Dep't of Correction v. Callabrass

OATH Index No. 1981/10 (July 23, 2010), *adopted in part, rejected in part*, Comm'r Dec. (Dec. 1, 2010), ***appended,*** *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 11-81-M (Oct. 31, 2011), ***appended***

Officer was charged with disobeying an order to take a post assignment, threatening to feign illness to avoid that assignment, abandoning her post, and making a false logbook entry. ALJ sustains false entry and unbecoming conduct for threat to feign illness and recommends five-day suspension. Remaining charges are dismissed.

Commissioner found that the charges of disobeying an order and abandoning post were sustained as well as the false entry and unbecoming conduct; penalty modified to 40 days suspension.

CSC agreed with the Commissioner's findings and conclusions but found that the officer's clean disciplinary record and 19-year tenure should mitigate the penalty to a greater degree; penalty modified to 30 days suspension.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
REGINA CALLABRASS
Respondent

REPORT AND RECOMMENDATION

TYNIA D. RICHARD, *Administrative Law Judge*

This disciplinary proceeding was referred by petitioner, the Department of Correction (the "Department"), pursuant to section 75 of the Civil Service Law. Petitioner alleges that Correction Officer Regina Callabrass disobeyed an order to take her assigned post and threatened to feign illness, abandoned her post, and made a false entry in a logbook. Respondent denies the allegations.

The hearing was conducted before me on May 10 and 11, 2010. Petitioner presented eight Department witnesses. Respondent testified on her own behalf and presented two

witnesses. At petitioner's request, the record remained open until May 25, 2010, so that counsel could supply written post-trial submissions.

For the reasons set forth below, I find that petitioner established that respondent made a false or misleading logbook entry and engaged in unbecoming conduct for feigning illness to avoid a work assignment for which I recommend five days' suspension.

ANALYSIS

Regina Callabrass is a correction officer assigned to the Queens Detention Center ("QDC") at the time of the incidents alleged. Petitioner alleges that she abandoned her assigned post in the Queens Central Booking area on November 3, 2009, and submitted a false and misleading report concerning the fact that she was off post (ALJ Ex. 2). Petitioner also alleges that respondent disobeyed a direct order to take a post assignment on November 11, 2009, and threatened to feign illness to avoid going on the assignment (ALJ Ex. 1).

B0549/2009

Abandonment of post

It is not contested that respondent was off post on November 3, 2009, when Captain Muhammad saw her walk past him on the second floor annex at QDC (Tr. 119). Respondent was working the midnight tour (2300 hours to 0731 hours) assigned to the Queens Central Booking ("QCB") desk, where she was the B officer and Officer Woodley was the A officer (Tr. 171). Prisoners are brought by NYPD to QDC for pre-arraignment booking, fingerprinting and pictures and then placed in the custody of the Department of Correction where they are searched and placed in holding pens according to gender and type of crime (Tr. 115-16, 295). The first post the prisoners pass through is the QCB area. Two officers are required to be posted at the QCB desk (Tr. 116).

Respondent testified that shortly before the end of her tour she left her post to go to the rest room. She went to the rest room in the Intake area, which was her steady post, because she needed personal hygiene items that were stored there inside her locker (Tr. 296-97). Her testimony was not contradicted. She admitted there were female rest rooms on the same floor as the QCB desk where she was posted, but she said they did not have the items she needed. She had to go upstairs to reach the rest room in the Intake area, and she passed Captain Muhammad

on the way (Tr. 295-96, 298). Neither of them spoke. She denied cursing at him. The record indicated that respondent was away from her post for approximately seven minutes (Pet. Ex. 7).

Captain Muhammad testified that officers must notify a supervisor whenever they leave post, including when going to the rest room (Tr. 118). Respondent is charged with failing to do so (ALJ Ex. 2). The General Rules and Regulations provide that "Members of the Department shall not leave their post or place of assignment without the permission of a superior." §3.05.130.

Captain Muhammad described this brief encounter with respondent:

> she looked at me and walked right past me. She got no authorization from me. She should have spoken to me at least, to let me know what the situation was.

(Tr. 124). He testified that he watched respondent walk past him, then "immediately" called Officer Woodley on the QDC desk post to inquire whether she had signed out in the logbook and the officer said she had not (Tr. 123). The captain hung up the phone and proceeded to the control room. He then "had an afterthought" (Tr. 124). He called Officer Edwards, who was assigned to the QDC entrance gate post, and ordered him to secure his post, go to the QDC desk to retrieve the post logbook, and bring it to him in the control room. After waiting for some time, the captain went downstairs to the post himself and inspected the post logbook. Respondent had not signed out to go to the rest room. He made an entry (at 0645 hours) indicating that she had left her post without authorization (Tr. 124-25, Pet. Ex. 7). He went back to the control room and contacted Officer Edwards.[1] On the way there, Officer Edwards was delayed by respondent.

There was no evidence that respondent left her post unsecured or that her conduct jeopardized the security of the facility, as Officer Woodley remained on post for the seven minutes respondent was away. Respondent testified that, although prisoners were processed through her post, there was no movement of prisoners at that time, because the tour was ending and the force was awaiting relief from the oncoming tour (Tr. 123, 297, 337). This was confirmed by others, including Captain Muhammad (Tr. 139, 157).

In defense, respondent asserts that the Department condoned her conduct because officers were generally not required to sign out or seek authorization to go to the rest room (Tr. 26).

[1] The captain here repeats his testimony about having the "afterthought" that led him to order Officer Edwards to bring him the logbook (Tr. 125). It appears to be a repeat of his earlier testimony, so the actual sequence of events intended by the captain is unclear.

Respondent testified that she never signed off-post or sought a supervisor's authorization to go to the bathroom and had never seen other officers do so (Tr. 301). Several officers testified they did not always sign out to go to the rest room (Tr. 233, 265). Officer Peele indicated it would be unusual for an officer to call a captain to report a trip to the rest room (Tr. 238). Officer Woodley, for whom the QCB desk is a steady post, said he usually does not sign out because the men's room is so close – directly across from the desk. He does sign out if he goes upstairs which he said is outside of the area (Tr. 171-72). Even Captain Muhammad conceded that officers do not sign out when they visit the rest room directly across from the desk, noting that the officer would be "in earshot" of the post in case something happened (Tr. 118). Several witnesses testified that the rest room nearest to the QCB desk was for men only (Tr. 171, 233, 251, 296), which the captain disputed (Tr. 117).

The record did not establish the defense of condonation and waiver. Under the doctrine, an agency may not lead its employees into believing that their conduct will not be considered in violation of a rule and then reverse course and have the employee disciplined. *See Dep't of Correction v. Johnson*, OATH Index No. 514/02 at 13 (May 30, 2002), *modified on penalty*, Comm'r Dec. (July 17, 2002) (agency, which explicitly told or led respondent to believe that he was on retirement status and not required to report to work, could not sustain charge of AWOL); *Law Dep't v. Coachman*, OATH Index No. 1370/00 at 8 (June 13, 2000), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD01-13-SA (Apr. 11, 2001) (employer had allowed employee to rely upon an assumption that properly submitted leave forms would be granted without awaiting notification). That is, the defense requires a showing that there is an existing agency practice of being allowed to take bathroom breaks without authorization. *See Dep't of Parks and Recreation v. Wilson*, OATH Index No. 398/91 (May 3, 1991). Though the record contained evidence that officers did not always sign the logbook or obtain personal authorization from a supervisor to go to the rest room, the evidence did not establish by a preponderance that the omission was permitted by the agency's supervisory personnel. It could have simply happened that the officers who did so were not caught in the act. While it is reasonable to conclude that an agency cannot efficiently function by requiring supervisory input on all bathroom breaks, the evidence that the agency condoned the conduct was insufficient.

Resolution of these charges must include a determination of the credibility of the witnesses. In making a credibility determination, the tribunal looks to "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. 4, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998).

Respondent contends that Captain Muhammad has a bias against her because she spurned his romantic advances in the distant past. She testified about an EEO complaint she filed against Captain Muhammad on March 28, 2001, after he began to express an interest in dating her, called her at home, and made personal comments to her at work that she found offensive (Tr. 282-87). In the EEO complaint, she detailed instances of harassment that included excessive criticism of her work and demeaning her in front of colleagues (Resp. Ex. A). On April 2, 2001, Captain Muhammad filed disciplinary charges against her alleging that she left her post without permission, was disrespectful, and failed to salute her superior officer (Pet. Ex. 17). The charges were dismissed (Tr. 286). Respondent was never interviewed regarding her EEO complaint and it was not substantiated by the Department (Pet. Ex. 15, Tr. 287). Nevertheless, after she filed the complaint, Captain Muhammad was transferred to a different facility and they did not work together again until 2007 (Tr. 291-92). When she started at QDC, Captain Muhammad gave her instructions that made her uncomfortable, such as demanding that she call him each time she reported to work because he did not hold roll call (Tr. 293). She told him she would but did not do so. Since the filing of these charges, respondent has been transferred to another facility.

Captain Muhammad testified that he worked with respondent in and around 2001 and 2002, and has had a purely professional relationship with her (Tr. 102-04). He admitted preferring charges against her during that time and claimed not to know the outcome of the charges. He did recall that her EEO complaint was not substantiated and he recalled being transferred after the EEO complaint. He said he has worked with respondent for six or seven years and has not preferred charges against her since then (Tr. 105), although the number of years was not confirmed by the record. Respondent indicated they next began to work together when she was returned to QDC in December 2007, two years before the current charges were preferred (Tr. 280).

Respondent's history with Captain Muhammad invites a query into motivation in a review of the credibility of these witnesses. Captain Muhammad's credibility suffered as a result of what appeared to be contradictory and embellished testimony. Although he testified on direct

that respondent walked past without speaking to him, on cross examination he claimed that she cursed at him:

> As a matter of fact, when I went to say something to her, she looked me up and down, sucked her teeth and walked off. Then when she made the right turn, I didn't put this in my report, you know, she made profane statements, this is just M and F and BS, and then she kept going about her way. That was it.

(Tr. 134-35). He did not offer a motive for respondent to exhibit such aggression. Compare this testimony to his earlier testimony that she looked at him and walked right past him without a word (Tr. 124), which also seemed to offend him. The captain offered no response to this alleged disrespect (no verbal rebuke and no written report of the incident), which sharply contrasted to his excessively vigilant response to her seven-minute bathroom break. Concluding that it would be completely out of character for a supervisor who had bothered to charge this officer with a seven-minute off-post violation to forbear charging her for cursing and berating him, I found this testimony, belatedly offered on cross examination, lacking in credibility and disregarded it. *See Dep't of Correction v. Fulmore*, OATH Index No. 757/06 at 9 (Mar. 27, 2006) (refusal to credit captain's claims due to evident bias, lack of candor and contradictory statements).

It is well established that in order to sanction civil service employees for misconduct under section 75 of the Civil Service Law, there must be some showing of fault on the employee's part, either that he acted willfully or intentionally, *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, *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. *See Ryan v. New York State Liquor Auth*., 273 A.D. 576 (3d Dep't 1948); *Dep't of Correction v. Messina*, OATH Index No. 738/92 (July 9, 1992). Nor is strict liability a basis for finding misconduct in a disciplinary context. *See Dep't of Sanitation v. Burns*, OATH Index No. 1322/01 (June 15, 2001).

This tribunal has dismissed misconduct charges in marginal situations where there is de minimis impact or offense. *See, e.g., Dep't of Transportation v. Coppola*, OATH Index No. 1566/03 at 13 (June 30, 2003) (brief stop at the ATM did not constitute supervisory misconduct because of its de minimis impact on pothole repair crew's work); *Dep't of Sanitation v.*

Palmisano, OATH Index No. 2032/01 (Mar. 14, 2002) (respondent's absence was justified by the need to use the bathroom and the 10-minute portion of the absence that could not be accounted for was insufficient to warrant a finding of misconduct); *Transit Auth. v. Nixon*, OATH Index No. 2131/96 (Mar. 31, 1997), *modified on penalty*, Auth. Dec. (May 16, 1997). *Cf. Dep't of Correction v. Camille*, OATH Index No. 985/04 at 5 (Sept. 20, 2004) (officer's departure from fuel pump post without being relieved did not violate Department rule 3.05.130 where the safety of inmates or the facility was not involved).

In *Nixon*, respondent was not guilty of misconduct where she admittedly left her post to eat soup before her scheduled lunch hour but when confronted by her supervisor immediately returned to the office and resumed work. The tribunal found the conduct too "trivial" to warrant formal discipline. OATH Index No. 2131/96 at 21. In *Nixon*, the supervisor stepped in and issued an instruction that caused the employee to immediately correct her behavior. *Id*. Here, rather than instructing respondent to correct her conduct and return to her post, Captain Muhammad allowed her to walk past him and then expended time and effort by going to her post to make a logbook entry about her absence and ordering additional personnel to shut down his post in order to retrieve her logbook. (What this second retrieval was intended to achieve, after the captain had already made the entry noting she was off-post, was not made clear.) Such extravagant effort expended to document such a marginal offense leads one to conclude that Captain Muhammad harbored a deep dislike for this officer. Captain Muhammad claims his concerns were for the security of the agency but he described no particular security concern, and this contention was belied by his conduct: he stood by as he watched respondent walk by him on her way to the rest room without posing a single inquiry or making an objection, and he took Officer Edwards off of the entrance gate post, apparently without supplying a relief officer. The fact that he directed Officer Edwards to leave his post supports respondent's claim that there was no prisoner movement at the time.

On the other hand, respondent's motives seemed clear cut. Her testimony that she left her post solely for purposes of going to the rest room was uncontroverted. No evidence has been presented that respondent's failure to sign out or receive permission had any detrimental effect on the Department. There was no indication that she went to an unauthorized area of the facility, that she was frequently off-post, that her time was frequently unaccounted for, or that the security of her post was compromised. The sole basis for this allegation of misconduct is her

absence from her post for a seven-minute bathroom break without obtaining permission. I find her conduct to be a de minimis violation of the rules and insufficient to warrant a sanction.

False logbook entry

Respondent is charged with submitting a false, misleading and incomplete report after being caught off-post, as described above. Petitioner's counsel explained at the hearing that this charge involves a logbook entry, rather than a report (Tr. 24).

Again, to prove misconduct petitioner must show intent. "Where disciplinary charges attach to a variance between statements which are mandated by the employer, it is logical that only intentional falsehoods rise to the level of misconduct." *Dep't of Correction v. Maldonado*, OATH Index No. 1373/99 (Oct. 14, 1999), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD00-87-M (Aug. 7, 2000); *Dep't of Correction v. Biland*, OATH Index Nos. 569-70/89 (Mar. 6, 1990) (finding of misconduct for false statement requires showing some degree of fault).

Respondent testified that, on her way back from the rest room, she saw Captain Muhammad who asked her for a report as to why she was off her post (Tr. 299). She retrieved a 600 A/R from the control room and returned to see Officer Edwards exit the elevator with her post logbook. Officer Edwards was bringing it upstairs pursuant to the captain's request and encountered respondent who appeared to be en route to her post (Tr. 156). She asked if it was her logbook and, according to Edwards, when he answered yes, she grabbed the logbook from him and began writing an entry (Tr. 151). The entry states "C.O. Callabrass return to post" (Pet. Ex. 7).

Captain Muhammad arrived and saw respondent kneeling on the floor with the logbook on her lap signing it (Tr. 126-27). He said he asked her for the book and she gave it to him. Officer Edwards said that Captain Muhammad saw them but did not approach them and that he gave the logbook to the captain (Tr. 153).[2]

Respondent denied that she snatched the logbook but admitted making the entry as she stood outside the elevator bank on the second floor (Tr. 299-300). It was not disputed that she was not on post at the time she wrote the entry. She said she signed it because the logbook would not have been at her post when she returned, since it was on its way to the control room

[2] After respondent signed the logbook, the captain took it to the control room and had it time-stamped "0652" hours (Tr. 127). The captain made no entry indicating the logbook was moved off-post to accommodate this errand (Tr. 185-86).

pursuant to the captain's request. While true that the logbook would not have been at her post when she returned, and it is understandable that respondent would want to note for the record in a timely way that she was returning to her post, the entry does not convey that. It states that she has returned to post, which was untrue.

Petitioner contends that the entry is false and misleading because respondent had not in fact returned to post. I agree that respondent's logbook entry is false and misleading for this reason. Thus, petitioner sustained this specification.

B0548/2009

Disobeying order to take assigned post

Respondent is charged with disobeying an order to go on a hospital run, threatening to feign illness, and loudly stating she would "bang in" sick to avoid going on the assignment (ALJ Ex. 1).

November 11, 2009 was Veteran's Day and a court holiday (Tr. 37, 42, 319-20). Respondent was scheduled to work but her assigned post was closed that day due to the court holiday. She was therefore considered an "extra" or "miscellaneous officer" who would be assigned as needed to fill gaps in the assignment roster. Captain Sherman, who worked the tour preceding respondent's, scheduled her to go on the hospital run along with Officer Bush (Pet. Ex. 3 at 2). Captain Cohen took Captain Sherman's post on the next tour when respondent reported for duty.

Captain Cohen was in charge of admissions and the control room, and he conducted roll call (Tr. 56-57). Captain Muhammad was the operations captain and tour commander (Tr. 34, 47). Captain Cohen reviewed the schedule when he arrived on tour and reassigned the hospital run to Officers Bush and Woodley (Tr. 57-58). He talked to respondent before he did so but was vague about their conversation. When Officer Woodley learned of the assignment, he went to Captain Cohen and told him he was tired from two straight doubles (16-hour shifts conducted on two consecutive days) and he did not want to go (Tr. 59, 167-68). Shortly thereafter, Captain Cohen saw Captain Muhammad who told him to send respondent on the hospital run instead of Woodley because she was the extra officer and Woodley, a steady officer, should remain in his steady post (Tr. 63, 108).

When Captain Cohen conducted roll call at 2300 hours, he assigned respondent to the hospital run (Tr. 64). Either during or immediately after roll call, respondent approached him and said, "If I have to go out to the hospital, then I'm sick, and I want to see the O.D." (Tr. 64-

65, 110, 191, Pet. Ex. 6). He said she was upset and loud. This was corroborated by Officers Ricci, Bush, and Vaca who heard respondent state that she would go out sick (Pet. Exs. 11, 12, & 13). All of the officers who reported the incident heard her ask for the O.D. (Pet. Exs. 9, 11, 12 & 13). The O.D., or Officer of the Day, is the title given the ranking officer in the facility that day, normally a deputy warden (Tr. 48).

Captain Cohen sent Officer Vaca on the hospital run instead of respondent, and he assigned her to Officer Vaca's post (Tr. 65). Respondent at no time evidenced illness that day nor did she take sick leave ("bang in").

Respondent testified that she was surprised that Captain Cohen assigned her to the hospital run at roll call and that she asked for the O.D. because the assignment was unfair and she needed to speak to the captain's boss (Tr. 308). As respondent continued to ask for the O.D., Captain Cohen began to ask other officers to take the hospital run (Tr. 309). Respondent denied stating that she would "bang in" if given this assignment. She claimed that Captain Cohen told Captain Muhammad that she would "bang in" if he did not change her post, which was the first time she heard the term used during the incident (Tr. 310). She admitted telling Captain Cohen "don't worry about it, Captain Cohen, I could go home. I know how to go home" and said the captain assured her it was "taken care of" (Tr. 310). She denied being given an order to go on the hospital run (Tr. 312).

The O.D. is generally contacted when significant events arise, such as an escape, erroneous discharge, or death (Tr. 50). It is not disputed that it would violate the chain of command for an officer to call the O.D. and that it is not done. Although respondent asked for someone to contact the O.D. on her behalf, I credited the testimony of petitioner's witnesses who said that a minor scheduling dispute such as this was not the sort of matter that an O.D. would be called upon to address (Tr. 50, 93, 110).

Captain Cohen believed that he issued respondent an order by virtue of assigning her the post, that is, by calling her name at roll call (Tr. 89-90). Captain Muhammad agreed (Tr. 107). According to Captain Cohen, once respondent protested the assignment and asked to speak to the O.D., he said nothing else to her about the post assignment (Tr. 89-91). He did not tell her a second time to take the post.

It is well-established that an employee is obligated to obey the lawful order of a supervisor and, if she disagrees with it or feels it to be improper, to grieve it at a later time through appropriate channels, the rule known as "obey now, grieve later." *Ferreri v. New York*

State Thruway Auth., 62 N.Y.2d 855 (1984); *Strokes v. City of Albany*, 101 A.D.2d 944 (3d Dep't 1984); *Health and Hospitals Corp. (Kings County Hospital Ctr.) v. Gordon*, OATH Index No. 1843/98 (Nov. 2, 1998). There are a few narrowly-applied exceptions to the rule, which are not relevant here. Respondent is charged with insubordination for refusing a "direct order" to take a hospital run assignment.

To prove insubordination, petitioner must establish that an unambiguous order was communicated to respondent and that she willfully refused to obey. *Health & Hospitals Corp. (Bellevue Hospital Ctr.) v. Tanvir*, OATH Index No. 797/10 at 5 (Dec. 17, 2009). Insubordination is not limited to defiant refusals; it also includes a passive but deliberate failure to comply, which can be inferred from circumstantial evidence. *See Health & Hospitals Corp. (Central Office) v. Jimoh*, OATH Index No. 979/06 at 3-4 (Apr. 10, 2006) (employee's passive resistance to moving his office by not packing or making preparation to move was insubordination).

An order need not be in the form of a demand as long as it is a clear request. *See Dep't of Correction v. Graham*, OATH Index No. 1380/03 at 17 (Feb. 25, 2004), *modified on penalty*, Comm'r Dec. (Aug. 6, 2004), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD07-83-M (July 27, 2007) (supervisor's repeated request that officer "do me a favor" and move the SRG board constituted an order as supervisor's desire that the board be moved was clear and unambiguous); *Dep't of Environmental Protection v. Schnell*, OATH Index No. 2262/00 (Oct. 25, 2000) (respondent's claim that he was under no obligation to comply with order to turn off tape recorder because his supervisor did not use the words "direct order" was bogus); *Human Resources Admin. v. Aguirre*, OATH Index. No. 1734/00 (Sept. 14, 2000) (supervisor's statement to employee to "do what you have to do" in response to respondent's statement that she was not feeling well and was going home, was ambiguous enough to have reasonably been interpreted as authorization for her departure). There is no dispute that respondent refused the hospital run assignment. The question is whether an order was given.

In this case, Captain Cohen's request for respondent to take the hospital run assignment was clear, but his intent was not unambiguous. Contrary to his testimony that he believed he was issuing an order, none of Captain Cohen's words or actions after roll call suggested he had given her an order. In his own account, Captain Cohen merely called her name at roll call once, issuing the assignment, and once she objected, he never asked her a second time nor did he restate the fact that she was assigned. Instead, he began looking for someone else to take the

assignment. The record failed to show that an order was communicated. Holding otherwise, on this set of facts, would be tantamount to finding that all roll call assignments are automatically deemed orders, which has never been held in this tribunal. *See, e.g., Dep't of Correction v. Buford*, OATH Index No. 388/02 (June 17, 2002), *aff'd*, Comm'r Dec. (Aug. 15, 2002), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD03-49-SA (June 12, 2003) (officer disobeyed order to take a post assigned during roll call when officer insisted on another assignment despite captain's second direction to take the post, then engaged in an argument with the supervisor and delayed taking the post for 30 minutes). Petitioner pointed to no Departmental rule classifying all roll call assignments as orders.[3]

Consider *Police Dep't v. McKeon*, OATH Index No. 736/90 at 27-28 (Mar. 29, 1990). In an encounter with his sergeant, a police officer refused to hand in his shield and ID where the sergeant (i) asked him to do it, (ii) then told him "I would still like to see your ID," and (iii) finally "ordered" him to do it. The tribunal found that respondent's refusals after the first two "requests" were insubordinate because the sergeant "conveyed a clear desire to obtain the respondent's shield and ID."

The same is true in *Department of Correction v. Velez*, where an officer was found insubordinate for refusing to take a mandatory overtime assignment. OATH Index No. 1655/02 (Dec. 3, 2002), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD05-34-SA (Aug. 11, 2005). There, the captain made three statements to the officer that demonstrated the requisite clarity of intent: the captain (i) advised him he was being assigned overtime, (ii) (after the officer said he could not stay) told him it was his turn to be stuck for overtime, and (iii) told him he would redirect the overtime assignment to another officer *if* Velez found someone who wanted it. The officer did not. *Id*. at 3 (emphasis added). All three communications from the captain, even without authoritative language such as "this is a direct order," reinforced the notion that Velez had to take the overtime. It was properly viewed by the tribunal as an order. Not so here. As soon as respondent objected to the roll call assignment, Captain Cohen turned his attention to reassigning the post to someone else. Thus, the captain failed to unambiguously communicate that the roll

[3] Despite the statement in its post-trial submission that all "[roll call] assignments are to be treated as orders," petitioner offered no Department rule or caselaw that supports the statement (Pet. Mem. at 4). The Health and Hospitals Corporation case it cites did not find that objection to a roll call assignment, by itself, constitutes insubordination. The facts of that case are quite different. At roll call, the hospital employee was ordered to produce his memo book and failed to do so; after making several inappropriate statements, he was told to step off the line, and he said "fuck that" and walked out; when ordered to return to roll call, the employee did not return. *Health and Hospitals Corp. (Woodhull Hospital Ctr.) v. Knight*, OATH Index No. 1368/03 at 2 (July 1, 2003). The actions in *Knight* are unquestionably insubordinate and have no correlation to the facts of this case.

call assignment constituted an order. A respondent who reasonably believes that he was not given an order is not guilty of misconduct, because his conduct lacks the intent to disobey an order. *Dep't of Environmental Protection v. Salinas*, OATH Index No. 1020/04 at 5 (Nov. 15, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-16-SA (Jan. 9, 2006). *See also Transit Auth. v. Wong*, OATH Index No. 1866/08 at 16-17 (Aug. 28, 2008) (supervisor who acquiesced to subordinate's request for a change in his schedule failed to communicate an unambiguous order).

Thus, I find that respondent did not refuse a lawful order.[4]

This specification includes the allegation that respondent threatened to feign illness.[5] I credited the evidence that respondent threatened to "bang in" sick if forced to go on the unwanted assignment, which was corroborated by the credible testimony of numerous uninterested witnesses and their contemporaneous reports. Even if I credited respondent's testimony that she stated, "I know how to go home," it would not have offered a meaningful distinction. It too would have been a threat to go home, and the only basis for going home would have been illness. I found her loud threat to "bang in" sick and insistence that the O.D. be called to be attempts to manipulate the captain into giving her a more desirable assignment (Tr. 329), and her actions were successful, perhaps because Captain Cohen was concerned about filling her post or forcing another officer to work overtime if respondent took sick leave (Pet. Ex. 6). As the "extra" officer on the tour, respondent had no reasonable expectation of receiving any particular assignment that day, and I found her claim of unfair treatment to be bogus and her objections to the assignment disruptive and unjustified.

It is well established that not every disagreement with a supervisor or expression of dissatisfaction is misconduct, even when voices are raised and emotions are vented. *Dep't of Correction v. Laboy*, OATH Index No. 783/96 (Aug. 12, 1996), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 00-90-M (Aug. 10, 2000); *Human Resources Admin. v. Bichai*, OATH Index No. 211/90 (Nov. 21, 1989), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD90-54 (June 15, 1990). Whether or not the behavior rises to the level of misconduct depends on the

[4] It bears mention that if respondent had been given an order, she would have had no justification for calling the O.D. to challenge such an order because she believed her assignment to be "unfair." The rule of "obey now, grieve later" bars any unreasonable delay of compliance with an order that is not "indisputably" beyond the authority of the supervisor to make. *See Ferreri*, 62 N.Y.2d at 856-57. The grievance process is expected to manage issues of fair distribution of work assignments.

[5] Petitioner is correct in describing respondent's conduct as a "threat" to feign illness. *See* DOC Directive No. 2262R (III)(H). Respondent did not actually feign illness in that she did not deceive anyone regarding her condition and took no sick leave. Moreover, no one believed she was sick.

manner, tone and content of the exchange. *Dep't of Correction v. Martin*, OATH Index No. 431/95 (Jan. 17, 1995); *Dep't of Correction v. Stokes*, OATH Index No. 663/91 (Mar. 11, 1991), *modified on penalty*, Comm'r Dec. (July 12, 1991). In this case, it is not respondent's objection to her post assignment that is troubling, nor the fact that her disagreement was loudly expressed; rather, it is her threat to feign illness because of her disagreement with her post assignment that rises to the level of misconduct. *Fulmore*, OATH 757/06 at 5 (whether officer's remarks constituted willful misconduct was based on the totality of the circumstances, including tone, manner, and substance of what was said). This kind of intentional manipulation cannot be tolerated in a paramilitary environment, such as the Department's, where individual preference must succumb to the efficient management and security of the institution.

I therefore find respondent's threat to "bang in" sick because she disagreed with her post assignment to be conduct unbecoming an officer that constitutes willful misconduct.

FINDINGS AND CONCLUSIONS

1. Petitioner failed to prove that respondent abandoned her post by taking a seven-minute bathroom break on November 3, 2009.

2. Respondent committed misconduct by making a false and misleading entry in her logbook.

3. Petitioner failed to prove that respondent disobeyed an order to go on a hospital run.

4. Respondent's threat to feign illness when given an undesirable work assignment was conduct unbecoming an officer.

RECOMMENDATION

Upon making these findings, I obtained and reviewed an abstract of respondent's employee performance service report (Form 22R) for purposes of recommending an appropriate penalty. According to the Department's records, Officer Callabrass was appointed to her position as a correction officer on May 30, 1991. She has no prior disciplinary record. A record of respondent's evaluations and commendations was not provided by petitioner, despite a request. Respondent testified that she has received commendations from the Department (Tr. 278).

The Department has requested a 45-day suspension for all the charges alleged, some of which were not sustained by the evidence. The misconduct proven is worthy of a much lower penalty.

Respondent asserts a defense by arguing selective enforcement engendered by her supervisor's animus toward her (Tr. 25), but such a defense is not available in this forum. *See Dep't of Sanitation v. Yovino*, OATH Index No. 1209/96 (Oct. 9, 1996), *aff'd in part, rev'd in part*, NYC Civ. Serv. Comm'n Item No. CD 97-109-O (Dec. 4, 1997) (defense of selective enforcement available only if based upon constitutionally suspect criteria and, even then, may be asserted only upon judicial review of an adverse administrative determination).

However, for purposes of mitigation, I have considered respondent's lengthy 19-year tenure with the Department and unblemished prior history.

Although I did not find respondent guilty of disobeying an order to take a work assignment, I have found her guilty of making a threat to feign illness to avoid the assignment. For this misconduct, the Department seeks a 10-day penalty. I am recommending a three-day suspension, which takes into account her long tenure and unblemished record and the fact that threatening to feign illness is a lesser offense than actually feigning illness. *See Dep't of Environmental Protection v. Stewart*, OATH Index No. 1787/10 (July 9, 2010) (five-day suspension recommended for employee's refusal to perform work assignment by feigning illness and going out sick); *Dep't of Correction v. Aiken*, OATH Index No. 797/95 (Mar. 8, 1995) (five-day suspension for officer who was disrespectful and failed to obey order to join institutional search).

In addition, I have found respondent guilty of making a false logbook entry, although I must acknowledge that the incident that led to her making the entry was needlessly instigated by her supervisor. She had to know at the time she made the entry that it was technically false and it was apparent to all who watched as she wrote it, so there was no deception here. I believe that her motive was to note for the record that she was present and accounted for at a time certain, so as to minimize the effect of whatever discipline might have been forthcoming. Under the circumstances, it garners a lower penalty than the typical false entry charge. *See Dep't of Correction v. Vives*, OATH Index No. 817/05 (June 9, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-40-SA (Aug. 1, 2006) (two suspension days for officer who made an improper official entry indicating she had turned in a radio when she had not). I have also taken into

account her long tenure and good record and the difficult relationship with her supervisor that precipitated this incident.

For the false entry, I recommend a two-day suspension.

Tynia D. Richard
Administrative Law Judge

July 23, 2010

SUBMITTED TO:

DORA B. SCHRIRO
Commissioner

APPEARANCES:

FLORENCE A. HUTNER, ESQ.
DONZELL TUCKER-NIMROD, ESQ.
Attorney for Petitioner

KOEHLER & ISAACS, LLP
Attorneys for Respondent
BY: PETER TROXLER, ESQ.

Commissioner's Decision (Dec. 1, 2010)

Respondent, Correction Officer Regina Callabrass, was charged with:

1. Disobeying an order to take a hospital assignment on November 11, 2009;
2. Threatening to feign illness if she was required to comply with that November 11, 2009 order;
3. Abandoning her post on November 3, 2009; and
4. Making a false logbook entry indicating that she was on post when she was undisputedly off post.

After a trial before Administrative Law Judge ("ALJ") Tynia D. Richard of the Office of Administrative Trials and Hearings ("OATH"), Respondent was found guilty of engaging in two acts of misconduct, namely, threatening to feign illness on November 11, 2009 and making a false entry in a logbook on November 3, 2009. She was found not guilty of the other two charges of misconduct, *i.e.*, disobeying an order to take a hospital assignment on November 11, 2009, and abandoning her post on November 3, 2009. ALJ Richard recommended a total penalty of five (5) suspension days as the penalty for the findings on those two specifications.

Based on the record in this matter, I adopt ALJ Richard's findings that Respondent was guilty of threatening to feign illness on November 11, 2009 and of making a false entry in a logbook on November 3, 2009. However, I respectfully reject ALJ Richard's findings that Respondent was not guilty of disobeying an order to take her assigned post on November 11, 2009, and of abandoning her post on November 3, 2009. I further reject ALJ Richard's recommended penalty of five (5) suspension days.

Respondent Improperly Threatened to Feign Illness

ALJ Richard correctly found Respondent guilty of threatening to feign illness. The evidence revealed that Respondent threatened to feign illness only after she was properly ordered to assume the hospital assignment with C.O. Bush. Captain Cohen testified that he gave Respondent the hospital assignment (Tr. p. 64, lines 12-14) during roll call, and Judge Richard credited his testimony. After roll call, Respondent approached him and said, "If I have to go out to the hospital, *then* I'm sick and I want to see the OD." (Tr. p. 65, lines 5-6; Pet. Ex. 6; emphasis added). The record is also replete with additional testimony from "numerous uninterested

witnesses and their contemporaneous reports" (Report and Recommendation, p. 13), *i.e.*, correction officers who heard Respondent say in effect that, if she had to take the hospital assignment, she would "bang in" sick.

Respondent's subsequent testimony further corroborates the finding that she threatened to feign illness in order to avoid her hospital assignment. Respondent told Captain Cohen she knew "how to go home" (Tr. p. 330, lines 20-23) and asserted that, if she was unable to speak to the OD "to discuss what was being done there," she would leave work immediately, before the end of her tour (Tr. p. 331, lines 3-10; p. 337, lines 3 to 4). It was clear that the sole basis for her threat to go home was the illness she would feign if she did not get the post assignment she wanted (Report and Recommendation, p. 13).

Based on the record in this matter, I adopt the Judge's finding that Respondent threatened to feign illness but reject the Judge's recommended penalty of only three (3) suspension days for such misconduct. Respondent's behavior was too egregious and disruptive to warrant such a minimal sanction. Accordingly, the penalty in this particular specification should be ten (10) suspension days.

Respondent Disobeyed an Order at Roll Call to Assume a Hospital Assignment

The evidence also established that Captain Cohen's assignment of the hospital assignment to Respondent was a legal order. "An order does not have to be in the form of a demand as long as it is a clear request." *Graham*, OATH Index No. 1380/03 at 17- 18, citing *Gellman*, OATH Index No. 347/84; *see also Schnell*, OATH Index No. 2262/00 at 4 (respondent's claim that he was under no obligation to comply with order to turn off tape recorder because his supervisor did not use the words "direct order" was "bogus"); *Police Dep't* v. *McKeon*, OATH Index No. 736/90 at 27-28 (police sergeant's initial request to police officer to turn in shield and ID constituted order because sergeant "conveyed a clear desire to obtain the respondent's shield and ID"); *see also Fuentes*, OATH Index No. 988/93 at 5.

OATH has expressly upheld as orders even instructions phrased as "a favor," *Graham*, OATH Index No. 1380/03 at 18, or as "requests," *Dep't of Correction v. Jones*, OATH Index No.

1266/96 (Aug. 16, 1996), *modified on penalty*, Comm'r Decision (Sep. 19, 1966), *aff'd*, Civil Service Comm'n Item No. CD99-70-D (July 9, 1999). Rendering an order "in terms as pleasant as possible" does not alter the fact that an order was intended to be conveyed: "a reasonable person in [that] position would have understood as much." *Dep't of Correction v. Tirado***,** OATH Index No. 94/1213 at 8 (Aug. 17, 1994). "Coming from a supervising officer, the difference is merely semantic so long as the request is clear." *Jones*, OATH Index No. 1266/96 at 31, citing *Tirado*, OATH Index No. 94/1213 at 8; *Gellman*, OATH Index No. 346/84 at 26. Clearly, Captain Cohen's roll call assignment of Respondent to the hospital post was a valid order.

Respondent testified that she "wanted to speak to the OD [On Duty supervisor] because an officer refused to go [on the hospital assignment] and they're sending me." (Tr. p. 329, lines 4-9). This evidence further underscores that Respondent understood that Captain Cohen had given her a valid order to take the hospital assignment. Respondent testified that she wanted to speak to the OD because she "didn't like what was being done because it was unfairly [sic] - it wasn't right." (Tr. p. 329, lines 24-25). It is not credible that Respondent would have so reacted had she not clearly understood that the hospital assignment was an order.

I respectfully disagree with ALJ Richard that Respondent would have followed the rule that an employee must "obey now, grieve later" had Respondent understood the post assignment to be an order (Report and Recommendation p. 13, n.4). On the contrary, Respondent exacerbated matters by failing to comply with that well-established rule. *See Dep't of Correction v. Mamon*, OATH Index No. 605/07 (Feb. 8, 2007) at 13, *citing, inter alia*, *Ferreri v. New York State Thruway Auth.*, 62 N.Y.2d 855, 477 N.Y.S.2d 616 (1984); *see also Human Resources Admin. v. Bichai*, OATH Index No. 211/90, at 9 (Nov. 21, 1989), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 90-54 (June 15, 1990).

"The purpose of the 'obey now, grieve later' rule is to promote orderly and efficient relations between supervisors and subordinates and to help maintain a smoothly functioning workforce." *Dep't of Correction v. Velez*, OATH Index No. 1655/02 (Dec. 3, 2002), *aff'd* **,** NYC Civ. Serv., Comm'n Item No. CD05-34-SA (Aug. 11, 2005) at 4; *see also Dep't of Correction v. Buford*, OATH Index No. 388/02 (June 17, 2002), *aff'd*, NYC Civ. Serv. Comm'n Item No.

CD03-49-SA (June 12, 2003), OATH Index No. 388/02 (even though institutional function was not disrupted, respondent had an obligation to assume the post, then pursue any remedy available under the principle of obey now and grieve later); *Gellman*, Index No. 347/84 at 13. Respondent's refusal to follow her superior's order and subsequent threat to feign illness were in clear violation of that principle, particularly given ALJ Richard's own finding that "Captain Cohen's request for respondent to take the hospital run assignment was clear." (Report and Recommendation, p. 11).

In holding that Respondent did not fail to obey an order, ALJ Richard apparently relied on the consideration that "Petitioner pointed to no Departmental rule classifying all roll call assignments as orders" (Report and Recommendation, p. 12), an issue that she raised *sua sponte*. However, the absence of an explicit policy stating what should be self-evident is not determinative here. As the Department showed in its post-trial submission, OATH has found that the failure to accept an assignment at roll call -- indeed, to accept such an assignment *promptly* -- constitutes insubordination. In *Buford, supra,* respondent correction officer was found guilty of refusing to obey an order when he disputed the control room captain's order during roll call to assume a particular post. Just as it was in this case, the originally assigned post had been changed, and respondent Buford asked why he could not have the original assignment. After an exchange of words and a fifteen- or twenty-minute delay while Buford waited to see the tour commander, Buford eventually assumed the newly assigned post. He was nonetheless appropriately disciplined for failing to assume that post *promptly. See also Dep't of Correction* v. *Vanderpool*, OATH Index No. 191/93 (respondent sanctioned for not assuming her post until she had made and drunk a cup of coffee). Here, Respondent *never* assumed her properly assigned post; accordingly, she should be sanctioned for such misconduct.

ALJ Richard's finding that the hospital assignment was not a valid order is also belied by her own finding that Respondent acted improperly in threatening to feign illness in response to such order. Moreover, the evidence at trial plainly establishes that Respondent herself understood the hospital assignment to be a valid order. Respondent testified as follows:

> Q *(by DOC Attorney Tucker-Nimrod)*: Captain Cohen called your name, Officer Callabrass, hospital outpost, isn't that correct?

A: He said hospital run, Callabrass -- Bush, Callabrass. (Tr. p. 324, lines 21-24)
[Note: C.O. Bush complied with the order to take a hospital assignment.]

Moreover, the ALJ's finding that Respondent was not guilty of disobeying an order to take the hospital assignment is inconsistent with her well supported finding that Respondent's "claim of unfair treatment . . . [with respect to her being ordered to take the hospital assignment was] bogus and her objections to the [hospital] assignment disruptive and unjustified" (see Report and Recommendation, p. 13). Clearly, Respondent failed to obey the order to take the hospital assignment.

For the reasons stated above, I hereby respectfully reject ALJ Richard's finding that Respondent did not refuse a lawful order. Further, I find that the penalty for this particular specification should be ten (10) suspension days.

Respondent Made a False Logbook Entry

ALJ Richard found Respondent guilty of making a false and misleading entry in a Department logbook, based on the evidence that she signed herself in as being on post when she was undeniably off post, on another floor, and in another area of the building. Based upon the record in this matter, I adopt the ALJ's findings of fact with respect to this specification. However, the recommended penalty of a two-day suspension is not sufficient for such a serious dereliction of duty. The appropriate penalty should reflect the severity of Respondent's falsification of an official Department record. Accordingly, the penalty for this particular specification should be ten (10) suspension days.

Respondent Abandoned Her Post

ALJ Richard found that Respondent left her assigned post in the basement and went to the second floor -- the Judge could not otherwise have found Respondent guilty of false reporting when Respondent wrote in the logbook that she was on post when she was in fact on the second floor. Indeed, ALJ Richard noted that it was "not contested that respondent was off post on November 3, 2009." (Report and Recommendation, p. 2). It is therefore inconsistent to find that Respondent did not abandon her post, since she did not have permission to leave her post to go to the second floor, regardless of Respondent's testimony that she needed to use the bathroom and

had to retrieve personal hygiene items from her locker located on the second floor. There is no dispute that Respondent failed to obtain permission to go to the second floor (Report and Recommendation, p. 2). ALJ Richard concluded that Respondent's abandonment of her post was a *de minimis* violation because she was absent from her post for only a seven-minute bathroom break. A Correction Officer's abandonment of a post, however, is a serious matter, as the Department carefully establishes staffing levels to ensure security. Provision is made for officers to be relieved for personal needs such as using the restroom; however, this does not mean that an officer can simply leave his or her post when he or she feels like it without coverage being provided. Nor does the length of the absence excuse the violation; rather, Respondent was fortunate that no harm ensued from her abandonment of her post.[6] For the reasons set forth above, I reject the findings of fact of ALJ Richard and conclude that, based on the record, Respondent improperly abandoned her post. The penalty for this violation should be ten (10) suspension days.

Conclusion

In conclusion, I concur with and adopt ALJ Richard's findings that Respondent made a false or misleading logbook entry on November 3, 2009, and that she engaged in conduct unbecoming in that she feigned illness to avoid a work assignment on November 11, 2009.

However, I also find that Respondent disobeyed an order to take a hospital assignment on November 11, 2009, and that she abandoned her post on November 3, 2009. I therefore reject ALJ Richard's findings as to these charges.

I further reject ALJ Richard's recommended total penalty of a five-day suspension. The mitigating factor of nineteen years of service with no prior disciplinary record does not outweigh Respondent's egregious misconduct of falsifying an official Department record, abandoning her post without authorization, disobeying an order and threatening to feign illness in order to avoid

[6] I also reject ALJ Richard's determination that Respondent's supervisor, Captain Muhammad, "needlessly instigated" the November 3, 2009 incident. See Report and Recommendation, p. 15. I find instead that the record does not support a finding of unilateral animosity on Captain Muhammad's part; on the contrary, if the relationship was "difficult", as ALJ Richard found *(id.* at 16), it is more likely that the difficulties were mutual. ALJ Richard fails to credit the effect of Respondent's unsubstantiated EEO complaint and instead draws unfounded conclusions from Captain Muhammad's failure to file additional disciplinary charges against Respondent.

an assignment. Furthermore, Respondent's lack of remorse is extremely troubling. Respondent's testimony revealed no understanding that her conduct was inappropriate. For the reasons set forth above, I find that an appropriate penalty for all four specifications should be forty (40) suspension days, as discussed above.

Date: 12-1-10 Commissioner Dora B. Schriro

THE CITY OF NEW YORK
CITY CIVIL SERVICE COMMISSION
---------- X
IN THE MATTER OF THE APPEAL OF:

REGINA CALLABRASS
Appellant:
-against- :

DATE: 10/31/11

ITEM NO. CD 11-81-M

NYC DEPARTMENT OF CORRECTION
Respondent:

Pursuant to Section 76 of the New York
State Civil Service Law
---------- X

PRESENT:
NANCY G. CHAFFETZ, COMMISSIONER
CHAIR

RUDY WASHINGTON. COMMISSIONER

MATTHEW W. DAUS, COMMISSIONER

CHARLES D. MCFAUL, COMMISSIONER

ALINA A. GARCIA
DIRECTOR/ GENERAL COUNSEL

AMANDA M. WISMANS
ATTORNEY FOR THE COMMISSION

PETER TROXLER, ESQ.
REPRESENTIVE FOR APPELLANT

DONZELL TUCKER-NIMROD, ESQ.
REPRESENTATIVE FOR RESPONDENT

APPELLANT PRESENT

STATEMENT

On Thursday, May 19, 2011 the Civil Service Commission heard oral argument in the appeal of **REGINA CALLABRASS,** Correction Officer, NYC Dept. of Correction, from a determination by the NYC Department of Correction, finding her guilty of charges of misconduct and imposing a penalty of **40 DAYS SUSPENSION** following an administrative hearing conducted pursuant to Civil Service Law Section 75.

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NEW YORK CITY CIVIL SERVICE COMMISSION

REGINA CALLABRASS

REGINA CALLABRASS appeals from a determination of the New York City Department of Correction ("DOC") finding her guilty of misconduct and imposing a penalty of 40 days' suspension following disciplinary proceedings conducted pursuant to Civil Service Law section 75. The Civil Service Commission ("Commission") conducted a hearing on May 19, 2011, and received post-hearing submissions from both sides.

Appellant, a Correction Officer, was charged with: (1) on or about November 3, 2009, violating DOC Rules and Regulations, 3.05.010, 3.05.100, 3.05.120, 3.05.130, 3.20.030, 3.10.110, 3.20.010, 3.20.030, and 3.20.300 by abandoning her assigned post; (2) violating DOC Rules and Regulations 3.05.01 0; 3.05.120, 3.20.01 0, 3.20,030, 3.20.30, and 4.30.020, by making **a** false, misleading, and incomplete entry in the CBQ logbook regarding being off post; (3) on or about November 11, 2009, violating DOC Rules and Regulations 3.05.010, 3.05.120, 3.20.010, 3.20.030, 3.20.070, 3.20.190, 3.20.300, and Directive 2262R by disobeying a direct order to go on a hospital run; and (4) violating DOC Rules and Regulations 3.05.010, 3.05.120, 3.20.010, 3.20.030, 3.20.070, 3.20.190, 3.20.300, and Directive 2262R by threatening to feign illness if she was required to comply with an order.

The Administrative Law Judge ("ALJ") found Appellant not guilty of charges (1) and (3) and guilty of all others charges and recommended a penalty of five days' suspension. The DOC Commissioner found Appellant guilty of all charges and imposed a penalty of 40 days' suspension.

Appellant's Position

Appellant's counsel argued that Appellant did not engage in misconduct. In the alternative, counsel argued that even should Appellant be found guilty of misconduct, the penalty imposed by DOC was so excessive as to be shocking to the conscience.

Counsel argued that the charges arising from Appellant's November 3**,** 2009 "bathroom incident" were unsubstantiated and based solely upon the testimony of a biased source. Counsel noted that the captain who wrote her up for the incident had prior EEO complaints lodged against him by Appellant and argued that his testimony was inconsistent and lacked credibility. Counsel further argued that the correctness of the ALJ's finding that Appellant was not guilty of misconduct when she took a bathroom break because it was a *de minimus* violation of the rules and should be upheld.

Counsel also argued that Appellant's entry in the logbook was not intentionally false or illegal, but had merely been made by Appellant as a means of protecting herself from the captain who had a lengthy history of retaliation against her.

Counsel asserted that Appellant never threatened to feign illness during the November 11, 2009 incident. Moreover, he asserted that Appellant cannot be charged with misconduct for disobeying orders when those orders were confusing and unclear. Counsel argued that the "obey now, grieve later" principle was inapplicable in the instant circumstance because the orders given to Appellant were neither clear nor unequivocal. After being given two separate orders to report to two different posts by supervisors of equal rank, Appellant was unsure and confused as to what was expected of her. Thus, she should not be penalized for her actions under these circumstances.

Counsel noted that Appellant is a 19-year employee with no disciplinary record and that a suspension of 40 days is excessive. At the hearing and in a post-hearing submission, counsel argued that the penalty imposed on Appellant was inconsistent with case law and cited cases where DOC employees with less tenure and more extensive disciplinary records than Appellant received less serious penalties for similar misconduct. Counsel contended that the cases proffered by DOC in support of the proposition that the penalty was commensurate with the misconduct were not on point and distinguishable on the basis of the facts in those cases and the employment and disciplinary histories of the employees involved.

DOC'S Position

Counsel for DOC argued that the penalty in this case was supported by case law and was neither shocking to the conscious nor arbitrary and capricious. Counsel maintained that the issue in this case was not whether Appellant was taking a bathroom break, but simply whether she had followed proper procedure by seeking and obtaining permission to leave her post. Counsel argued that seven minutes in a jail setting can be an eternity, and that while DOC suffered no harm in this instance, asking for permission is an important protocol that is necessary to ensure coverage and safety. Counsel noted that Appellant did not deny being off post and that her log book entry was clearly false. Appellant had signed the book indicating that she had returned to her post, when in fact, she had not done so.

Counsel argued that Appellant was under no misconception as to her orders on November 11, 2009. As a miscellaneous officer, Appellant was aware that she could be assigned to support her fellow officers in any position that was required of her. It is not relevant that Appellant had

previously been given an order from another supervisor to assume a separate post, since the last order Appellant received at roll call was to go on the hospital run. This order was clear and unequivocal and Appellant's reaction established that she understood it to be so.

Counsel also argued that there was overwhelming evidence that Appellant had threatened to feign illness. Counsel contended that four officers had heard Appellant threaten to call in sick if she had to do the hospital run, and that Appellant had made no mention of feeling sick until after receiving her assignment. Counsel concluded that Appellant's long employment history and lack of a disciplinary record did not outweigh the seriousness of her misconduct. As a 19-year employee, Appellant should have known better.

In DOC's post-hearing submission, Counsel argued that the ALJ adopted the wrong standard in evaluating whether Appellant was guilty of misconduct for being off post, by deciding that question on the basis of whether Appellant's violation had more than a *de minimus* impact. Counsel argued that the lack of harm to the Department did not negate the misconduct and cited *Dept. of Correction v. Williams*, OATH Index No. 211/85 (Sept. 10, 1985) in which the OATH ALJ found that lack of apparent harm from misconduct was an invalid consideration for a penalty recommendation. Counsel also submitted a number of cases where employees with different employment and disciplinary histories from Appellant received similar penalties for charges similar to the case at bar as support for the appropriateness of the penalty imposed. Counsel concluded that the penalty imposed on Appellant was not excessive, or inconsistent with case law, but was commensurate with the serious nature of Appellant's misconduct.

Analysis

The Commission has carefully reviewed the record on appeal and considered the arguments and supporting materials submitted by both sides. The record indicates that the OATH ALJ issued a thoughtful and thorough decision in which she found Appellant guilty of two charges: threatening to feign illness and making a false logbook entry (charges 2 and 4). The ALJ found Appellant not guilty of disobeying an order to take a hospital run and abandoning her post (charges 1 and 3). The ALJ recommended a five-day suspension without pay as a penalty.

Upon her review as the final decision maker, the DOC Commissioner found Appellant guilty of all charges and imposed a penalty of 40 days' suspension. Under the disciplinary procedures set forth in section 75 of the Civil Service Law, the agency commissioner is vested with the final decision making authority. The commissioner may make different findings of fact based on the record and may impose a different penalty than that recommended by the designated hearing officer. See Civ. Serv. Law § 75(2); *Matter of Simpson v. Wolansky***,** 38 N.Y.2d 391, 393, 380 N.Y.S.2d 630, 632 (1975); *Mancini v. Dept. of Environmenta1 Protection*, 26 A.D.3d 178, 809 N.Y.S.2d 30 (1st Dept. 2006). In her final decision, the Commissioner explained her reasoning for disagreeing with the ALJ's legal analysis and found Appellant guilty of disobeying an order given at roll call to take a hospital run and in leaving her post without permission. The Commissioner's decision expressed the significance of Appellant's misconduct in a correctional setting and imposed a 40-day suspension (10 days for each of the four misconduct charges) as a penalty.

We hereby affirm the findings of fact made by the DOC Commissioner as being supported by the facts and the law. We concur with the Commissioner's analysis that Appellant's misconduct represented a breach of established rules and procedures, was insubordinate and potentially jeopardized the safety and security of the institution. We disagree, however, with the penalty imposed for the misconduct at issue here. While a more serious penalty is in order for the additional misconduct found by the Commissioner, we believe Appellant's lengthy tenure and lack of any prior disciplinary record should mitigate the penalty to a greater degree.

Decision

We hereby modify the penalty imposed on Appellant to a 30-day suspension.

Nancy G. Chaffetz, Commissioner
Chair

Rudy Washington, Commissioner
Vice-Chairman

Matthew W. Daus, Commissioner

Charles D. McFaul, Commissioner

Date: 10/31/2011