

Human Resources Admin. v. Mays

OATH Index No. 1299/11 (Mar. 16, 2011), *modified on penalty*, Comm'r Dec. (Apr. 19, 2011), **appended**, *rev'd*, NYC Civ. Serv. Comm'n Item No. CD 12-8-R (Jan. 31, 2012), **appended**

Petitioner failed to establish that respondent knowingly and willingly participated in a Medicaid fraud scheme or received compensation for inquiries related thereto. It also put forth no evidence that respondent failed to report her arrest and the circumstances surrounding the arrest to the HRA Commissioner. ALJ finds that respondent knowingly and willingly made four attempts to use a supervisor's ID to access case information in petitioner's Welfare Management System. ALJ recommends that respondent be demoted to a position equivalent to a clerical associate, which will not permit her access to the Welfare Management System database.

Commissioner imposed the penalty of termination.

*Civil Service Commission (CSC) reinstated the former employee without back paid and imposed the penalty of demotion.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
HUMAN RESOURCES ADMINISTRATION
Petitioner
-against-
LAVERNE MAYS
Respondent

REPORT AND RECOMMENDATION

INGRID M. ADDISON, *Administrative Law Judge*

The Human Resources Administration ("HRA") brought this disciplinary proceeding under section 75 of the Civil Service Law, against respondent, Laverne Mays, an Eligibility Specialist Level II, who was arrested at her work station on May 2, 2006, and charged with knowing and willing participation in, and using the United States Postal Service (USPS) to facilitate Medicaid fraud, in violation of Title 18 of the United States Code. Petitioner charged that respondent: failed to report her arrest and the circumstances surrounding it in writing to the

HRA Administrator/Commissioner, accessed the Welfare Management System (WMS) database without permission or authorization, obtained information on four Medicaid beneficiaries, provided that information to an outside party, and received money as a *quid pro quo*, in violation of section II(E), and section III, paragraphs 1, 4, 8, 9, 10, 11, 22 and 36 of petitioner's Code of Conduct, Executive Order No. 651 (ALJ Ex. 1).¹

At a hearing on February 1 and 2, 2011, petitioner relied on documentary evidence, audio and video recordings, and the testimony of Robert Fraterrigo, special agent with the Office of Inspector General of the USPS, Frank DeLisi, special investigator with the New York City Department of Investigation (DOI), Caroline Hernandez, special investigator with HRA, Julian Perry, HRA's Director of Information Technology Infrastructure and Imaging Services, Carlos Jimenez, Deputy Director of HRA's Hospital Eligibility Division, and Cherry-Ann John, an HRA team manager at the location where respondent is employed. Respondent, who disputed the charges, testified on her own behalf, and presented the telephone testimony of Donna Dorr, who was convicted for her participation in the Medicaid fraud scheme, and is currently incarcerated.

At trial, petitioner moved to amend specifications I and II of charge 2, to include the allegation that respondent employed the user ID of supervisor Carlos Jimenez to access information on four Medicaid beneficiaries. Respondent did not object, and I granted the motion (Tr. 278-80). At the conclusion of trial, petitioner conceded that there was no proof that respondent received monetary compensation for facilitating Medicaid computer inquiries, as charged.

Based on the evidence presented, I find that petitioner failed to prove that respondent knowingly and willingly participated in a Medicaid fraud scheme or received compensation for inquiries related thereto. Petitioner put forth no evidence that respondent failed to report her arrest or the circumstances surrounding the arrest to the HRA Commissioner. Petitioner established that respondent knowingly and willingly made four attempts to use a supervisor's ID to access case information in the WMS.

¹ The petition contained ten charges with multiple, repetitious specifications. This tribunal has held that if the same conduct violates multiple provisions of petitioner's executive order, such conduct will only exact a single penalty. See *Health & Hospitals Corp. (Seaview Hospital Rehab. Ctr. & Home) v. Cantres*, OATH Index No. 1142/03 at 4 n. 3 (May 29, 2003), *modified*, Chief Operating Officer's Determination (July 1, 2003), *aff'd, sub nom. Cantres v. NYC Health & Hospitals Corp.*, 30 A.D.3d 164 (1st Dep't 2006); *Human Resources Admin. v. Marfo*, OATH Index No. 1643/97 at 13 n. 1 (May 27, 1998).

As penalty, I recommend that respondent be demoted to a position equivalent to a clerical associate, which will not permit her access to the WMS database.

BACKGROUND

From 2004 through 2007, Cherry-Ann John was the section manager of HRA's Customer Reception Department in its Medicaid office at 330 West 34th Street in Manhattan, where respondent worked as an eligibility specialist (ES) at the time of her alleged misconduct. Ms. John supervised the Principal Administrative Associates Level I (PAA I), who supervised the ES workers.

The ES workers at 34th Street handle walk-in renewal applications and re-certifications for Medicaid recipients, determine eligibility, amend the demographics such as date of birth or address of recipients, and provide general information to consumers about their cases. Those with customer service skills work directly with the public from behind ten windows, only five or six of which are staffed on a regular basis (John: Tr. 248, 253; Mays: Tr. 313-14). The windows are open to the public from 8:00 a.m. to 6:00 p.m. and are dedicated to different issues: mail re-certifications; services for senior citizens and the physically disabled; information; and the issuance of temporary cards. The windows are not equipped with telephones because they are intended to provide in-person customer service (Tr. 248-50).

New applicants for Medicaid are only served at the 34th Street location if their circumstances are deemed a priority. The ES workers register new applicants by inputting their information into the WMS database and assigning them pending status. If an applicant is eligible, the case is activated and processed. The PAA I or any of the senior personnel transmits the case to the New York State Department of Social Services for a determination. Determinations are made overnight. If approved by the State, the case becomes active (Tr. 236-40, 243-44, 260). Medicaid recipients receive permanent plastic cards which are mailed to them by the State. Occasionally, temporary cards may be issued by the HRA office, but only supervisors and their seniors have authorization to issue them (Tr. 255-56).

Temporary Medicaid cards are paper cards which expire after about three months. Generally, they are printed only for active cases, but may be issued for a pending case (Tr. 257-58). If a recipient reports a card lost and requests a temporary (replacement) card, the ES worker

must obtain a picture ID from the person making the request before referring the matter to a supervisor (Tr. 255-56).

Procedurally, when a recipient approaches an ES worker at the window seeking information on a case, the recipient must provide picture ID so that HRA may be certain that information is being divulged to the proper party (Tr. 245). In lieu of an in-person appearance, the Medicaid recipient may provide a representative with written authorization to secure information on their behalf. This may occur where the recipient is wheelchair-bound, homebound or ill (Tr. 246-47). In addition, individuals from community-based organizations (CBO) or agencies may enquire into recipients' cases if they have documentation from the recipient authorizing HRA to release information. The individual representing the CBO must also present picture ID to the HRA office. If an ES worker encounters problems at the window, the supervisor must be informed (Tr. 247-48).

Case inquiries may also be received from HRA supervisors at other work locations, but those are normally supervisor-to-supervisor inquiries. To the best of Ms. John's knowledge, supervisors from other sites did not contact ES workers at the windows (Tr. 233-35, 251-52).

To check the status of a case, the ES worker must access the WMS database which retains information on past and present recipients. This enables them to advise consumers, based on the symbols displayed, if their case is active (AC), pending (AP), rejected (RJ) or closed (CL). The WMS database is accessed with a user ID and password. Before a user ID and password may be entered, the screen displays a warning which states in pertinent part that "Unauthorized access to or release of system data may entail both civil liability and criminal prosecution" (Pet. Ex. 3). Passwords must be changed every six months and workers are not permitted to login with someone else's ID (John: Tr. 254-55; Hernandez: Tr. 83-86). Ms. John testified that supervisors should not permit a subordinate to use their IDs but it was possible that they did (Tr. 276).

When Ms. John joined the Customer Reception Department in 2004, respondent was already employed as an ES worker (Tr. 264). Ms. John was not respondent's direct supervisor, but based on her observations of staff, assessed respondent as a very good worker who knew the whole operation, would assist with the supervisors' reports, and had good customer service skills (Tr. 257, 264-67).

The events that culminated in these disciplinary charges began to percolate in December 2003, the year that respondent became an ES. At that time, Robert Fraterrigo, currently a special agent in the Office of the Inspector General of the USPS, was a postal inspector. His job included investigating internal mail theft, mail fraud, computer forensics, and identity theft (Tr. 12-13). In 2003, a special agent from the Department of Health and Human Services notified Mr. Fraterrigo that the Secret Service had arrested an individual for credit card fraud. The arrestee, who later became the USPS's confidential informant, revealed that he knew someone on the street from whom he could purchase temporary Medicaid cards. The USPS acquired jurisdiction to commence an investigation in December 2003, because its mail system was being used to facilitate distribution of the cards. At first, Mr. Fraterrigo used the confidential informant to purchase cards from the seller, Miguel Paredes. The scheme operated as follows. The informant would approach Mr. Paredes and express his need for a Medicaid card, hand over around \$400 and provide a name, social security number, date of birth and address. After a day or so, Mr. Paredes would provide a temporary Medicaid card or a printout, as proof that the information was in petitioner's WMS system (Tr. 14-19).

Later, an undercover USPS inspector replaced the informant and continued with the buys for several months. The investigators eventually met with an attorney from the United States Attorney's Office of the Eastern District, and a decision was made to use a Pen Register, a device that records which numbers are being dialed from a particular phone. The investigators believed that City employees were implicated because the temporary Medicaid cards and printouts had been generated from HRAs computers. Accordingly, Frank DeLisi, a special investigator with New York City Department of Investigation (DOI), which investigates corruption by City employees, joined the investigation in 2004. Mr. DeLisi, who had experience with Medicaid eligibility investigations and had received eligibility training from HRA, assisted the Federal investigators with deciphering activities that were internal to HRA. Through the Pen Register, they discovered that Mr. Paredes regularly contacted two City employees, Donna Dorr and Donald Miles (Fraterrigo: Tr. 14-15, 72; DeLisi: Tr. 145-47, 151, 158-59, 161).

The investigators eventually expanded the investigation and obtained a 30-day wiretap for Mr. Paredes' cell phone in November 2005. This was extended to the cell phones of Ms. Dorr and Mr. Miles. The investigators also conducted street surveillance on the buys executed with Mr. Paredes. The wire taps revealed the names of several other City employees from the

HRA office at 34th Street. Accordingly, from around October or November 2005, the investigators conducted video surveillance of that office and discovered that Mr. Paredes frequently visited it (Fraterrigo: Tr. 20-21; DeLisi: Tr. 153-54).

On December 19, 2005, during one of the wiretaps, one “Laverne” was overheard on Mr. Paredes’ cell phone speaking with Ms. Dorr and Mr. Paredes who was in the customer service lobby of the 34th Street office (Tr. 21-22, 24-25). Respondent was the only “Laverne” at that office (Fraterrigo: Tr. 75; DeLisi: Tr. 164). According to Mr. Fraterrigo and Mr. DeLisi, during the three-year investigation, none of the other wiretapped conversations revealed any calls between respondent and either Ms. Dorr or Mr. Miles. But Mr. Paredes occasionally mentioned respondent’s first name during his conversations with Ms. Dorr, usually inquiring about her whereabouts (Fraterrigo: Tr. 68-69, 73-74; DeLisi: Tr. 217). In any event, the investigation culminated in the issuance of warrants against approximately 16 persons. Respondent was arrested on May 2, 2006 (Tr. 21-22).

At trial, petitioner played an audio recording of the conversation between Mr. Paredes, Ms. Dorr and respondent, and submitted a compact disc of it into evidence (Pet. Ex. 1). Petitioner also showed the video of Mr. Paredes in the customer service lobby, captured simultaneously with the audio (Pet. Ex. 2).

The Audio Recording

The entire conversation lasted but a few minutes. It was undisputed that the predominant voices were those of Miguel Paredes and Donna Dorr, and respondent acknowledged the third voice as hers (Tr. 318). A portion of the recording was unclear, but respondent’s voice was clear. The following are portions of the conversation that I could distinguish:

Mr. Paredes: What’s up, Dee?

Ms. Dorr: Hi. You called me back?

Mr. Paredes: Yeah, yeah... I had called you back. I’m here.

Hold on. Hold on. You want me to put her on?

Ms. Dorr: Alright. She said she can’t find one of them?

Mr. Paredes: She said it don’t have coverage. Let me put her on... hold on....
Let me give her my cell.

Ms. Dorr: Which one is it?

Mr. Paredes: The Quinturner [sic]....

Ms. Dorr: She just put them in this morning... she don't want to give you the cards for them?

Mr. Paredes: Laverne... Laverne.

Ms. Dorr: Tell her none of them have coverage... They just was opened today... Is the supervisor around you? ...

Mr. Paredes: She's writing a note. Hold on, Dee ... let me see what the note says... They can't give it unless they sign for it... they gotta go to Parsons, Upson or Graham....

Respondent: Donna, Donna... if I can find another number to do it on I will.

Ms. Dorr: See if my number works....

Respondent: You know what... Nelson made it bad for us.

Ms. Dorr: Take this number down... 500-----256²
...if it don't 6 don't work, do 7 or 8....

Respondent (repeated number)... Hurry because I have to get off the cell phone... We can't talk on the cell phone....

The phone was then returned to Mr. Paredes:

Mr. Paredes: Yea Dee....

Ms. Dorr: I gave her ... Carlos' number....

Mr. Paredes: Nah... he won't do it... she is trying now... denied... she said you could leave them... she'll find another number that she can use.

Further along in the conversation, Mr. Paredes stated to Ms. Dorr that:

Mr. Paredes: ...[S]he's gonna do it through her number.

Ms. Dorr: Huh?

Mr. Paredes: She's gonna do it through her number... yeah... because the supervisor....

After more discussion between Mr. Paredes and Ms. Dorr, the phone was returned to respondent:

Respondent: When I put the numbers in, it says no coverage so I can't get a case number either....

Ms. Dorr: ...Just put the CIN number in and it'll come up....

Respondent: No, it don't. It comes up saying specific client not known to Database.... I put in ten, right?

² Some of the digits in the user ID, and the password that followed were purposely omitted from this recommendation because it was unclear whether the user ID is still valid.

Ms. Dorr: No. Put an 02 inquiry.... and all those case numbers will come up. I should have given him the case numbers. I just gave him the CIN numbers...
Because I'm driving, I can't get them.

The phone was then returned to Mr. Paredes. Ms. Dorr explained to him her instructions to respondent, and he informed her:

Mr. Paredes: She got them... she is getting the case numbers.

Soon after, they ended the call.

The Video Recording

The video recording was less compelling than the audio. It established that an individual, whom Mr. Fraterrigo identified as Mr. Paredes (Tr. 41, 44), was at Window 4 from about 17:21:43 until about 17:32:10 on December 19, 2005. The person behind the window was hardly visible but was identified as respondent (Fraterrigo: Tr. 45; Perry: Tr. 112-17). Respondent acknowledged that she attended to Mr. Paredes on December 19, and testified that she recalled her interaction with him and Ms. Dorr after listening to the audio and viewing the video (Tr. 318). Because the camera appeared to be directed to the windows in the lobby area, it captured lateral views of Mr. Paredes as he approached and left the window. At all other times, only his back was visible. The video showed Mr. Paredes take his cell phone out of his pocket as he approached the window and start to speak. But it was unclear when he passed it to respondent or when she returned it to him. A close review of the video showed the following:

<u>Time</u>	<u>Activity at Window 4</u>
17:21: 43	-Mr. Paredes (P) approaches Window 4 and takes out cell phone.
17:22:03	-P nods his head.
17:22:22	-P places right hand in right pants pocket.
17:23:45	-P holds something in left hand.
17:23: 50	-Respondent holds up something white behind window.
17:24:35-47	-P fiddles with both pockets.
17:25:35	-P moves arms and appears to place something in inside pocket of jacket
17:28:20	-P makes arm gestures.
17:31:26	-P steps back from window, stretches.
17:31:46-50	-Respondent appears to hold an undetectable object/document behind the window and P appears to place his hand in the inner right section of his jacket.
17:32:05	-P puts left hand in pocket.
17:32:10	-P gestures goodbye, leaves window.

The total time that elapsed during Mr. Paredes appearance at respondent's window was approximately ten and a half minutes. In the meantime, the video showed that another client who had entered the queue at 17:23 did not get to approach respondent until 17:32.

Investigation of Respondent's WMS Inquiries on December 19, 2005

Mr. DeLisi and Caroline Hernandez, HRA's special investigator, obtained the December 19, 2005 security logs for the computer terminal at Window 4 from the New York State Office for Technology (OFT) (Tr. 159, 176). IT Director Julian Perry, provided the terminal ID number, which was unique to that terminal (Tr. 107-08, 113-19, 123). Mr. DeLisi confirmed the ID number that Mr. Perry provided with the terminal IDs he had obtained during a site survey of the office prior to setting up video surveillance (Tr. 181).

From the security logs, Mr. DeLisi and Ms. Hernandez determined that the user ID that Ms. Dorr gave respondent was Carlos Jimenez' (Tr. 159, 176). One log displayed respondent's and Mr. Jimenez' user IDs (Pet. Ex. 5). Another displayed activity on the terminal by: 1) Transaction; 2) Terminal or PID number; 3) Date; 4) Time; and 5) Information logged about the transaction, which included the user ID associated with the transaction and whether the user conducted a search by case number, client information number (CIN), name, or social security number (Perry: Tr. 113-19; Hernandez: Tr. 91-105; Pet. Ex. 4). The latter log demonstrated that on December 19, 2005, four failed attempts were made to login with Mr. Jimenez' ID at: 5:19:16; 5:19:29; 5:19:48; and 5:20:39. The attempts failed because of an inaccurate password (Tr. 100; Pet. Ex. 6). At 5:21:02, respondent attempted to login under her user ID but failed because of an incorrect password. She was successful 29 seconds later, at 5:21:33. The system automatically logged her off at 5:45:17 (Tr. 100).

The log further demonstrated that following her login at 5:21:33, respondent accessed four case files (Tr. 177-189; Pet. Ex. 4 at 18; Pet. Exs. 9, 10). Mr. DeLisi explained the two inquiry options mentioned by Ms. Dorr and respondent. Option 10 is entered into the WMS to extract coverage information on Medicaid recipients, while option 2 extracts client information (Tr. 176-77). Mr. DeLisi reviewed the four cases that respondent accessed and found that they were fraudulent Medicaid cases that were made active on December 19, 2005. They included

one for “Quinturner,” the name mentioned by Mr. Paredes during his conversation with Ms. Dorr (Tr. 171-72, 186-91, 197-99). Mr. DeLisi commemorated his findings in an e-mail to a prosecutor at the Eastern District court (Tr. 201-03; Pet. Ex. 11). He testified that he found no evidence that respondent opened the fraudulent cases or issued temporary Medicaid cards (Tr. 213-16). But in his e-mail, Mr. DeLisi concluded that respondent had given Mr. Paredes printouts of the WMS inquiry screens for the four Medicaid cases that had been activated on December 19, 2005 (Pet. Ex. 11). He came to this conclusion because the undercover agent usually obtained printouts of the WMS inquiry screen from Mr. Paredes in exchange for money. Mr. DeLisi asserted that the video recording showed respondent handing over something to Mr. Paredes, which Mr. Paredes grabbed from the window. Mr. DeLisi could not determine what was handed over (Tr. 214-16, 225). And there was no testimony that printouts for the four cases were recovered from the undercover agent.

Mr. Jimenez, HRA’s Deputy Director of Hospital Eligibility, has worked at the 34th Street location for seven years. Before that, he was at HRA’s office at 260 Eleventh Avenue in Manhattan where he hired Ms. Dorr as an ES worker Level II, but used her as his assistant (Jimenez: Tr. 130-31; Dorr: Tr. 293-94). Mr. Jimenez had supervisory rights that permitted him to transmit Medicaid applications to the State for approval but he never needed to do so (Tr. 132-34, 136-37). He has a numeric WMS user ID and an alpha-numeric password (Tr. 135-36). The letter portion of Mr. Jimenez’ password matched the letters that Ms. Dorr gave respondent. Mr. Jimenez testified that while at the Eleventh Avenue office, he would occasionally call the 34th Street office to check on a Medicaid case, and would speak with Gary Jenkins, the Director, or a supervisor designated by Mr. Jenkins (Tr. 141-42). Sometimes Ms. Dorr called on his behalf, but she was never directed to speak with ES workers (Jimenez: Tr. 143-44; Dorr: Tr. 294). Above all, Mr. Jimenez never authorized Ms. Dorr nor anyone else to use his ID (Tr. 141)

Petitioner submitted Mr. Jimenez’ electronic timesheet from HRA’s Autotime system for the week ended December 24, 2005, which Mr. Jimenez authenticated (Pet. Ex. 7). It established that he was not at work on December 19 and therefore, was not the person attempting to login to the WMS with his user ID (Tr. 139-140).

Ms. Dorr testified from Federal prison in West Virginia, where she has been incarcerated since 2008, after pleading guilty to conspiracy to commit mail fraud (Tr. 286). She acknowledged that from 2004 through 2006, she conspired with Miguel Paredes, Donald Miles

and Christone White to “help” people get Medicaid benefits by putting information provided by Paredes into the WMS and printing cards (Tr. 287-89). Ms. Dorr and respondent denied that respondent was a co-conspirator in the elaborate scheme or received any compensation (Dorr: Tr. 292; Mays: Tr. 315-17, 337). Ms. Dorr also claimed to have no inkling of Mr. Jimenez’ WMS user ID or password (Tr. 301). After listening to the audio recording, she could neither recall the conversation, nor with certainty identify respondent’s voice, even though she described respondent as a friend (Tr. 290-92, 298).

In December 2005, Ms. Dorr was a Food Stamps supervisor with authorization to print cards (Tr. 288, 290). Her job entailed making eligibility determinations for food stamps applicants only, not Medicaid applicants (Tr. 286-87, 289). But she claimed that if someone asked her for help and she knew how to, she would render assistance. Ms. Dorr asserted that on the audio, Mr. Paredes sounded as if he was attempting to have respondent access the system and retrieve information (Tr. 292). She claimed that she did not ask respondent to retrieve information. Rather, she was attempting to assist her when she instructed her to enter “an 02 inquiry” (Tr. 295-96, 299). She speculated that she was referring to Christone White when she told Mr. Paredes “she just put them in this morning” because Ms. White was the person who was complicit in the opening of fraudulent Medicaid cases during 2004 and 2006 (Tr. 296-97). Ms. Dorr contradicted Mr. Jimenez and testified that she also called ES workers for him (Tr. 294).

Respondent started with HRA in 1997 as part of the City’s Work Experience Program (WEP), and became an eligibility specialist in 2003 (Tr. 309-10). She testified that as an ES worker, she was usually assigned to Window 4, the inquiry information window (Tr. 314). She recalled that on December 19, 2005, Mr. Paredes came to her window and identified himself as a representative. He had no authorization letters from any client but presented her with multiple client numbers, which she seemed to consider sufficient. When she checked the client numbers, they were not in the WMS. Mr. Paredes insisted that they had coverage, and asked her to speak with Ms. Dorr. To assuage any notion that she was reluctant to assist a “legitimate” representative, and convey instead that she was constrained in her ability to assist him, respondent reminded Ms. Dorr that “Nelson made it bad for us” (Tr. 323-25, 340-41, 348).

Respondent explained that up until a few months prior to December 2005, the ES workers at the windows could print temporary Medicaid cards if requested by eligible individuals. However, due to an incident involving Nelson C, one of respondent’s co-workers,

ES workers lost that privilege, and only supervisors could issue temporary Medicaid cards (Tr. 319-23, 334). Under the new practice, if a client or representative wanted a temporary card, they would come to respondent's window and give her a case or social security number which she would enter into the WMS to determine if the case was active. If it was, respondent would log it on a log sheet and the person would wait to be called by a supervisor who would issue the card. In December 2005, only supervisors Charlene Parsons, Maurice Upson, Sharon Graham, Wendy Berch (Ms. John's direct supervisor), Gary Jenkins, and Ms. John were authorized to issue temporary Medicaid cards (John: Tr. 256-57; DeLisi: Tr. 174). Respondent asserted that Mr. Paredes' mention of the supervisors' names was a direct consequence of her informing him that he would need to see one of them (Tr. 325-27). Meanwhile, she expected Ms. Dorr to help her determine whether the clients had other case numbers (Tr. 325).

Respondent insisted that when Ms. Dorr gave her an ID number to input into the WMS, she assumed it to be Ms. Dorr's because it had been prefaced by "Take my number down." She denied that Ms. Dorr gave her variations of a password to login. When the audio recording was replayed, respondent claimed not to recall the variations (Tr. 328-29, 351-53). She accepted the number from Ms. Dorr because supervisors have access to more information in WMS, and she was trying to assist Mr. Paredes. Respondent did not think it odd when Ms. Dorr mentioned that she was driving. She considered herself to be fairly knowledgeable about the rules and procedures governing the customer service reception area, but did not think it a violation of HRA policy to use another person's ID because workers did so all the time. Respondent identified two supervisors who had previously permitted her to use their IDs (Tr. 330-32, 344, 353-55, 359).

Respondent testified that even with the ID that Ms. Dorr had given her, the system continued to indicate "no coverage" for the case numbers in which Mr. Paredes was interested. Respondent claimed that entering a case number and a "send" number may produce older case numbers if any existed. But if the client has no coverage, the system will produce the response "Client not known to database." Thus, when she told Ms. Dorr that, "When I put the numbers in it says no coverage so I can't get a case number either," she wanted Ms. Dorr to know that without more, she could provide no further assistance (Tr. 334-36). She eventually gave Mr. Paredes Medicaid application forms and a list of locations where they could be filed. But he pushed them back at her and left (Tr. 336).

Respondent admitted that in retrospect, she should not have used the number given to her by Ms. Dorr, but emphasized that, at the time, she was focused on helping someone she thought to be a legitimate representative, and was being guided by a supervisor (Tr. 338). It was not uncommon for supervisors from other sites to call the ES workers and inquire into pending Medicaid applications. Rather, supervisors often made referrals for SSI and Food Stamps clients, and the same card was used for Medicaid and Food Stamps benefits (Tr. 338-40). Finally, respondent claimed that when she initially stated to Ms. Dorr, "If I can find another number to do it on I will," she meant another case number (Tr. 351).

Respondent was arrested early in May 2006, but was never prosecuted (Tr. 340, 363). On May 22, 2006, attorneys from HRA's Employment Law Division interviewed respondent, who was represented by counsel (Pet. Ex. 13). Respondent stated under oath that Ms. Dorr had initiated the call to her on December 19, 2005. When asked whether Ms. Dorr had called her about the same clients in whom Mr. Paredes was interested, respondent testified that she did not know. She was asked to clarify whether she could not recall, and she insisted that she did not know (Pet. Ex. 13 at 29:55 *et seq.*).

After her arrest in 2006, respondent was removed from the Customer Reception Department to HRA's stock room (Tr. 311-12).

ANALYSIS

Failure to Report Arrest and Circumstances Surrounding Charges (Charges I and VII)

At trial, petitioner put forth no evidence to support that respondent failed to report her arrest and the circumstances surrounding it to petitioner's Commissioner. Accordingly, I recommend dismissal of Charges I and VII which allege that she did.

Compensation for Participation in Medicaid Fraud Scheme (Charges II, III and IV)

Petitioner conceded that the evidence did not support that respondent received compensation for any activity related to these charges. Therefore, I recommend dismissal of Charges III and IV in their entirety, and those portions of charge II that allege that respondent received compensation for facilitating computer inquiries for Mr. Paredes.

Unauthorized Use of Mr. Jimenez' WMS ID and Providing Information to Mr. Paredes (Charges II, V, VIII, IX)

With no objection from respondent, I granted petitioner's motion to conform Charge II to the proof, that on December 19, 2005, respondent used Mr. Jimenez' ID without authorization.

Section III(11) of petitioner's Code of Conduct prohibits employees from committing acts that constitute an unauthorized and abusive exercise of the employee's official functions. Section III(1) provides that employees must conduct themselves in a manner which reflect favorably upon them, the Agency and the City, and section III(36) prohibits conduct detrimental to the Agency or which would undermine the effectiveness of the employee in the performance of her duties. I find that respondent's conduct constituted a violation of all three sections.

Petitioner must prove its case by a fair preponderance of the credible evidence. *See Dep't of Correction v. Hall*, OATH Index No. 400/08 at 2 (Oct. 18, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD OS-33-SA (May 30, 2008). I find that petitioner's evidence overwhelmingly supported that respondent attempted to login to the WMS on four separate occasions on December 19, 2005, using Mr. Jimenez' ID and password.

Even though some of petitioner's witnesses provided exaggerated testimony with respect to what the video actually revealed, overall, I found their testimony to be clear and consistent and devoid of any ulterior motives. It detailed an elaborate Medicaid fraud scheme and tracked how respondent was implicated in it. On the other hand, respondent's witness' (Ms. Dorr's) testimony was less than candid. Her responses to questions regarding Mr. Jimenez' user ID and password were cagey. She feigned ignorance about them, even though on the audio she could be heard gloating that she had given respondent "Carlos' number." Further, her claim that she was merely assisting respondent to retrieve information seemed concocted because she advanced no reason why she, rather than respondent's supervisors, needed to provide guidance on how to access Medicaid cases that turned out to be fraudulent. It appeared more likely than not that Ms. Dorr and Mr. Paredes pre-arranged to have Ms. Dorr contacted if respondent could not access the cases, thereby bypassing respondent's supervisors. Ms. Dorr's testimony that respondent was not a co-conspirator in the fraud was more credible. Given her incarceration, there was no incentive for her to protect respondent. Further, the December 19, 2005 recording was the only time that respondent was overheard on the wiretapped conversations. Had she been a co-

conspirator, it is more likely than not that she would have been included in the conversations that were captured.

I found no evidence that respondent was a co-conspirator in the fraud, but it was difficult to reconcile portions of her testimony with the audio recording and with her responses under oath during her interview on May 22, 2006. At that time, she disclaimed knowledge that Ms. Dorr was inquiring into the same cases as Mr. Paredes, even though the interview took place a few months after her encounter with Mr. Paredes. At the hearing, she offered no explanation for what appeared to be a deliberate prevarication.

As an initial matter, this is not the case of an ES worker who was unsure about her tasks and responsibilities. On the contrary, according to Ms. John, respondent knew the whole operation. Respondent testified that she was fairly apprised of the policy and procedures governing the Customer Reception Department. Yet, even though he presented no authorization letters from the Medicaid clients whose information he sought, respondent considered Mr. Paredes to be a legitimate representative. Section II(C) of petitioner's Code of Conduct which governs staff ethics provides that each employee is responsible for safeguarding the confidential nature of information concerning public assistance applicants and participants. At trial, petitioner highlighted respondent's failure to follow proper procedure regarding client representatives. Indeed, respondent's acceptance of Mr. Paredes as a representative, absent documentation, seemed at odds with her responsibility under section II(C). But she was not charged with failing to follow the established procedure in this regard and I decline to rule on it. Even so, her failure to obtain proper documentation from Mr. Paredes was not dispositive of how she perceived him.

Respondent offered no explanation why she did not refer to her own supervisors when the WMS system indicated that the Medicaid clients whom Mr. Paredes purported to represent had no coverage. The urgency in respondent's voice when she told Ms. Dorr that she needed to get off the phone gave me the sense that respondent knew that what she was doing or about to do, was wrong, and not just because ES workers were not supposed to be on the phones. I was therefore convinced that she declined to refer to her supervisors because: 1) she did not perceive the call to be a legitimate business call, given that she was speaking on Mr. Paredes' cell phone; and 2) Ms. Dorr was involved, and her relationship with Ms. Dorr was closer than she admitted.

While respondent claimed that they only exchanged pleasantries at work, Ms. Dorr characterized respondent as a “friend.”

Respondent testimony that she had previously used supervisors’ IDs where the supervisor logged on to the WMS first was plausible (Tr. 354-55). But even if she had been given a supervisor’s ID and password, as she asserted, respondent knew that the ES workers were now prohibited from printing temporary Medicaid cards. As a consequence, they could not access the screens to which supervisors had access. In fact, not only did she remind Ms. Dorr of the reason why she could no longer do what was being requested of her, but in a surreptitious manner, wrote Mr. Paredes a note that referral had to be made to supervisors Parsons, Upson, or Graham. That conduct suggested that she did not want to be overheard. It was compounded by Mr. Paredes’ revelation to Ms. Dorr that respondent was “gonna do it through her number...because the supervisor...” This suggested that respondent’s supervisor was nearby and she wanted to conceal that she was using someone else’s ID, even if that ID belonged to Ms. Dorr.

I was not convinced that respondent genuinely believed that the user ID given to her was Ms. Dorr’s, when Ms. Dorr appeared to be sending her on a “phishing” expedition with passwords. Even if she did, her attempts to use it to retrieve information from the WMS database were deliberately deceptive. Ms. Dorr was not her supervisor, did not work at the same location as respondent, and was not even a Medicaid supervisor. Further, as the audio recording indicated, respondent attempted to use her own ID when one of her supervisors was in the vicinity. In addition, Ms. John testified that the use of a supervisor’s ID by an eligibility specialist is prohibited. Mr. Paredes’ statement that respondent wanted him to “leave them all” and “she’ll find a number that she can use” gave me the sense that respondent was in the habit of using other people’s IDs to obtain information from the WMS system which was not accessible through her own ID. Her testimony that workers used each other’s IDs all the time was uncorroborated and self-serving.

In sum, I find that respondent knowingly and willingly made four attempts to use a supervisor’s ID (which turned out to be Mr. Jimenez’), to access case information in the WMS system. Such conduct constitutes an unauthorized and abusive exercise of her official functions, in violation of sections III(1), (11) and (36) of petitioner’s Code of Conduct. Therefore, charges V, VIII and IX, and those portions of charge II, as amended, that allege that respondent used Mr. Jimenez’ ID without authorization are sustained.

I turn now to the allegation that respondent provided the information obtained on four fraudulent Medicaid cases to Mr. Paredes. As Mr. Fraterrigo explained, printouts of the WMS screens were sometimes provided in lieu of temporary Medicaid cards. Petitioner's exhibits 4 and 9 demonstrated that on December 19, 2005, while Mr. Paredes was at her window, respondent used her ID to access the four fraudulent Medicaid cases. On the audio, Mr. Paredes could hardly contain his exuberance when informing Ms. Dorr that "She got them . . . she is getting the case numbers." But the video did not show documents being handed over.

A finding based entirely on circumstantial evidence may be established in a civil service disciplinary proceeding. But the circumstantial evidence must be able to support the conclusion that "the inference drawn is the only one that is fair and reasonable." *See Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Amoros*, OATH Index Nos. 469/02 & 470/02 at 23 (Nov. 6, 2002) (citing *Dep't of Transportation v. Mascia*, OATH Index No. 403/85 at 12 (May 30, 1986)).

The credible evidence indicated that Mr. Paredes usually collected either temporary Medicaid cards or printouts of fraudulent cases as proof to his street purchasers that their demographics were in the HRA database, and they either had Medicaid coverage or it was pending. The audio recording proved that Mr. Paredes was at respondent's window to check on cases in the system. When respondent could not find the cases or when she found cases that did not appear to have coverage, Mr. Paredes called his co-conspirator, Ms. Dorr, for her to guide respondent through the system using Mr. Jimenez' ID and password. When that failed because of an invalid password, Ms. Dorr directed respondent as to the type of inquiry to be entered in the WMS database. Soon after, Mr. Paredes elatedly informed Ms. Dorr that respondent located the cases and was getting the case numbers. He then disconnected the call, but spent another two and a half minutes at respondent's window. Given that another client was in queue waiting to speak with respondent, the only possible inference to be drawn from the additional time that Mr. Paredes spent at respondent's window is that he was awaiting printouts on the four fraudulent Medicaid cases, and that he left only after respondent had given them to him.

The question is whether respondent committed misconduct for giving Mr. Paredes printouts of these four cases. I think not. Respondent was well aware that ES workers were no longer authorized to issue temporary Medicaid cards, but petitioner neither asserted nor established that they were prohibited from giving information or printouts to recipients'

representatives. And even though respondent failed to obtain authorization letters from the recipients in whom Mr. Paredes was interested, I harbor no doubt that, blinded by Mr. Paredes' camaraderie with Ms. Dorr, respondent thought him to be a legitimate representative. Because I did not find respondent complicit in the Medicaid fraud scheme, I find it unlikely that she knew how the printouts were being used.

Accordingly, respondent's actions in giving Mr. Paredes the printouts on the four fraudulent Medicaid cases were not misconduct.

Altering or Making False Entries into WMM Database (Charge VI)

Petitioner put forth no evidence in support of this charge. I therefore recommend that it be dismissed.

FINDINGS AND CONCLUSIONS

1. Petitioner put forth no evidence that respondent failed to report her arrest on May 2, 2006, and the circumstances surrounding it to the HRA Commissioner, in violation of sections II(E) and III(22) of Executive Order No. 651. Charges I and VII should therefore be dismissed.
2. Petitioner conceded that the evidence did not support a finding that respondent accepted compensation for conducting computer inquiries into fraudulent Medicaid accounts, in violation of sections III(8), (9) and (10) of Executive Order No. 651. Accordingly, Charges III and IV, and those portions of Charge II that allege that respondent accepted compensation, should be dismissed.
3. Petitioner established by a preponderance of the credible evidence that respondent knowingly and willingly attempted to use a supervisor's ID to access information which she was not authorized to access, on four Medicaid cases in the HRA Welfare Management System. Respondent's conduct violated sections III(1), (11) and (36) of Executive Order No. 651. Charges V, VIII and IX, and those portions of Charge II, as amended, that allege that respondent used Mr. Jimenez' ID without authorization are therefore sustained.
4. Petitioner established by a preponderance of the credible evidence that respondent gave Mr. Paredes information on

four fraudulent Medicaid cases based on computer inquiries made under her ID, but failed to establish that to do so constituted misconduct. Therefore, that portion of Charge II that alleges misconduct for respondent's provision of information to Mr. Paredes should be dismissed.

5. Petitioner failed to prove that respondent altered or made any false entries in the Welfare Management System database or submitted any false documents, in violation of Executive Order No. III(4). Charge VI should therefore be dismissed.

RECOMMENDATION

Upon making the above findings, I obtained and reviewed an abstract of respondent's personnel record maintained by the agency. The record establishes that respondent was formally hired by HRA as a clerical associate level II, on June 27, 1999. She was permanently appointed as an eligibility specialist level II on July 13, 2005. She has no disciplinary history. No performance evaluations within the past four years were provided. Instead, petitioner provided two evaluations for the periods ending March 31, 2005 and 2006. They both corroborate Ms. John's testimony acknowledging respondent as a very good to outstanding worker.

At trial, respondent testified that she had been removed to HRA's stock room since 2006, but petitioner did not forward any documentation in which that move was commemorated. Nevertheless, in June 2007, respondent received an award for outstanding achievement as an ES II/Stock Worker Assistant. Respondent also received other commendations and awards during the period 2001 through 2010. In December 2001, she received a commendation letter for her efforts in helping surviving victims of the terrorist attack on the World Trade Center receive Disaster Relief Medicaid. In May and October 2005, respondent received certificates of appreciation and achievement, respectively, for valuable contributions to HRA, and successful completion of HRA's Customer Service Institute program. She received an award in 2009, in recognition of her tenth anniversary with the City, and in May 2010, respondent received an award for demonstrating professionalism, accountability and integrity in the workplace.

Petitioner seeks respondent's termination on the premise that respondent was complicit in and facilitated the Medicaid fraud scheme in which Mr. Paredes, Ms. Dorr, and many other HRA workers were involved. Because I find no evidence that respondent was a knowing and/or willing participant in the fraud, I find that termination would be disproportionate to the proven

misconduct. In the limited number of cases involving charges against workers for accessing information without authorization, this tribunal has recommended penalties ranging from 30 days suspension without pay to termination. See *Human Resources Admin v. Anonymous*, OATH Index No. 2596/10 (Jan. 31, 2011) (termination recommended where eligibility specialist improperly accessed the confidential records of family members more than 200 times and repeatedly slept on duty); *Office of the Comptroller v. Lattanzio*, OATH Index No. 1029/04 (Oct. 13, 2004) (30-day suspension recommended for claims specialist who used office computer to view and print confidential documents that she was not authorized to access). However, where, as here, respondent was found guilty of knowingly and willingly attempting to access information from the WMS database in an unauthorized manner, there appears to be little precedent. In *Anonymous*, OATH 2596/10, respondent, while seated at a co-worker's terminal, improperly used the co-worker's ID to access his sister's confidential information. But in light of respondent's overall misconduct, a separate penalty for misuse of the co-worker's ID was not discussed.

This tribunal has repeatedly reinforced the concept of progressive discipline, which suggests that a lesser penalty be imposed for a first offense. See *Dep't of Transportation v. Jackson*, OATH Index No. 299/90 at 14 (Feb. 6, 1990) ("it is a well-established principle in employment law that employees should have the benefit of progressive discipline wherever appropriate, to ensure that they have the opportunity to be apprised of the seriousness with which their employer views their misconduct and to give them a chance to correct it"). But progressive discipline is not a bar to imposing a stiffer penalty where warranted. See *Keith v. NYS Thruway Auth.*, 132 A.D.2d 785 (3d Dep't 1987) (upholding termination for first offense where incident was egregious); *Dep't of Environmental Protection v. Evelyn*, OATH Index No. 3343/09 (Oct. 9, 2009) (despite lack of disciplinary history, termination recommended where respondent found guilty of neglecting his duty regarding a scheduled water shutdown and had 18 unauthorized absences); *Human Resources Admin. v. Ali*, OATH Index No. 2380/09 (July 20, 2009) (where first-time offenses of 30-year employee with unblemished record garnered 60-days suspension); *Office of Management & Budget v. Perdum*, OATH Index No. 998/91 (June 17, 1991) (nineteen-year employee with no prior record terminated for repeated insubordination and incompetence where he demonstrated no willingness to change); *Latimer v. Dep't of Health*, NYC Civ. Serv.

Comm'n Item No. CD 84-77 (Oct. 5, 1984) (upholding penalty of termination for first offense despite policy of progressive discipline, where proved misconduct was intentional and obstinate).

Supervisors are assigned higher-level rights than eligibility specialists. Respondent's attempt to use a supervisor's ID is a serious violation of the trust that HRA places in its workers when they are assigned user IDs. It also calls into question respondent's integrity. The sensitive nature of the information contained in the WMS database demands strict adherence to rules. That she was so easily co-opted by a co-worker, and an individual who was not a legitimate representative, to engage in what at the least constitutes unethical behavior, leaves no doubt in my mind that respondent should not be permitted access to the WMS database.

Thus, in spite of positive performance evaluations for her two years as an eligibility specialist up until March 31, 2006, and her most recent award whilst working in the stock room, I recommend that respondent be demoted to a position equivalent to a clerical associate, which will not permit her access to the WMS database.

Ingrid M. Addison
Administrative Law Judge

March 16, 2011

SUBMITTED TO:

ROBERT DOAR
Commissioner

APPEARANCES:

PATRICK SOOHOO, ESQ.
Attorney for Petitioner

FAUSTO ZAPATA, ESQ.
Attorney for Respondent

Comm'r Decision (Apr. 19, 2011)

Administrator/Commissioner Robert Doar has carefully reviewed the Report and Recommendation of the Administrative Law Judge, Ingrid M. Addison and the record of the Section 75 Disciplinary Hearing held on February 01, 2011 and February 02, 2011, on charges heretofore preferred against respondent.

Administrator/Commissioner, Robert Doar adopts all the findings of fact of the Administrative Law Judge and finds respondent guilty of misconduct. However, he disagrees with the recommended penalty based on the Administrative Law Judge's findings. Therefore, he has decided that respondent shall be terminated from her position as an Eligibility Specialist II effective at the close of business today.

Under the provisions of Section 76 of the Civil Service Law, respondent is entitled to appeal this determination by application either to the Civil Service Commission, 1 Centre Street, Room 2300, New York, New York 10007 or to the Supreme Court of the State of New York in accordance with the provisions of Article 78 of the Civil Practice Law and Rules. If respondent elects to appeal to the Commission, such appeal must be filed in writing within twenty-three days after receipt of this notice of determination.

By: Denise DePrima
Deputy Commissioner for
Labor Relations

NEW YORK CITY CIVIL SERVICE COMMISSION

LAVERNE MAYS

LAVERNE MAYS appeals from a determination of the New York City Human Resources Administration (“HRA”) finding her guilty of violating various sections of the HRA Code of Conduct (see attached charges) and imposing a penalty of termination following disciplinary proceedings conducted pursuant to Civil Service Law Section 75. The Commission conducted an appellate hearing on August 18, 2011.

Appellant, an Eligibility Specialist, was charged with nine specific violations of HRA’s Code of Conduct based on her involvement in a scheme to defraud HRA, Department of Social Services/Medical Insurance and Medicaid/MICSA Program out of funds intended for eligible needy individuals and families.

The Administrative Law Judge (“ALJ”) found Appellant guilty of charges 5, 8, 9, charge 2 (in part) and she recommended a penalty of demotion to a position equivalent to clerical associate, which would not permit her access to the WMS database. The Commissioner of HRA accepted the ALJ’s findings of guilt but rejected the recommended penalty, instead imposing a penalty of termination.

Appellant's Position

Appellant was represented by counsel, who argued that HRA only established that Appellant had acted at the direction of a supervisor when accessing the database using a password provided by that supervisor. Appellant was not aware that the supervisor who was instructing her to access the database had provided the Appellant with another supervisor’s

password and not her own. Counsel further argued that Appellant had no malice or intent to defraud and was instead used as a pawn in someone else's scheme. The ALJ further found that Appellant did not benefit financially from the alleged misconduct.

Appellant's counsel also argued that the penalty imposed by the Commissioner of HRA was excessive and that he did not provide any explanation as to why he was rejecting the ALJ's recommendation, a recommendation that was based on a thorough assessment of the evidence and that considered all the mitigating factors. Counsel added that even after the charges were filed against Appellant, she continued to receive awards and accolades from HRA for her work performance.

HRA's Position

On questioning from the Commission, counsel explained that the supervisor instructing Appellant to access the database was not a supervisor in the department where Appellant worked and Appellant should have known better than to follow her instructions. Counsel further argued that Appellant's conduct was a serious breach of trust and that Appellant, who was fully aware of the rules and regulations, should not have used a password that had not been issued to her. Counsel pointed to Appellant's telephone conversation with the supervisor in question where she stated, "hurry up, I am not supposed to be on the phone" as support of HRA's assertion that Appellant was aware that what she was doing was in violation of the rules and regulations.

Counsel was unable to respond to the Commission's inquiry as to why the Commissioner did not support his decision to reject the recommended penalty, other than to state that the recommended penalty was "insufficient." Further, on questioning from the Commission, Counsel was not able to provide an explanation for the imposition of termination.

Analysis

The Commission has considered the record below and the arguments presented at the hearing.

We note that Appellant was found guilty of four charges out of a total of nine. We further note that the ALJ found that Appellant was not a knowing or willing participant in the fraud and that she determined that termination would be a disproportionate penalty in light of the proven misconduct and the mitigating factors of an excellent record with no disciplinary history. (See ALJ decision pg. 19). This Commission recognizes that the ALJ's recommended penalty is only a recommendation. However, we note the Commissioner's determination rejected a recommendation that was based on a careful review of the evidence after a lengthy hearing and did not provide any rationale to support setting aside the ALJ's recommendation. Counsel for HRA was also unable to provide this Commission with any support or rationale which would explain the basis for the penalty of termination imposed in this case.

This Commission finds that the record supports the ALJ's recommendation that, in light of Appellant's positive performance evaluations and her many commendations, she should be disciplined with a penalty short of termination. We further find that the record supports the ALJ's determination that Appellant's conduct at the very least constitutes unethical behavior and that she should not be permitted to remain in a position that would allow her access to the WMS database.

Decision

We therefore modify the Commissioner's determination and impose a penalty of time served. Given Appellant's serious breach of security she is also hereby demoted to a position equivalent to a clerical associate, as recommended by the ALJ.

Appellant is to be reinstated to a position that will not permit or require access to the WMS database within thirty (30) days from this determination.

Nancy G. Chaffetz, Commissioner
Chair

Rudy Washington, Commissioner
Vice-Chair

Charles D. McFaul, Commissioner

Date: 1/31/12