wrong or what had happened and if respondent was okay. Respondent told Ms. Espada about what had happened (Jones: Tr. II. 90, 104; Espada: Tr. I. 148, 181). This conversation occurred within ten minutes of the incident (Pet. Ex. 4: Resp. Ex. A). Ms. Espada recounted that she approached respondent because the latter "seemed a bit upset" (Tr. I. 148). Respondent replied that she had seen a mother "smack" her older child, who had fallen (Tr. I. 181). Ms. Espada testified that she had asked respondent if she had reported the incident; respondent had replied that she had not, because Mr. Khan had been present, had

observed what had occurred, and had helped the child up and asked if he was okay (Tr. I. 149, 150). According to respondent, Ms. Espada also made a comment that the mother should not have as many children as she did; respondent was upset by the comment, which she believed to be racist (Tr. II. 134, 135).[2]

Ms. Espada testified that after speaking to respondent, she asked Mr. Khan what he had seen; he replied that he had seen the child trip over a book bag and helped him up (Tr. I. 151, 166). Ms. Espada next telephoned Carmen Cabrera, the pediatric supervisor on the second floor, and explained what respondent had said. Ms. Cabrera transferred Ms. Espada to the social work department; later, a staff member from social work visited her to get more information, including the patient's name and respondent's name (Tr. I. 152-53, 170-71). Ms. Espada apparently also reported the incident to the head pediatric physician, Dr. Santiago, and told him that she had heard some "vulgar language" and then a "loud, thumping sound" (Tr. I. 203).

Ms. Espada's call to Ms. Cabrera triggered a telephone call from Jaime Gonzalez, Director of Security for Hospital Police. Mr. Gonzalez asked Ms. Espada to get a statement from respondent. Ms. Espada testified that she told respondent that Mr. Gonzalez wanted to know if she was willing to report the incident (Tr. I. 154). Respondent replied that she did not want to get involved. Ms. Espada also asked Mr. Khan if he was willing to report the incident. Mr. Khan said he could not report the incident because all he saw was a child trip over a book bag. Ms. Espada then telephoned Mr. Gonzalez and told him the staff was not willing to report the incident (Tr. I. 153-55). Mr. Gonzalez told Ms. Espada that possible child abuse cases should be reported and he then telephoned Ms. Rubin, to advise her that respondent was refusing to provide him with any information (Gonzalez: Tr. I. 207; Rubin: Tr. I. 68, 71).

It is undisputed that Ms. Rubin next telephoned Ms. Espada, and said that she needed to talk to the staff member who witnessed the incident. Ms. Espada told Ms. Rubin that respondent did not want to get involved and Ms. Rubin replied that respondent did not have a choice and asked Ms. Espada to put respondent on the telephone (Rubin: Tr. I. 70-71; Espada: Tr. I. 155). Ms. Espada handed the phone to respondent. According to Ms. Espada, she told respondent that "Sara from Child Protective Services at Gouverneur" was on the telephone and needed to speak

[2] Respondent testified that the woman who hit the child was African-American, while Ms. Espada is "Spanish" (Tr. II. 134, 135).

to her (Tr. I. 155). Ms. Rubin also testified that she identified herself several times to Ms. Espada, including her title as child protection coordinator, and that Ms. Espada repeated the title out loud before giving the phone to respondent (Tr. I. 70).

It is not disputed that during the call, Ms. Rubin asked respondent to explain what happened in the registration area, but respondent said she wanted to speak to her union representative before speaking to Ms. Rubin. Ms. Rubin told her that was not acceptable and that concluded the conversation (Rubin: Tr. I. 72, 74; Jones: Tr. 90, 115). Ms. Rubin testified, additionally, that respondent said her supervisor had seen what happened and that she did not want to get involved. She told respondent that she was calling to find out what respondent had to say, and respondent replied that she did not want to get into trouble and "had her rights" (Tr. I. 72). She did confirm, however, that respondent did not outright refuse to tell her what happened; rather, when she asked if respondent was refusing, respondent "paused" and said that she wanted to speak to her union representative (Tr. I. 74). Respondent had a slightly different spin on what transpired; she testified that she did not know who she was talking to; the person only gave her first name. Respondent testified that she did not answer questions because she wanted the person to further identify herself (Tr. II. 107, 109). She also testified that she never had "a chance" to ask the person to identify herself, because the person just kept talking, saying she would have to report respondent if she did not cooperate (Tr. II. 114). At Mr. Gonzalez's request, Ms. Rubin sent him an e-mail on December 2, 2008, memorializing her telephone conversation with respondent. That e-mail (Pet. Ex. 3) is consistent with her trial testimony.

Ms. Rubin testified that she needed to interview respondent as part of an assessment to determine whether the hospital's obligation to report suspected abuse to the Administration for Children's Services ("ACS") was triggered (Tr. I. 96-97). However, following the telephone conversation, Ms. Rubin decided that she would no longer attempt to interview respondent. Instead, she focused on interviewing the family involved in the incident. They were still in the hospital (Tr. I. 103).

About 3:00 or 3:30 p.m. that afternoon, Ms. Espada and Mr. Khan called respondent into the office to ask her to explain what happened. According to Ms. Espada, ". . . the minute we sat down [respondent] stated that she did not see anything and that she needs the union rep, that she has rights" (Tr. I. 156). Mr. Khan, somewhat differently, wrote in his memorandum to Mr.

Gonzalez that respondent refused to speak without her union representative present after he asked her to explain her reason "not to cooperate with the departmental procedure" (Resp. Ex. A). Respondent acknowledged telling Mr. Khan and Ms. Espada that she did not want to continue talking with Mr. Khan because she wanted her union representative present (Tr. II. 110). Mr. Khan then telephoned the union representative for Gouverneur, Derek Davis, and asked if he could come to the area because respondent had refused to be interviewed without union representation. Mr. Davis said the earliest he could come was in three days, which Mr. Khan conveyed to respondent (Espada: Tr. I. 156, 176-77; Khan: Tr. II. 22, 24; Jones: Tr. II. 117). It was not disputed that respondent was not at work over the next several days. Respondent testified that she was out because her brother was hospitalized and that her leave was authorized (Tr. II. 130). As soon as she came back to work, she was suspended (Tr. II. 131).

Respondent submitted two memoranda concerning the incident. In the first, dated December 8, 2008, she wrote that she heard the parent use vulgar language toward her child, then several minutes later heard a loud "thumb" (presumably, "thump"), and turned and saw the child getting up from the floor. She noted that she reported the incident to her "superiors" once the patient was processed and left the premises (Pet. Ex. 7). In the second memorandum, dated December 18, 2008, respondent provided a much longer and more detailed explanation of what had transpired, including that the mother had pushed the child to the floor (Pet. Ex. 8).

Petitioner asserts in its post-trial submission (ALJ Ex. 2) that respondent failed to report suspected child abuse or maltreatment, even though she had been instructed in training that she had to report any suspected child abuse. Petitioner contends that respondent's testimony that she reported the incident to Mr. Khan was not credible. Petitioner also posits that although respondent told Ms. Espada what had occurred, that does not satisfy her obligation to report suspected misconduct because it was not proactive. I disagree. First, as to Ms. Espada, it was undisputed that Ms. Espada approached respondent shortly after the boy had been struck or pushed and asked her what happened. Respondent told her what had occurred. Respondent also noted that her supervisor, Mr. Khan, had been present and had witnessed what had occurred. Although respondent did not report what had occurred until she was approached by Ms. Espada, the fact remains that she did tell a supervisor of suspected child abuse. This is consistent with the information provided on training materials displayed by the hospital in annual training, which

indicated, "If you witness an incident of Domestic Violence at your facility, call Hospital Police . . . consult with your supervisor or a social worker" (Pet. Exs. 1a-1e). Ms. Rubin also testified that an employee who witnesses any type of suspected child abuse should contact her supervisor, hospital police, or herself (Tr. I. 95).

Regarding Mr. Khan, it is entirely plausible that respondent made a comment to him about an abusive situation, because Mr. Khan was present when the boy was on the floor. Indeed, Mr. Khan acknowledged that he helped the boy get up from the floor. It was unclear from his testimony whether he actually saw the child "trip" or fall over the book bag, or whether he simply saw the child once he was on the ground and assumed that he had tripped (Tr. II. 19, 35, 41, 45, 46, 63, 64-65). However, in a memorandum he wrote only two days after the incident, Mr. Khan stated that he "heard some sound" and saw the child . . . tripping over his book bag" (Resp. Ex. A). In light of that unambiguous language, I found Mr. Khan's trial testimony, over a year later, that he surmised that the child had fallen because he saw him on the floor (Tr. II. 64-65) to be contrived and not credible. Thus, I concluded that Mr. Khan actually saw the child fall to the floor. Whether or not he actually saw the mother push or strike the boy, or whether he turned, after hearing a sound he could not describe (Tr. II. 17, 18, 53, 54, 55, 58) and at that juncture he saw the boy falling, need not be determined. The point is that it was reasonable for respondent to believe that her supervisor, Mr. Khan, also saw what had occurred, and that she may well have made a comment to him after the family went upstairs for its medical appointment. In any event, it was uncontroverted that respondent told her immediate supervisor, Ms. Espada, about the force, thus reporting the incident as required by the hospital's policy.

Although respondent received some training related to reporting of suspected child abuse and neglect, that training was minimal. Respondent participated in the "Multistar" annual training program between 2004 and 2008. Ms. Bas, the assistant director of organizational staff development in charge of the training, explained that employees were required to visit a training room containing approximately 20 or 25 display boards on various topics, including domestic violence. Typically an employee would spend between an hour and two hours in the room. Each employee was also given a written quiz containing 20 to 25 questions on all topics, including domestic violence, to complete as they viewed the display boards. If any question was answered incorrectly, trainers who were in the room would correct the employee. As indicated above,

there was one panel on the family violence display board that notified employees to call Hospital Police and/or "consult with your supervisor or a social worker."[3] Written materials were generally not provided to employees after the training (Tr. I. 17, 18, 25, 26, 30-33, 42-47, 59; Pet. Exs. 1A-1E, 2, 6).

In sum, charge three, specification two, alleging that respondent failed to report suspected child abuse or maltreatment, is not sustained and should be dismissed.

Petitioner has also alleged that on or about December 1, 2008, respondent provided false and misleading responses when questioned during an investigation into child abuse (charge three, specification one). The evidence showed that when questioned on December 1, 2008, respondent indicated that she would not respond unless her union representative was present. This is not tantamount to providing false and misleading responses, although it may constitute separate misconduct, as discussed below. In its post-trial brief, petitioner contends, alternatively, that this charge should be sustained based upon the written statements which respondent submitted on December 8, 2008, and December 18, 2008. The December 8, 2008, memorandum appears false and materially misleading because it did not indicate that respondent actually saw the child's mother use any force against the child. *See Dep't of Correction v. Cooper*, OATH Index No. 2585/08 at 4 (Nov. 12, 2008) (finding the intentional omission of a material fact in a report to be false or misleading); *Dep't of Correction v. Hall,* OATH Index Nos. 155/05 & 156/05 at 15 (Aug. 11, 2005) (same).

However, submitting a false and misleading written statement nearly a week after the incident is simply not the same as providing false and misleading responses during questioning on or about the date of the incident. Respondent was never on notice that she was charged with submitting false and misleading written statements. *See Murray v. Murphy,* 24 N.Y.2d 150, 157 (1969) ("no person may lose substantial rights because of wrongdoing shown by the evidence, but not charged"); *see also, Brown v. Saranac Lake Central School District*, 273 A.D.2d 785, 785 (3rd Dep't 2000). Thus, charge three, specification one, is also not sustained.

Finally, petitioner alleges in charges one and two that on December 1, 2008, respondent failed to cooperate with an official investigation, refused a directive to provide information

[3] There was also an additional panel requiring a "health care professional" to report suspected child abuse or neglect to the New York State Central Register of Child Abuse and Neglect/Maltreatment, but it was not alleged that respondent, a clerical associate, is a "health care professional."

concerning a patient, and refused to provide information necessary for an incident report (charges one and two). Regarding the alleged failure to provide information for the incident report, Ms. Espada testified, credibly, that she asked respondent whether she would speak to Mr. Gonzalez and respondent said that she did not want to get involved. Mr. Gonzalez's incident report (Pet. Ex. 5) notes that he was unable to get a statement from respondent about what had occurred. Respondent did not testify about whether or not she agreed to talk to Mr. Gonzalez. However, asking respondent if she would speak to Mr. Gonzalez is not the same as directing or ordering her to speak to him. Ms. Espada never testified that she gave respondent such a directive. Absent proof of a clear and unambiguous order, charge two, specification one, alleging that respondent refused a directive to provide information necessary for an incident report, is not sustained. *See Dep't of Homeless Services v. Chappelle*, OATH Index No. 1918/07 at 3 (Aug. 30, 2007) (to establish a charge of insubordination, an employer must prove that an order was communicated to the employee and the employee heard and understood the order, the contents of the order were clear and unambiguous, and the employee willfully refused to obey the order); *Dep't of Homeless Services v. Ferguson*, OATH Index No. 1611/02 at 6 (Jan. 22, 2003), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 04-27-M (May 24, 2004) (same).

The remaining portions of charges one and two relate to respondent's refusal to speak to Ms. Rubin, and later, Mr. Khan and Ms. Espada. Respondent acknowledges refusing to talk with them about the incident but contends that she did not commit misconduct because she had the right to demand the presence of a union representative before speaking with Ms. Rubin and her two supervisors. As to Ms. Rubin, I disagree. As to respondent's two supervisors, I agree.

Under the principle of "obey now, grieve later," an employee is required to obey an order when given, unless the order exceeds the agency's authority under the collective bargaining agreement, is illegal, or would threaten the health and safety of any person if followed. The burden of proof is upon the respondent to demonstrate, by a preponderance of the credible evidence, that an exception to the "obey now, grieve later" principle exempts her from compliance with an agency order. *Health & Hospitals Corp. (Queens Health Network) v. Smith*, OATH Index No. 2019/08 at 4 (Oct. 17, 2008); *Health & Hospitals Corp. (Coler-Goldwater Hospital) v. Hinkson*, OATH Index No. 163/04 at 4 (Nov. 21, 2003); *Health & Hospitals Corp.*

(Lincoln Medical & Mental Health Ctr.) v. Serrano, OATH Index No. 2064/00 at 4 (Feb. 21, 2001).

The issue before me is whether the orders to respondent to provide information about what she witnessed in the registration area were illegal because respondent had requested the presence of a union representative (who was not available for three days) prior to answering questions. As petitioner acknowledged, an employee has the right to refuse to submit to an employer's interview without the presence of a union representative if the employee reasonably believes that the interview could result in disciplinary measures, and the employee requests such representation. *National Labor Relations Board v. J. Weingarten, Inc.*, 420 U.S. 251, 257-58 (1975); *Ass't Deputy Wardens v. City of New York,* 71 OCB 9 (BCB 2003) (Feb. 26, 2003). Applying *Weingarten,* we have held that an employee has a right to have a union delegate present during an interview at which alleged misconduct would be discussed. *Human Resources Admin. v. Levitant,* OATH Index No. 397/04 at 10-11, *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 06-59 (May 2, 2006); *Dep't of Environmental Protection v. Ebanks,* OATH Index No. 263/05 at 7 (Feb. 10, 2005). However, we have also held that the right to representation does not apply where the primary purpose of the interview is investigatory, rather than disciplinary. *Dep't of Sanitation v. Gentile,* OATH Index No. 1207/96 at 9 (Feb. 27, 1997), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 98-49-A (July 21, 1998) (respondent's right to representation under section 75(2) of the Civil Service Law was not triggered "during the brief and limited questioning at the district office just a few hours after the incident); *Dep't of Correction v. Jones,* OATH Index Nos. 1332/95 & 1334/95 at 12-13 (Dec. 22, 1995) (questioning of a correction officer at the time of a use of force incident was primarily investigatory of nature, "when respondent's answers might materially affect the course of action that the supervisory officers would have to take to ensure the safety and security of the correctional facility").[4]

[4] These cases also involved analysis under Section 75(2) of the Civil Service Law, which confers an analogous right of representation to employees who at the time of questioning appear "to be a potential subject of disciplinary action." As petitioner has noted, HHC employees are not subject to the Civil Service Law and HHC's Personnel Rules and Regulations do not contain a similar provision. However, as petitioner acknowledged, they do have similar rights under *Weingarten.* The analysis of whether an interview is investigatory or disciplinary is the same. As noted by Judge Kramer in *Gentile,* OATH 1207/96 at 5, Section 75(2) was intended to "equate the rights of public employees with regard to representation at investigatory or disciplinary interviews with the rights of employees in the private sector in the wake of the Supreme Court's holding in . . . *Weingarten.*"

Here, there was no reasonable basis for respondent to believe during her brief telephone call with Ms. Rubin that what she said during the call could lead to disciplinary charges against her. I credited both Ms. Espada's and Ms. Rubin's testimony that Ms. Rubin identified herself to Ms. Espada as the child protection coordinator and that Ms. Espada repeated the title out loud before giving the phone to respondent. I did not credit respondent's testimony that she did not know who Ms. Rubin was. Rather, I found it more probable than not that respondent, who was already upset by what she had observed, became anxious and fearful about being questioned and simply panicked. Indeed, I credited Ms. Rubin's testimony that respondent said she did not want to get involved and that she did not want to get into trouble. However, nothing in the record suggests that respondent would have gotten into trouble had she told Ms. Rubin what she had witnessed. Ms. Rubin was not respondent's supervisor and the purpose of her questioning was to assess the situation to determine whether there was an incident of suspected child abuse which the hospital was required to report to the Administration for Children's Services (Tr. I. 95-97). In this situation time was of the essence. The mother and child were still in the hospital, and Ms. Rubin, prior to interviewing the family, wanted to determine what respondent had seen. This questioning was clearly investigatory in nature, not a precursor to possible discipline. *See Gentile,* OATH 1207/96 at 9 (characterizing "purely" investigatory questioning as that "which has as its primary purpose some articulable legitimate employer goal other than discipline, such as ensuring the public safety or preventing imminent harm to persons or disruption in the workplace").

It might have been better, for all concerned, including Ms. Rubin, who was responsible for assessing suspected child abuse within the facility, if the union representative had been notified and had been able to appear and represent respondent. It was not clear why the union representative was not available until some three days later. However, because the purpose of Ms. Rubin's interview was investigatory, and not disciplinary, respondent's refusal to speak with her did not fall within one of the exceptions to "obey now, grieve later." Hence, to the extent that charges one and two allege that respondent refused to cooperate with Ms. Rubin's investigation, they are sustained.

However, when Mr. Khan and Ms. Espada sought to interview respondent later that afternoon, that questioning was primarily disciplinary in nature. Importantly, Mr. Khan and Ms.

Espada were not charged with assessing suspected child abuse. Mr. Khan was respondent's director and Ms. Espada her immediate supervisor. Mr. Khan acknowledged that he began the meeting by asking respondent why she had refused to cooperate with Ms. Rubin. At this juncture, several hours after the incident with the family, the focus of the questioning was upon respondent and her alleged insubordination, not upon what happened with the family. *See Gentile*, OATH 1207/96 at 11 (although initial, brief interview of employee was investigatory, by the time the second interview was held, he had become a potential target of disciplinary action, triggering his right to obtain union representation). Thus, respondent had a reasonable belief that providing information during this second interview could result in disciplinary action. Her refusal to answer Mr. Khan's and Ms. Espada's questions until a union representative was present was protected under *Weingarten* and *Ass't Deputy Wardens*, and, thus, may not form a basis for a finding of insubordination.

FINDINGS AND CONCLUSIONS

1. Petitioner failed to establish by a preponderance of the credible evidence that respondent failed to report suspected child abuse or maltreatment on December 1, 2008.

2. Petitioner failed to establish by a preponderance of the credible evidence that respondent provided false and misleading responses on December 1, 2008, when questioned in the course of an investigation into child abuse.

3. Petitioner failed to establish by a preponderance of the credible evidence that on December 1, 2008, respondent refused to provide information necessary for an incident report.

4. On December 1, 2008, respondent refused to cooperate with an official investigation or assessment of the child protective coordinator into suspected child abuse until her union representative was present. Because respondent did not have a reasonable basis to believe that the interview could result in disciplinary measures, her refusal to speak to the child protective coordinator constituted misconduct.

5. On December 1, 2008, later in the day, respondent also refused to provide information about the incident and its aftermath to her supervisor and her director until her union representative

> was present. Because this attempted interview was focused upon respondent, rather than the incident, respondent had a reasonable basis to believe her participation in it could result in discipline, and hence her refusal to cooperate was not misconduct.

Thus, charge three is not sustained. Charge two, insubordination, and charge one, refusal to cooperate with an investigation, is sustained only as to respondent's refusal to speak to Ms. Rubin.

RECOMMENDATION

Having made these findings, I requested and received a personnel abstract. It indicates that respondent has been an employee for almost 29 years, since July 1981. She has no previous history of formal discipline.[5]

Petitioner seeks a recommendation of termination. This penalty is excessive and disproportionate to the misconduct, which, while serious in nature, consisted only of respondent's refusal to speak to Ms. Rubin, the hospital's child protection coordinator, about the suspected child abuse, unless her union representative was present. As set forth above, the charges that respondent failed to report suspected child abuse or maltreatment and provided false and misleading responses during questioning were not sustained. Respondent was wrong in refusing to speak to Ms. Rubin, who needed to assess the situation in order to decide whether the incident was reportable to ACS. She would have liked to have heard from respondent about what she saw prior to speaking to the family. She needed to talk to the family quickly, before they left the hospital. However, respondent had had minimal training in the reporting of child abuse. She is a clerical associate, not a mandated child abuse reporter.

To her credit, very shortly after the incident, respondent told her supervisor, Ms. Espada, what she had witnessed. She also believed, not unreasonably, that Mr. Khan was present at the scene and saw the child being pushed or struck. Respondent may have been more cooperative had Ms. Rubin, or even someone from her staff, visited her in person to interview her. This visit could even have taken place after the unsuccessful telephone call. As it was, Ms. Rubin

[5] Her one instance of informal discipline was a counseling for excessive lateness, in August 1993. While not discipline, she was terminated in November 1993 as an office associate during her probationary period, and returned to her permanent office aide title. Petitioner has not referenced any other informal discipline since 1993.

concluded the phone call by saying respondent's request to speak to her union representative was unacceptable. She made no further attempts to speak to respondent. Her impatience was understandable, given the urgency to speak to the family before they left the hospital, but it did not inspire confidence in respondent nor ease her fear or anxiety about what might transpire. It remains a mystery why someone from the union was not contacted immediately and did not appear to assist in the situation.

Moreover, it appears that this was a one-time incident which will not reoccur, as respondent, as a result of this trial, now fully understands that she is obligated to cooperate with any investigation into suspected child abuse at the hospital.

Considering all the above, I recommend that respondent be suspended for 30 days, with credit for time served, and that she receive follow-up training on the reporting of suspected child abuse.

Faye Lewis
Administrative Law Judge

June 30, 2010

SUBMITTED TO:

MENDEL HAGLER
Executive Director

APPEARANCES:

MOIRA E. FITZGERALD, ESQ.
Representative for Petitioner

DRUYAN & ASSOCIATES
Attorneys for Respondent
BY: MARTIN DRUYAN, ESQ.

Hospital Decision (October 28, 2010)

Gouverneur
Healthcare Services

Dear Respondent:

As the designee of Mendel Hagler, Executive Director of Gouverneur Skilled Nursing Facility, I am in receipt of Judge Faye Lewis' Report and Recommendation regarding respondent's Administrative Hearing. I have reviewed the entire record, including the letter that was submitted by respondent's attorney pursuant to *Fogel v. Board of Education*. Based on this review, I agree with Judge Lewis that respondent was insubordinate when she refused to cooperate with an official investigation concerning an incident of suspected child abuse that she witnessed. However, I disagree with Judge Lewis' recommended dismissal of the charge that respondent failed to report said incident. In this regard, while I do not disagree with Judge Lewis' findings of credibility, I disagree with both her assessment of the credible facts and her reasoning. In addition to the aforementioned, I disagree with Judge Lewis' recommended penalty. Therefore, after careful consideration, I am modifying the thirty day suspension without pay recommended by Judge Lewis for the reasons set forth below.

The disciplinary charges against respondent concern an incident that occurred on December 1, 2008. On that date, it is undisputed that while on duty in the Registration Department, respondent witnessed a mother hit her child so hard that he fell backwards and into the wall of respondent's cubicle. The evidence presented at trial unequivocally established that a Gouverneur employee is required to contact Hospital Police, his or her supervisor or a social worker upon witnessing an incident of domestic violence. Despite the aforementioned, respondent returned to her duties and did not notify anyone of what she had witnessed. Indeed, respondent did not disclose that she had observed a mother strike her child until she was approached and questioned, about ten minutes after the incident, by your immediate supervisor, Ana Espada.

However, notwithstanding the above facts, Judge Lewis recommends the dismissal of the charge that respondent failed to report the incident of suspected child abuse. In support of her position, Judge Lewis sets forth that by ultimately advising Ms. Espada of what respondent had witnessed, she reported the incident as required. I disagree with Judge Lewis' assessment. Specifically, on cross-examination, respondent agreed that it was important for the requisite authorities to be advised of had happened as soon as possible in order to address the situation. Yet she did nothing. Respondent did not notify the Hospital Police, she did not seek out one of her supervisors nor did she contact a social worker. Indeed, it was only after Ms. Espada inquired as to why respondent was upset, almost ten minutes after the incident, that she disclosed what she had seen. Precious time may have been lost. Moreover, respondent later stated in a telephone conversation with Sara Rubin, a licensed Social Worker and Gouverneur's Child Protection Coordinator, that respondent did not want to be involved in the matter when she sought to question respondent about the incident. In combination, these facts demonstrate that

respondent had absolutely no intention of reporting what she had witnessed and would not have done so had she not been approached by a concerned supervisor and prompted to relate what she had witnessed. As such, I find that the charge that respondent failed to report the incident was substantiated.

While Judge Lewis relies on respondent's disclosure to Ms. Espada in recommending the dismissal of the above charges, she references the presence of another supervisor, Mujeeb Khan, in the area at the time of the incident to further support her position. Specifically, Judge Lewis notes that, "it was reasonable for respondent to believe that her supervisor, Mr. Khan, also saw what had occurred." Unlike Judge Lewis, I find Mr. Khan's presence to be irrelevant. Indeed, Judge Lewis acknowledges that an employee is required to contact Hospital Police or "consult with" his or her supervisor or a social worker if he or she witnesses an incident of domestic violence. Yet Judge Lewis did not credit as fact respondent's testimony that she spoke with Mr. Khan after the incident. Furthermore, by failing to "consult with" Mr. Khan about what respondent observed, regardless about what he may have witnessed, respondent did not satisfy her obligation as a Gouverneur employee.

In addition to the above, respondent was also charged with refusing to cooperate with an official investigation and insubordination. After respondent ultimately disclosed what she had observed to Ms. Espada, she testified that she began to make a series of phone calls, first to track down the mother and her child, and then to provide the requisite authorities with information as to what had occurred. Thereafter, Ms. Espada received a telephone call from Ms. Rubin who advised her that she needed to speak with the staff member who had witnessed the incident in order to assess the danger to the child involved and to ascertain whether she was required to report the incident to the Administration for Children's Services. It is undisputed that respondent refused to speak with Ms. Rubin about the incident. However, respondent contends that her failure to cooperate with Ms. Rubin's investigation doers not constitute misconduct because respondent had the right to demand the presence of a union representative before speaking with her. Judge Lewis dismissed this defense and held that respondent's refusal was insubordinate.

In so holding, Judge Lewis sets forth that an employee may only refuse to submit to an employer interview without the presence of a union representative if the employee reasonably believes that the interview could result in disciplinary measures. I agree with Judge Lewis' assessment that it was unreasonable for respondent to believe that the phone conversation with Ms. Rubin would lead to discipline. In fact, Judge Lewis held that the record was devoid of any evidence to suggest that respondent would have been subject to discipline had she told Ms. Rubin what she had witnessed.

In particular, Judge Lewis credited the testimony of both Ms. Espada and Ms. Rubin that Ms. Rubin identified herself as Gouverneur's Child Protection Coordinator and that as such, respondent knew the purpose for which she was calling and that the purpose was purely investigatory. Specifically, Judge Lewis notes that Ms. Rubin, who was not respondent's supervisor, needed to assess the situation in order to determine what action needed to be taken. This required that she speak to respondent, as a witness, and the family. As such, time was of the essence. In particular, Ms. Rubin testified that she needed an accurate eyewitness account of

the incident before approaching the family and that it was urgent that she speak with the family prior to their departure from the facility. However, despite the severity of the situation, Judge Lewis credited the testimony of Ms. Rubin that respondent advised her that she simply did not want to get involved in the matter and refused to speak with her further. Your refusal to provide Ms. Rubin with the requested information is inexcusable.

Judge Lewis found that respondent's conduct on December 1, 2008 was serious in nature. I agree. However, in support of her recommendation of a penalty less than termination, Judge Lewis notes respondent received minimal training concerning the obligation to report any incident of domestic violence and that "it appears that this was a one-time incident which will not reoccur" and that following the hearing respondent understands that she is "obliged to cooperate with any investigation into suspected child abuse at the hospital." I disagree.

Termination is the only appropriate penalty for respondent's misconduct. The record clearly establishes that respondent received training each year, for at least five years preceding the incident, regarding her obligation to report an incident of domestic violence. Moreover, respondent's testimony and that of Ms. Rubin demonstrated that respondent was aware of the obligation, but simply chose not to get involved. Consequently, respondent's conduct showed a callous disregard for the welfare of a child and her responsibilities as a Gouverneur and HHC employee. The primary mission of any HHC employee is to ensure the health and safety of HHC's patients. Ignoring this responsibility constitutes a serious breach. Respondent's failure to report the incident and her subsequent refusal to provide details about what she witnessed impeded Ms. Rubin from doing her job and placed a child at risk of further abuse by delaying intervention. Respondent's behavior was not only selfish and inexcusable; it established that Gouverneur cannot trust that she will carry out its mission.

Thus, based on the foregoing and the testimony and evidence produced at trial, respondent's actions on December 1, 2008, amount to serious misconduct and termination is the only appropriate penalty. Consequently, I hereby modify Judge Lewis' recommendation of the penalty of a thirty day suspension to that of termination of respondent's services as Secretary, effective close of business October 28, 2010.

Sincerely,

Howard Kritz
Sr. Associate Executive Director
Human Resources

c: Moira Fitzgerald, Esq.
Martin Druyan, Esq.
OATH
Personnel
Payroll
TKID# 000009285

Personnel Review Board Decision (May 24, 2011)

PERSONNEL REVIEW BOARD
THE NEW YORK CITY HEALTH AND
HOSPITALS CORPORATION
----------x

DECISION NO.: 1404

In the Matter of the Appeal of

Karen Jones
Clerical Associate

DATE: May 24, 2011

Gouverneur Healthcare Services

DOCKET NO.: PRB No. 3074/10

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CIRCUMSTANCES

Karen Jones (the Appellant), a Clerical Associate at Gouverneur Healthcare Services, was charged with misconduct. Pursuant to Corporation Personnel Rule 75, a two-day disciplinary hearing at the Office of Administrative Trials and Hearings (the OATH Hearing) was held before Administrative Law Judge Faye Lewis (the ALJ), who considered three charges against the Appellant. On June 30, 2010, the ALJ sustained charges one and two in part, dismissed the third charge, and recommended that the Appellant be suspended for 30 days with credit for time served.

On October 28, 2010, Howard Krilz, the Senior Associate Executive Director of Human Resources at Gouverneur Healthcare Services, rejected the ALJ's

recommendations and findings and directed that the Appellant be terminated effective that same day of October 28, 2010.

The Appellant appealed this termination to the Personnel Review Board (the Board) and a hearing was held on April 6, 201 1 with due notice to counsel for Appellant and to the Corporation. On that date Moira Fitzgerald, Esq. appeared on behalf of the Corporation and Martin Druyan, Esq. appeared on behalf of the Appellant.

FINDINGS AND ANALYSIS

The charges against the Appellant were as follows:

Charge # 1:
That the Appellant refused to cooperate with an official investigation and provide information necessary for an incident report.

Charge # 2:
That she was insubordinate for failing to comply with a directive to provide information concerning a patient.

Charge # 3, Specification # 1:
That she failed to report suspected child abuse or mistreatment.

Charge # 3, Specification # 2:
That she provided false and misleading responses when questioned during an investigation into suspected abuse.

The charges stemmed from an incident which occurred around 10:30 am. on December 1, 2008, while the Appellant was registering a baby that been brought in by his mother. The mother also had another child with her, an eight-year old boy with whom the mother became impatient, at which point she pushed or hit him so hard that he fell over backwards. A director of the Appellant, Mr. Mujeeb Khan, was also in

the general area. Mr. Khan walked over after the boy fell, picked up the boy's book bag, handed it to him, and then left the area.

The Appellant did not report this incident until several minutes after it occurred, when her immediate supervisor Ms. Ana Espada noticed she was upset and asked her what had occurred. After describing the incident the Appellant was called into an office by Ms. Espada and was requested to speak over the telephone with the Gouverneur Child Protection Coordinator, Ms. Sara Rubln, At this point the Appellant informed Ms. Espada that she would only continue speaking within the presence of her union representative.

Later that same day, around 3:00 or 3:30 pm, Ms. Espada and Mr. Khan summoned the Appellant into an office again. For a second time, the Appellant reiterated her request for a union representative, Mr. Khan then telephoned the union representative for Gouverneur, Mr. Derek Davis, but Mr. Davis stated that the earliest he could come was in three days. The Appellant declined to provide any further statement and was not at work over the next several days. As soon as she returned to work she was suspended.

At the two-day OATH Hearing the AW heard testimony from the Appellant, Ms. Espada, Mr. Khan and Ms. Rubin. The ALJ also considered two memoranda submitted by the Appellant, an e-mail to Ms. Rubin from the Gouverneur Director of Security for Hospital Police, and numerous other exhibits.

The ALJ then sustained Charge #1 (refusal to cooperate with an investigation) and Charge #2 (insubordination) but only as to the Appellant's refusal to speak with Ms.

Rubin, the Child Protection Coordinator. The ALJ did not sustain either Specification of Charge #3 (Failure to report child abuse, and the submission of false or misleading responses), In making these findings, the ALJ noted that the Appellant "did tell a supervisor of suspected child abuse" and that her request for a union representative "Is not tantamount to providing false and misleading responses."

The ALJ then considered the penalty of termination which the Corporation was seeking, The ALJ found termination to be excessive and disproportionate to the misconduct. In reaching this finding, the ALJ noted that the Appellant had been an employee for almost 29 years, since July 1981, and had no previous history of formal discipline. Taking all of this into consideration, the ALJ recommended that he Appellant be suspended for 30 days, with credit for time served.

After careful consideration of the OATH Hearing transcript, the ALJ's recommendation, the testimony before this Board, and the Appellant's 29-year employment and disciplinary history, this Board upholds the ALJ's findings and conclusions as well as the Initial recommendation that the Appellant be suspended for 30 days, with credit for time served.

BOARD'S DECISION

Therefore, the Board upholds the ALJ's initial recommendation that the Appellant be suspended for 30 days, with credit for time served.

Gayle A. Gavin
Chair

Nelson A. Denis
Board Member

Pamela G. Ostrager
Board Member

c: Ann Rozakis, AVP, Labor Relations, NYCHHC
Moira Fitzgerald, Esq., Labor Relations, NYCHHC
Martin Druyan, Esq., Attorney for Appellant
Yvette Villanueva, Sr. AED, Human Resources, Woodhull Hospital Center