Dep't of Correction v. LaSonde

OATH Index No. 2526/11 (Aug. 18, 2011)

Correction officer refused to answer questions in MEO-16 interview. Termination from employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
CHANDRA LASONDE
Respondent

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORGNIOTTI, *Administrative Law Judge*

This employee disciplinary proceeding was referred by the Department of Correction ("DOC" or "Department") pursuant to section 75 of the Civil Service Law against respondent Chandra LaSonde, a correction officer. Petitioner alleges that respondent engaged in misconduct when she refused to answer questions on May 26, 2011, in an interview conducted under Mayor's Executive Order Number 16 ("MEO-16") (ALJ Ex. 1). The interview concerned an investigation into whether respondent, while acting as a union official, submitted a fraudulent insurance claim on behalf of another correction officer. Respondent denied engaging in misconduct and asserted that she had constitutionally protected rights not to answer questions that did not involve her official duties as a correction officer.

A hearing was conducted on July 20, and 21, 2011. Petitioner presented documentary evidence and the testimony of a Department of Investigation ("DOI") investigator and two DOC employees. Respondent presented documentary evidence and the testimony of two DOC employees, one of whom was also a union official. Respondent did not testify.

For the reasons below, I find that respondent engaged in misconduct as charged and recommend that her employment be terminated.

BACKGROUND

Relevant Background Facts and Related Litigation

Respondent was appointed as a correction officer on February 5, 1987 (Pet. Ex. 3). The primary duties of a correction officer are the care, custody, and control of inmates (Tr. 87, 176, 188; Resp. Ex. B). Officers may also have assignments that do not involve inmate contact including, *inter alia*, working in a DOC office setting or performing union activities on approved release time (Tr. 153, 164, 178-80, 253; Pet Ex. 7).

Release time for union activities is governed by Mayor's Executive Order No. 75 ("MEO-75") (Pet. Ex. 7). Employees on release time who are engaged in specified activities do so without the loss of pay or other employee benefits (Pet. Ex. 7 at ii). The Department is not reimbursed by the union for correction officers working on approved release time (Tr. 157, 162).

The Correction Officers Benevolent Association ("COBA") is the union for correction officers. DOC and COBA are separate and distinct entities (Tr. 152, 212-13).

In 2006 respondent became an elected COBA delegate and appeared at OATH to assist correction officers who were the subject of disciplinary charges. She was also appointed to COBA's executive board as the financial secretary (Pet. Exs. 1, 2 at 7). The Department granted respondent release time to perform union activities on a full-time basis for COBA (Pet. Ex. 1). As such, respondent was required to submit monthly Labor Management Joint Activity Reports to DOC accounting for her time spent working on union matters as well as her use of annual and sick leave (Tr. 145-47, 177; Pet. Exs. 4, 5). While on release time respondent received her correction officer's paycheck from the City of New York (Tr. 157, 179, 333).

In November 2009, DOI opened an investigation into whether respondent, as COBA's financial secretary, filed a false insurance claim for Officer Blake, another correction officer (Tr. 91, 277; Pet Ex. 3). In an unsworn statement at the hearing, respondent acknowledged that she processed and mailed the insurance form but denied any wrongdoing (Tr. 26-27).

DOI is the City agency charged with the investigation and elimination of corruption or other criminal activity, conflicts of interest, unethical conduct, misconduct, or incompetence by City agencies, City employees, persons doing business with the City, and persons who are paid or receive money from or through the City (Tr. 61). *See also* Charter §§ 803, 805 (Lexis 2011). Investigations conducted by DOI and designated agents are governed by MEO-16 (Resp. Ex. A).

DOI attempted to interview respondent in December 2009. Investigator MaQuine was present for the interview. Respondent, who had not been granted use immunity, declined to answer questions invoking her Fifth Amendment right against self-incrimination. Respondent was not compelled to testify because there was a criminal case pending (Tr. 65-67, 236-37, 256).

On April 20, 2010, respondent and Officer Blake were indicted by a grand jury for the crime of devising and implementing a scheme to use the United States mail to submit a false claim to an insurance company in violation of 18 U.S.C. sections 1341 and 1342. On June 15, 2010, the jury acquitted respondent and found the other officer guilty of mail fraud. *United States v. Blake*, 2010 U.S. Dist. LEXIS 81049 at *3 (S.D.N.Y. Aug. 9, 2010).

Respondent brought a federal action against COBA, the Department, and various individuals alleging, *inter alia*, that COBA falsely accused her of insurance fraud and forced her to resign from its executive board. These claims were dismissed. *See LaSonde v. Correction Officers Benevolent Assoc*., 2010 U.S. Dist. LEXIS 78698 (S.D.N.Y. July 26, 2010), *appeal denied*, No. 10-2776-cv (2d Cir. Dec. 7, 2010).[1]

After respondent's acquittal, Investigator MaQuine drafted a memorandum of complaint ("MOC") dated June 29, 2010, alleging that respondent had violated DOC's rules and regulations by filing an insurance claim on behalf of Officer Blake. Investigator MaQuine alleged that respondent engaged in conduct unbecoming an officer in that she submitted a false claim on October 23, 2009, on behalf of another officer knowing that he was not entitled to the benefit, submitted such claim without authorization of COBA, and failed to provide COBA with a copy of the claim (Pet. Ex. 3).

The MOC was forwarded to DOC for review and action (Tr. 62, 102). David Klopman, an attorney for DOC, scheduled an interview with respondent pursuant to MEO-16 regarding these allegations. Respondent appeared several times without counsel, invoked her right to counsel, and the interview was rescheduled (Tr. 238, 263, 273, 282). *See also LaSonde v. O'Leary*, No. 11-CV-02375, slip op. at 3 (SLT) (E.D.N.Y. May 25, 2011) (MEO-16 interviews

[1] Respondent also became involved in a union called Correction Officers Represented Equally ("CORE"). Respondent is CORE's President and Damon Carter is CORE's legal counsel (ALJ Ex. 2, e-mail from Klopman to Zorgniotti, June 14, 2011, 16:14 EST). *See also* Correction Officers Represented Equally (2011), http://corecorrections.com.

were scheduled for April 18, May 3, and 5, 2011, but respondent appeared without counsel). The interview was rescheduled for May 26, 2011.

Respondent also attempted, unsuccessfully, to enjoin DOC from conducting the interview in both State and Federal court. *See LaSonde v. O'Leary*, 2011 NY Slip Op 30837U (Sup. Ct. N.Y. Co. Apr. 6, 2011) (petitioner failed to set forth basis for quashing May 26, 2011, investigatory interview); *LaSonde*, No. 11-CV-02375 (motion to enjoin May 26, 2011, interview on grounds that it deprived plaintiff of procedural and substantive due process denied).[2]

On May 26, 2011, respondent appeared with counsel, Damon Carter, for the MEO-16 interview. During the interview, respondent invoked her "Fifth Amendment right pertaining to perjury" and stated that she would only answer questions about her "official" duties as a correction officer not her duties as a COBA board member on release time (Pet. Ex. 1).

On June 2, 2011, DOC served respondent with disciplinary charges alleging that on May 26, 2011, respondent was asked questions under MEO-16 that she refused to answer in violation of DOC rules 3.20.030, 3.20.300, and 3.40.040 (ALJ Ex. 1; Resp. Ex. C).

Procedural History at OATH

During the pre-hearing phase, respondent and her counsel, Mr. Carter made various applications and meritless allegations including claims that OATH was violating respondent's due process rights, was engaging in *ex parte* communications with DOC and COBA, was denying her a pre-trial conference, and was not impartial.[3] As summarized below, respondent

[2] In her appeal of *LaSonde*, 2010 U.S. Dist. LEXIS 78698, respondent also sought to enjoin the interview. The Second Circuit, after noting it was inappropriate to raise this issue for the first time on appeal, nevertheless considered the merits and denied the motion. *LaSonde v. Correction Officer's Benevolent Assoc*., No. 10-2776-cv, slip op. at 2 (2d Cir. Dec. 7, 2010).

[3] OATH is an independent tribunal established by Executive Order No. 32 in 1979. Contrary to respondent's assertions, OATH judges, when appropriate, have recommended dismissal of disciplinary charges referred by agencies including DOC and these recommendations have been adopted by the referring agencies. *See, e.g., Dep't of Correction v. Dominguez*, OATH Index Nos. 550/10 & 551/10 (Jan. 8, 2010); *Dep't of Correction v. Long*, OATH Index No. 2464/09 (July 8, 2009), *adopted*, Comm'r Dec. (Aug. 11, 2009); *Dep't of Correction v. Patterson*, OATH Index Nos. 2080/08, 2081/08, 2082/08, 2083/08, 2084/08, 2085/08, & 2088/08 (Apr. 9, 2009), *adopted*, Comm'r Dec. (Apr. 9, 2009); *Dep't of Correction v. Pack*, OATH Index No. 1553/06 (Jan. 25, 2007), *adopted*, Comm'r Dec. (Oct. 2, 2008); *Dep't of Correction v. Winchester*, OATH Index Nos. 911/07, 912/07, 957/07, & 958/07 (May 8, 2007), *adopted*, Comm'r Dec. (Sept. 25, 2007); *Dep't of Correction v. Gonzalez*, OATH Index Nos. 369/06 & 494/06 (June 7, 2006), *adopted*, Comm'r Dec. (July 28, 2006); *Dep't of Correction v. Benston*, OATH Index No. 1557/05 (Nov. 7, 2005), *adopted*, Comm'r Dec. (Feb. 2, 2006); *Dep't of Correction v. Cancel*, OATH Index Nos. 1085/05 & 1087/05 (Aug. 11, 2005), *adopted*, Comm'r Dec. (Oct. 5, 2005); *Dep't of Correction v. Hewett*, OATH Index No. 672/04 (Jan. 27, 2005), *adopted*, Comm'r Dec. (Mar. 4, 2005).

was accorded due process and was granted all reasonable applications. Copies of the cited e-mails as well as additional correspondence between OATH and the parties saved in electronic format have been made part of the record (ALJ Ex. 2).

On June 2, 2011, Mr. Klopman filed with OATH, on notice to Mr. Carter, the charges alleging that respondent was asked questions under MEO-16 that she refused to answer. Charges relating to the underlying insurance fraud were not referred for hearing. Mr. Klopman requested an expedited conference and a trial before June 27, 2011, stating that respondent's misconduct was a termination offense (ALJ Ex. 2, e-mail from Klopman to OATH Calendar Unit, June 2, 2011, 12:42 EST).

Pursuant to OATH rule section 1-26(d), a party may docket and select trial and conference dates *ex parte* and must serve notice of those dates promptly on the opponent. 48 RCNY § 1-26(d) (2011). OATH's calendar unit scheduled a conference for June 8, and a trial for June 27, 2011. Administrative Law Judge ("ALJ") Kevin Casey was assigned as the conference judge and ALJ Ingrid Addison as the trial judge.

By e-mail dated June 2, 2011, Mr. Carter advised the calendar unit that he would not be available until June 29, 2011, that he would be forwarding a request for subpoenas, that there was a substantial amount of discovery necessary, and that prosecution of this case was in retaliation for respondent's union activity (ALJ Ex. 2, e-mail from Carter to OATH Calendar Unit, June 2, 2011, 14:03 EST).

On June 3, 2011, Mr. Carter forwarded to the OATH calendar unit a subpoena request for approximately 19 witnesses. Mr. Carter also objected to the expedited nature of the proceedings (ALJ Ex. 2, e-mail from Carter to OATH Calendar Unit, June 3, 2011, 09:20 EST).

On June 7, 2011, Mr. Carter's request to adjourn the trial to June 29, 2011, was granted by ALJ Addison (ALJ Ex. 2, e-mail from Addison to Carter and Klopman, June 7, 2011, 14:01 EST). Because ALJ Addison was already engaged, the matter was reassigned to me for trial.

On June 7, Mr. Carter also advised that he would be available for a conference on June 22, 2011 (ALJ Ex. 2, e-mail from Carter to OATH Calendar Unit, June 7, 2011, 12:51 EST).

On June 8, 2011, neither respondent nor her counsel appeared for the conference (ALJ Ex. 2, e-mail from Klopman to OATH Calendar Unit, June 9, 2011, 16:29 EST). The conference

was rescheduled to June 22, 2011 (ALJ Ex. 2, e-mail from OATH Calendar Unit to Klopman and Carter, June 13, 2011, 09:40 EST).

On June 10, 2011, respondent filed a motion to dismiss the charges arguing that OATH lacks jurisdiction because the conduct under investigation was not part of respondent's official duties as a correction officer but involved her duties as a COBA representative, and that she had a Fifth Amendment right not to answer questions. Respondent also argued, *inter alia*, that the disciplinary proceeding was a violation of her First Amendment right to freely associate with others and that it constituted impermissible retaliation for union activity. A complete set of the motion papers is part of the record (ALJ Ex. 3).

In a separate e-mail Mr. Carter made an offer of proof regarding the subpoena request for 17 of the proposed 19 witnesses who included COBA board members as well as DOC and other City employees. According to counsel, 12 witnesses would testify that official union duties are not the same as official correction officer duties and/or that COBA and DOC are separate and independent. The other witnesses would be called in support of respondent's assertions that the disciplinary proceeding was motivated by COBA's bias, was selective prosecution, and was in retaliation for her exercising her First Amendment right to engage in union activity (ALJ Ex. 2, e-mail from Carter to Zorgniotti, June 15, 2011, 13:33 EST).

On June 16, 2011, I advised the parties that in light of respondent's objection to the expedited proceedings and because there were requests for subpoenas and a motion pending which needed to be reviewed, the June 22 conference date would be vacated and the June 29 trial converted to a conference. Based on Mr. Klopman's request that trial dates be selected, the trial was rescheduled to July 20, 21, and 25, dates that Mr. Carter had previously indicated were preferable and for which he was still available (ALJ Ex. 2, e-mails from Zorgniotti to Carter and Klopman, June 16, 2011, 11:58, 15:00, 16:13 EST).

On June 21, 2001, Mr. Klopman opposed the motion to dismiss arguing that respondent's union activities did not insulate her from questioning under MEO-16. Mr. Klopman also objected to respondent's subpoena request (ALJ Ex. 3).

On June 24, 2011, Mr. Carter filed a reply in support of respondent's motion. Respondent asserted that there were issues of fact to be determined and witnesses who needed to be presented at the hearing in support of her legal arguments (ALJ Ex. 3).

On June 28, 2011, respondent's request to take the case off the calendar pending a decision on the motion was denied (ALJ Ex. 2, e-mail from Zorgniotti to Carter and Klopman, June 28, 2011, 10:58 EST).

On June 29, 2011, counsel for both parties appeared for the settlement conference but respondent did not appear.

By memorandum decision dated July 8, 2011, respondent's motion to dismiss for lack of jurisdiction was denied without prejudice. *See Dep't of Correction v. LaSonde*, OATH Index No. 2526/11, mem. dec. (July 8, 2011) (ALJ Ex. 4). A decision on the merits of respondent's legal arguments was held in abeyance to be addressed in the report and recommendation made to the referring agency. In any event, respondent's allegations that there were issues of fact to be resolved at trial rendered a decision on the motion premature.

Respondent's request to subpoena Vincent Boscio, a correction officer and a COBA delegate was granted. The remaining request to compel 18 witnesses to testify was denied with a right to renew upon a showing that they were relevant and would not provide cumulative testimony. Moreover, respondent was advised that she would be given considerable leeway to testify on her own behalf regarding all her defenses and would be allowed to present voluntary witnesses and documentary evidence to the extent the evidence was relevant and not cumulative. A schedule was set to complete discovery and respondent advised that a pre-trial conference would be held on the morning of trial, and that the Boscio subpoena was available to be picked-up from the OATH calendar unit and served. *See LaSonde*, OATH 2526/11.

On July 11, 2011, Mr. Carter notified OATH that respondent would be proceeding with her disciplinary case *pro se*. He also indicated that he would continue to assist respondent and would appear at the hearing. Attached to the e-mail was a letter from respondent stating that she wanted to appear *pro se* with the assistance of counsel because the decision on her motion to dismiss was not "fair and impartial." She further stated that Mr. Carter was "a real attorney, practicing before real courts" and that he should not have to "endure the shenanigans" (ALJ Ex.

2, Letter from LaSonde to Zorgniotti, July 11, 2011, attached to e-mail from Carter to Zorgniotti, July 11, 2011, 12:31 EST).[4]

Mr. Carter was advised that pursuant to OATH Rule 1-12, he would have to make an application to withdraw and that a conference call with all parties was necessary to discuss respondent's request to proceed *pro se* with his assistance (ALJ Ex. 2, e-mail from Zorgniotti to Carter, July 11, 2011, 13:16 EST). The requirement that counsel seek leave to withdraw has several purposes, including protecting all parties' rights, monitoring and regulating the practice of the bar before this tribunal, ensuring that adjudication proceeds expeditiously and in an orderly fashion, and protecting the public interest in efficient application of this tribunal's resources. *Dep't of Correction v. Lewis*, OATH Index No. 1316/95, mem. dec. at 4 (May 31, 1995).

Respondent stated that she was unavailable for a conference call because she did not have "telephone conference capability at the location where I am scheduled to be for the duration of this week." She also stated that the trial date should be vacated and "the date of July 20, 2011 [ ] utilized to discuss the topics of concern surrounding the *pro se* issue" (ALJ Ex. 2, e-mail from LaSonde to Zorgniotti, July 11, 2011, 16:02 EST).

Mr. Carter also responded that he would not be available until July 20 (ALJ Ex. 2, e-mail from Carter to Zorgniotti, July 11, 2011, 16:26 EST).

In several subsequent e-mails, I advised the parties that I would make myself available for a conference call that was convenient for respondent and her counsel and that OATH would place the call. I also requested that Mr. Klopman make himself available for such a call. I further stated that I was inclined to grant respondent's application but that it was necessary to have a discussion on the record before doing so. Finally, I advised that unless and until Mr. Carter had been relieved as counsel, respondent should not communicate directly with this tribunal and opposing counsel and that all applications had to be made through Mr. Carter (ALJ Ex. 2, e-mails from Zorgniotti to Carter, LaSonde, and Klopman, July 11, 2011, 16:40 and July 12, 2011, 09:51 EST).

[4] Also on July 11, OATH was served with a 91-page amended complaint naming OATH as a defendant in respondent's federal action: *LaSonde v. O'Leary, et al.*, No. 11-CV-02375 (SLT) (E.D.N.Y.). Mr. Carter represents respondent in that case. The complaint alleges that OATH lacks impartiality.

On July 12, 2011, Mr. Carter indicated he would be available on July 14, 2011, at 10:00 a.m. (ALJ Ex. 2, e-mail from Carter to Zorgniotti, July 12, 2011, 10:36 EST). A conference call was scheduled at the time indicated and the parties advised that the call would be on the record. I asked Mr. Klopman that in the event respondent was on duty at the time of the conference call, to make the necessary arrangements so that she could participate. (ALJ Ex. 2, e-mail from Zorgniotti to Klopman, Carter, and LaSonde, July 12, 2011, 12:13 EST.) Mr. Klopman stated that respondent worked the midnight tour from 11 p.m. to 7:31 a.m. (ALJ Ex. 2, e-mail from Klopman to Zorgniotti, July 12, 2011, 12:18 EST).

Despite respondent's repeated assertions that she was too busy to deal with this matter and had limited ability to communicate, respondent sent numerous lengthy e-mails throughout the week objecting to having a conference call on a range of grounds including that it was unfair. She also made various requests directly to the tribunal that Mr. Klopman be removed from the case, that her subpoena request be granted without interference, that she be allowed to appear *pro se*, that she be given a pre-trial settlement conference, and that the trial be delayed (ALJ Ex. 2, e-mails from LaSonde to Zorgniotti, July 11, 12, and 13, 2011).

On the morning of July 14, 2011, respondent agreed to participate in the conference call. In keeping with rule 103(A)(8) of Appendix A to title 48 of the Rules of the City of New York, the Rules of Conduct for Administrative Law Judges and Hearing Officers of the City of New York, I explained to respondent her right to be represented by an attorney and the risks of proceeding self-represented as well as some of the procedural aspects that she would be responsible for during these proceedings. Respondent indicated that she wanted to represent herself because she was in the best position to address the charges in the fullest and clearest manner. I also advised respondent that in light of her recent e-mail correspondence, that she would be required to follow the rules and rulings of the tribunal and had to conduct herself in a civil manner. Respondent stated that she understood and wanted to proceed self-represented. Accordingly, Mr. Carter's request to withdraw as counsel was granted. Also discussed was the manner in which Mr. Carter would assist respondent, and the request to have him question her when she took the stand at trial was granted. Respondent also stated that she would be ready to proceed with the hearing as scheduled.

After Mr. Carter was relieved, respondent was given leave to make her applications to the tribunal. Among other things, respondent asked to call Mr. Klopman as a witness and to disqualify him as counsel on the pending disciplinary case. Mr. Klopman objected. The request was granted because Mr. Klopman was present for the interview that was the subject of the charges and the benefits of having him as a witness outweighed any burden on petitioner, which already had Assistant Commissioner Robert O'Leary, Esq. working on the case for trial. However, respondent's request to exclude Mr. Klopman from the hearing when he was not testifying was denied because excluding an attorney on the eve of trial who had done a considerable amount of work on the case would have posed an unfair burden on petitioner. Moreover, because the interview that respondent wished to question Mr. Klopman about was taped, there was no apparent prejudice to respondent in allowing Mr. Klopman to sit at the counsel table to assist Commissioner O'Leary. A schedule for exchanging witness lists and completing discovery was also finalized. A copy of the transcript from the conference is part of the record (ALJ Ex. 5).

Following the conference call, ALJ Casey spoke with the parties regarding possible settlement of the charges. Respondent was also advised that if she wanted another conference on the morning of trial that one would be provided.

On July 15, 2011, Mr. Klopman moved to reconsider the ruling to disqualify him as trial counsel and to be a witness for respondent. The request was denied (ALJ Ex. 2, e-mail from Zorgniotti to Klopman, LaSonde, and O'Leary, July 15, 2011, 12:10 EST).

Also on July 15, respondent submitted a new application to subpoena 15 witnesses including COBA members who had been previously requested and denied. Petitioner objected to the request. The new application was denied because there was an inadequate showing that the witnesses had relevant knowledge and would provide noncumulative testimony. Moreover, a number of the topics that respondent sought testimony about could be elicited from the witnesses whom petitioner intended to produce and by the two witnesses compelled to testify for respondent. Respondent was also reminded that she would be granted considerable leeway in her testimony, she could call voluntary witnesses, and in the event there was a showing that other witnesses were needed for her defense, an application to subpoena them would be considered at that time. After the close of business that Friday afternoon, respondent filed an objection to the

ruling, renewed her request for subpoenas, and also requested an adjournment of the hearing (ALJ Ex. 2, e-mails from LaSonde to Zorgniotti, July 15, 2011, 13:08, 17:34 EST).

On Monday, July 18, 2011, petitioner objected to the adjournment request (ALJ Ex. 2, e-mail from O'Leary to Zorgniotti, July 18, 2011, 10:42 EST). The requests to reconsider the second subpoena application and to adjourn the hearing were denied (ALJ Ex. 2, e-mail from Zorgniotti to O'Leary and LaSonde, July 18, 2011, 10:38 EST).

Respondent also requested that Joseph Archibald be allowed to act as a non-attorney representative at the hearing and that he be allowed to ask witnesses questions (ALJ Ex. 2, e-mail from LaSonde to Zorgniotti, July 18, 2011 10:59 EST). This request was granted (ALJ Ex. 2, e-mail from Zorgniotti to LaSonde and O'Leary, July 18, 2011, 12:00 EST).

On July 18, respondent was advised that she had not provided her witness list and discovery as scheduled and that the subpoena for Mr. Boscio had not been picked up and served as directed. Respondent indicated that she would serve the subpoena. At the request of the tribunal, petitioner agreed to produce Mr. Boscio for the hearing. Respondent also provided the requested information to petitioner. In addition to Mr. Klopman and Mr. Boscio, respondent's witness list included petitioner's witnesses in the event petitioner did not call them at the hearing (ALJ Ex. 2, e-mails from Zorgniotti to LaSonde and O'Leary, July 18, 2011, 16:36, 18:37 EST, e-mails from LaSonde to Zorgniotti, July 18, 2011, 16:57 EST and July 19, 2011, 09:18 EST).

The OATH Hearing

Respondent appeared for the hearing on July 20, 2011, with Mr. Archibald as her non-attorney representative and Mr. Carter as her stand-by counsel. Again, respondent was advised of her right to counsel and she indicated that she wished to proceed self-represented as previously discussed (Tr. 14-15). Moreover, respondent declined to have another settlement conference with ALJ Casey (Tr. 16-17). Respondent was given the option to be sworn in at the beginning of the hearing so that her statements would have the effect of sworn testimony. Respondent declined and indicated that she preferred to be sworn in when she took the witness stand (Tr. 17).

Petitioner appeared and was represented by Commissioner O'Leary with Mr. Klopman at the counsel table. Respondent renewed her request to exclude Mr. Klopman from the hearing. The request was denied for the reasons already stated (Tr. 5-6).

After opening statements from Mr. O'Leary and respondent, the hearing proceeded with petitioner's case, which included the testimony of DOC Investigator Tavares who authenticated and introduced the audio recording of respondent's MEO interview (Pet. Ex. 1).

The recording was played at the hearing. DOC Investigator Tavares administered the oath to respondent. Mr. Klopman conducted the interview; also present were DOI Investigator MaQuine, a law intern, respondent and her counsel, Mr. Carter. Pursuant to MEO-16, Mr. Klopman advised respondent that she was granted use immunity which meant that any statements made during the interview could not be used against her in a subsequent criminal prosecution other than for perjury or contempt, although statements made may be used against her in an administrative proceeding. Respondent was also told that if she remained silent or refused to answer questions related to the performance of her official duties, she would be subject to dismissal from employment. Respondent stated that she understood and declared herself ready to proceed.

During the interview Mr. Klopman asked respondent questions about her duties as a COBA financial secretary and the filing of insurance claims on behalf of correction officers. In response respondent asserted her "Fifth Amendment right pertaining to perjury" on the advice of counsel (Pet. Ex. 1). Several times Mr. Klopman and Investigator MaQuine explained the meaning of use immunity, respondent's obligation to cooperate, and the penalty for not doing so. Mr. Klopman also stated that respondent was not entitled to immunity for perjury. In response to additional questions posed, respondent continued to assert the Fifth Amendment and maintained that she would only answer questions about her official duties as a correction officer, not her duties as COBA board member on release time (Pet. Ex. 1).

At the hearing, DOI Investigator MaQuine testified about why the interview was conducted. On cross-examination by Mr. Archibald, Investigator MaQuine explained that an officer can be questioned about her official duties. An officer's official duties constitute whatever duties the officer is assigned to and that it is not limited to the care, custody, and control of inmates. In respondent's case, she was assigned to the COBA board office and the

questions asked related to the duties she was performing while she was being paid by the City to work on release time (Tr. 91).

Petitioner completed its case with the testimony of Nicholas Santangelo, DOC's Director of Labor Relations. Mr. Santangelo testified about the Department's adherence to MEO-75 for union activities and confirmed that release time allowed respondent to perform such duties for COBA on City time (Tr. 144-51).

Respondent was given wide latitude to cross-examine petitioner's witnesses beyond the scope of direct examination. Respondent's questioning included a probing, over petitioner's objection, into Investigator MaQuine's good faith basis for drafting the MOC concerning allegations that respondent had violated DOC's rules by filing a false insurance claim. Investigator MaQuine testified that she interviewed COBA board members, spoke with COBA's insurance carrier, and reviewed related documents (Tr. 112-114, 117, 121-22, 125-28).

Officer Boscio appeared for respondent pursuant to a subpoena that was served upon him at the hearing. He testified that he is a correction officer as well as a COBA executive board member and delegate. He is on release time (Tr. 183-84). Officer Boscio testified that his duties as a correction officer (care, custody, and control of inmates) are different from those of a union official whose duties include representing officers at OATH (Tr. 186-87, 189).

Officer Boscio further testified that he appears at MEO-16 interviews with COBA counsel on behalf of correction officers and that it is an officer's obligation to answer questions posed by the interviewer, who can ask about almost anything, including off-duty conduct. According to Officer Boscio, an officer cannot refuse to answer questions or plead the Fifth Amendment (Tr. 193-95, 206, 208, 222-23). Finally, Officer Boscio stated that good moral character, integrity, and honesty are requirements of a correction officer and a COBA board member (Tr. 222-23).

On July 21, 2011, respondent appeared for the second day of hearing with Mr. Archibald and stated that Mr. Carter would not be attending. Respondent's request to have Mr. Archibald question her when she took the stand was granted (Tr. 229-30).

Respondent called Mr. Klopman who testified that he has worked as a DOC attorney since 1988. Prior to DOC, he was an investigator for the New York City Board of Education

Inspector General's Office and for the Human Resources Administration in the Bureau of Client Fraud. At DOC Mr. Klopman has conducted hundreds of MEO-16 interviews (Tr. 231-32, 234).

Mr. Klopman testified that once an MOC has been issued, the person named in the complaint is not considered a witness and is questioned pursuant to MEO-16 (Tr. 276-81, 285). Moreover, since a disciplinary case is an administrative proceeding which has a different standard of proof than a criminal trial, it is DOC's practice to conduct MEO-16 interviews even when the subject of the investigation has been acquitted of criminal charges (Tr. 285).

Mr. Klopman testified that according to MEO-16, once an officer is given use immunity the officer must answer the questions posed. Asserting the Fifth Amendment is the same thing as refusing to answer a question and it is not allowed (Tr. 247-49). He stated that in his 22 years of conducting MEO-16 interviews, respondent is the only person who has ever refused to answer questions after being granted use immunity (Tr. 255; Tavares: Tr. 57-58; MaQuine: Tr. 64).

In further response to Mr. Archibald's questions, Mr. Klopman testified that in the MEO-16 interview with respondent, she refused to answer questions regarding the performance of her duties that she was assigned to do on behalf of COBA and that this constituted misconduct under DOC's rules as charged (Tr. 246-51, 262). Moreover, activities relating to the filing of a false insurance claim are not protected union conduct (Tr. 253-54). Mr. Klopman expressed surprise that respondent refused to answer questions because he was asking her about release time that she was being paid to do by the City (Tr. 256). Mr. Klopman also stated that regardless whether she was acting in her COBA capacity, respondent, as a City employee, could be questioned about alleged criminal conduct and questions of integrity (Tr. 259, 262, 285-86). He stated that the purpose of the interview was to get respondent's side of the story, but that she refused to answer any of the relevant questions (Tr. 269, 276).

Mr. Klopman also testified that under MEO-16, a person who refuses to answer questions is subject to termination from employment. Despite her years of service and lack of a disciplinary record, Mr. Klopman stated that termination is appropriate here (Tr. 272-73).

Following Mr. Klopman's testimony, respondent sought to recall Investigator MaQuine, claiming that she had been on respondent's witness list and that some of the statements MaQuine had made were wrong. Because respondent had the opportunity to cross-examine the witness for that purpose, the request was denied (Tr. 288). *People v. Drake*, 7 N.Y.3d 28,34 (2006) (finding

it was not an abuse of discretion for the trial judge to preclude the defendant from recalling a witness for impeachment purposes); *Feldsberg v. Nitschke*, 49 N.Y.2d 636, 643-44 (1980) ("recall of a witness . . . is subject to the discretion of the court . . . Generally, sound trial practice demands that every witness be questioned in the first instance on all relevant matters of which he has knowledge and be excused at the completion of this testimony.").

Respondent rested and stated that she would not testify. Because respondent was unrepresented and Mr. Carter was no longer present to assist her, I advised respondent that petitioner could seek an adverse inference and explained the meaning of such an inference. I also provided respondent with a recent case on the subject and allowed her time to review it and to speak with Mr. Archibald. Respondent thereafter indicated that she did not wish to testify (Tr. 288-93).

During her closing, respondent renewed her motion to dismiss and argued that there was no good faith basis for the charges relating to the insurance fraud and that she did not need to answer any questions about them in the MEO-16 interview. Moreover, under the express language of MEO-16, the interview should have been limited to her "official" duties of a correction officer (care, custody, and control) and that her COBA duties are not within the purview of DOC. Respondent also argued that she should have been interviewed without being placed under oath. In her view, the process engaged in by DOC was done in bad faith and her only recourse was to plead the Fifth Amendment. In support of the proposition that she had a constitutional right not to testify, respondent relied on *Uniformed Sanitation Men Association v. Commissioner of Sanitation*, 392 U.S. 280 (1968).

Moreover, respondent claimed that with the exception of Mr. Santangelo, all the other witnesses were incredible, including her own witnesses, Officer Boscio and Mr. Klopman who she contended should be discredited.[5] Despite being warned repeatedly throughout her closing, respondent kept alleging facts that were not in the record (Tr. 296-98, 307-08, 314, 323-25, 330, 333-35, 339). In short, respondent was testifying without being subject to cross-examination and without being under oath.

[5] Respondent repeatedly elicited testimony from witnesses that went to the ultimate conclusions that are the province of the ALJ. Respondent's non-attorney representative was advised several times not to do so (Tr. 47, 59, 79, 96, 99). I do not regard any of the witnesses' legal conclusions as binding on me but instead rely on the applicable law.

In petitioner's closing, DOC requested that an adverse inference be drawn from respondent's failure to testify. Petitioner also argued that all required procedures were followed in respondent's MEO-16 interview and that there was a good faith basis for conducting it. After being granted use immunity, respondent had a duty to answer questions and there was no basis for her refusal. The questions concerned respondent's integrity, good moral character and honesty, which DOC has a right to investigate.

ANALYSIS

OATH'S Jurisdiction

First, I reiterate my finding that OATH has jurisdiction to make recommendations on whether or not a DOC employee is subject to discipline. *See* Civ. Serv. Law § 75 (Lexis 2011) (stating that an employee shall not be removed or otherwise disciplined without a hearing); Mayoral Executive Order No. 32 § 2(a) (eff. July 25, 1979) ("Except as otherwise provided by law or agreed by [OATH's] Chief Administrative Law Judge, all agency heads shall delegate to the Chief Administrative Law Judge the authority to conduct disciplinary, disability or other trials and hearings permitted or required by the New York State Civil Service Law and to make written reports and recommendations with respect to such trials and hearings."); Charter § 1048(2) (Lexis 2011) (OATH is the tribunal for "the impartial administration and conduct of adjudicatory hearings for violations of this charter, the administrative code of the city of New York, rules promulgated pursuant to this charter or such code and any other laws, rules, regulations or other policies enforced or implemented by the agencies of the city"); *Dep't of Correction v. Auguste,* OATH Index No. 2770/08 at 3-9 (Apr. 17, 2009) (finding OATH has jurisdiction to conduct disciplinary hearings for DOC employees); *Dep't of Correction v. Malone,* OATH Index No. 882/06 at 6-8 (Jan. 11, 2007), *adopted,* Comm'r Dec. (Mar. 8, 2007), *aff'd sub nom. Malone v. Horn*, No. 108250/2007 (Sup. Ct. N.Y. Co. Jan. 14, 2008) (same).

Adverse Inference

Petitioner asks that an adverse inference be drawn against respondent for her failure to testify. This tribunal has drawn adverse inferences against respondents who have elected not to testify in civil disciplinary proceedings. *See Dep't of Correction v. Connell*, OATH Index No.

1598/11 at 2-3 (May 24, 2011) (adverse inference taken against correction officer who appeared at hearing and called witnesses but did not testify); *Dep't of Education v. Robles*, OATH Index No. 2275/09 at 9 (Oct. 19, 2009), *adopted*, Chancellor's Dec. (Nov. 16, 2009) (same); *see also Human Resources Admin. v. Agran*, OATH Index No. 515/07 at 2 (Jan. 26, 2007), *adopted*, Comm'r Dec. (Feb. 26, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 07-81-A (July 27, 2007) (adverse inference taken where employee failed to appear at hearing despite notice).

The inference that may be drawn is the strongest inference that "opposing evidence in the record permits." *Comm'r of Social Services v. Philip De G.*, 59 N.Y.2d 137, 141 (1983); *Noce v. Kaufman*, 2 N.Y.2d 347, 353 (1957). An adverse inference does not permit the trier of fact to fill gaps in petitioner's proof, or to speculate about what respondent's testimony might have been. *Laffin v. Ryan*, 4 A.D.2d 21, 26-27 (3d Dep't 1957). Instead, "[t]he adverse inference relates only to the question of contradicting or corroborating evidence which is already in the case. It cannot be used as a basis for finding upon a point on which there is no evidence at all." *Dep't of Sanitation v. Richins*, OATH Index No. 167/01 at 13 (Oct. 15, 2001). The effect of drawing an adverse inference against respondent is to lend greater weight to the evidence produced by petitioner. *See, e.g., Police Dep't v. Shim*, OATH Index No. 145/06, mem. dec. at 3 (Aug. 5, 2005) (using adverse inference to credit observations of the arresting officer that respondent was intoxicated); *Police Dep't v. Chirico*, OATH Index No. 2205/05, mem. dec. at 3 (June 28, 2005) (adverse inference lends greater weight to the complaint report).

Even where there is the potential for criminal jeopardy, an adverse inference may be taken. *See Marine Midland Bank v. John E. Russo Produce Co.*, 50 N.Y.2d 31, 42 (1980) (in civil trial, negative inference taken where defendants, on advice of counsel, invoked privilege against incrimination in light of ongoing FBI investigation); *Dep't of Correction v. Dasque*, OATH Index No. 1270/01, mem. dec. at 3-4 (July 26, 2001) (choice is "not an unconstitutionally impermissible choice to require a defendant to make").

Although the potential for criminal liability does not excuse the failure to testify in an administrative proceeding, it is notable that respondent has already been acquitted of the charges relating to the underlying fraud. To the extent respondent was concerned about being prosecuted criminally for perjury, as discussed below, there is no Fifth Amendment right attached to perjury.

While an adverse inference is available in this case, it is unnecessary because there is no serious dispute that respondent did not answer questions posed in the taped MEO-16 interview.

The Charges and Respondent's Defenses

The charges before OATH are straightforward and concern only whether respondent was asked questions under MEO-16 that she refused to answer, and, if so, whether there was a legitimate basis to do so. Petitioner's decision not to proceed on the underlying fraud claim was within the bounds of its discretion.

MEO-16 section 4(b) provides in relevant part that designated City officials:

> may require any officer or employee of the City to answer questions concerning any matter related to the performance of his or her official duties . . . after first being advised that neither their statements nor any information or evidence derived therefrom will be used against them in a subsequent criminal prosecution other than for perjury or contempt arising from such testimony. The refusal of an officer or employee to answer questions on the condition described in this paragraph shall constitute cause for removal from office or employment or other appropriate penalty.

There is no dispute that respondent was afforded the right to counsel. *See* Civil Service Law 75(2) ("An employee who at the time of questioning appears to be a potential subject of disciplinary action shall have a right to representation by his or her certified or recognized employee organization"). Moreover, she was provided the protections required by MEO-16, including the granting of use immunity.

Moreover, there is no dispute that when asked questions relating to her filing an insurance claim for another officer, respondent invoked her "Fifth Amendment right pertaining to perjury" and stated that she would not answer questions about her duties as a COBA board member (Pet. Ex. 1). For the reasons below, this conduct constituted a refusal to answer questions as required by MEO-16.

Contrary to respondent's claims, it is well settled that a public employee can be compelled to testify under penalty of termination so long as statements obtained are not used in subsequent criminal proceedings. *Gardner v. Broderick*, 392 U.S. 273, 278 (1968); *Matt v. Larocca*, 71 N.Y.2d 154, 159-60 (1987); *Human Resources Admin. v. Ali*, OATH Index No.

2380/09 at 28-29 (July 20, 2009); *Fire Dep't v. Waugh*, OATH Index No. 678/05 at 5-6 (Dec. 1, 2004), *aff'd*, 34 A.D.3d 401 (1st Dep't 2006); *Dep't of Buildings v. Galatro*, OATH Index. No. 1741/96 at 4-5 (June 12, 1996); *see also LaSonde*, 2011 NY Slip Op 30837U at *5-6.

Respondent has failed to come forward with any authority that she was entitled to an interview that was not under oath. Her reliance on *Uniformed Sanitation Men Association v. Commissioner of Sanitation*, 392 U.S. 280 (1968), is also misplaced. There, public employees asserted the privilege against self-incrimination and refused to testify, after being told that their answers could be used against them in subsequent court proceedings. The Supreme Court held that public employees cannot be criminally sanctioned for refusing to relinquish constitutional rights. However, the Court confirmed that they may be dismissed from employment for failure to answer questions relating to the performance of their official duties. 395 U.S. at 285. Here, respondent was given use immunity and told that her statements could not be used in a subsequent criminal proceeding but that they could be used in an administrative hearing. Thus, petitioner's actions were consistent with this decision. *See Mack v. United States*, 814 F.2d 120, 123-24 (2d Cir. 1987) (telling an FBI agent that information resulting from an administrative investigation would not be used against him in criminal proceedings was consistent with *Uniformed Sanitation Men Ass'n*).

Respondent's assertion that she had a Fifth Amendment right to remain silent in the interview to avoid criminal perjury charges is without merit. No constitutional right attaches to perjured testimony. *Harris v. New York*, 401 U.S. 222, 225-26 (1971); *People v. Tyler*, 245 A.D.2d 1100 (4th Dep't 1997); *Waugh*, OATH No. 678/05 at 6; *see also People v. Feinberg*, 19 Misc. 2d 433, 440 (Gen. Sess., N.Y. Co. 1959) (it did not violate a defendant's constitutional rights to compel his testimony before a Grand Jury where he was granted immunity except for perjury and contempt).

Respondent's contention that she had no obligation to answer questions that did not relate to her "official" duties of a correction officer is also without merit. Respondent's alleged filing of a fraudulent insurance claim for another officer concerns on-duty conduct that has a nexus to her official duties for DOC. Moreover, at the time, respondent was on release time to perform union activities while being paid by the City. Fraud is not an approved union activity under

MEO-75. *Cf. Dep't of Correction v. James*, OATH Index No. 305/89 at 9-10 (May 31, 1990) (union delegate who engaged in work stoppage subject to discipline).

More importantly, City agencies have broad rights to compel "any person enjoying a public trust to account for his activities." *See Matt*, 71 N.Y.2d at 159-60; *see also LaSonde*, 2011 NY Slip Op 30837U at *6 (citing *Seabrook v. City of New York*, 2007 NY Slip Op 31103[U] (Sup. Ct. N.Y. Co. 2007), *aff'd*, 57 A.D.3d 232 (1st Dep't 2008)) (DOC is authorized to conduct investigations into criminal or unethical conduct). The filing of a false insurance claim calls into question an officer's integrity, good moral character, and honesty. *Cf. Dep't of Sanitation v. Maldarelli*, OATH Index No. 1495/05 (Dec. 13, 2005), *aff'd sub nom. Maldarelli v. Doherty*, 40 A.D.3d 470 (1st Dep't 2007) (plea of guilty to the felony of insurance fraud in the third degree committed off duty subjected respondent to disciplinary action under MEO-16 because it was directly related to his employment and also involved a crime of moral turpitude). In addition, as a COBA delegate doing business with the City and receiving money from the City for performing those tasks, respondent was subject to MEO-16 (Resp. Ex. A at § 4(b)).

Respondent's refusal to answer questions in the MEO-16 interview was also a violation of DOC rules 3.20.030, 3.20.300, and 3.40.040 (Resp. Ex. C). These rules prohibit an officer from engaging in conduct that is in conflict with Department rules, require that officers obey orders and refrain from unbecoming conduct, and require that officers answer questions during an investigatory interview. Here, respondent failed to answer questions in an investigatory interview as directed. Such conduct was not only insubordinate and conduct unbecoming but was contrary to the express rules of the Department.

DOC also had a good faith reason to conduct the interview based on the MOC alleging that respondent's conduct violated DOC's rules. Moreover, DOI Investigator MaQuine had a good faith basis for drafting the MOC following Officer Blake's conviction based on her interviews with COBA board members, discussions with COBA's insurance carrier, and a review of the related documents. Except for unsworn, conclusory statements, respondent failed to put forward any evidence to the contrary.

Respondent's acquittal of the underlying criminal charges is also not a bar to DOC disciplinary investigation because there is a lower burden of proof in an administrative hearing. *Dep't of Environmental Protection v. Barnwell*, OATH Index No. 177/07 at 7 (Sept. 18, 2006)

(citing *Gonzalez v. Police Comm'r,* 227 A.D.2d 287 (1st Dep't 1996)); *Dep't of Parks and Recreation v. Chapman,* OATH Index No. 243/86 at 2 n.1 (Dec. 5, 1986).

Respondent's arguments that the charges were motivated by impermissible animus based on her First Amendment right to engage in union activity or some other bias are conclusory and speculative. There is no proof of such animus and, in any event, it is well settled that a selective enforcement or retaliation claim is not a proper defense in an administrative proceeding. *See, e.g., 303 W. 42nd St. Corp. v. Klein,* 46 N.Y.2d 686, 693 n.5 (1979) (noting that a selective enforcement claim was not before the administrative tribunal, rather it was "properly brought only before a judicial tribunal"); *Bell v. NYS Liquor Auth.*, 48 A.D.2d 83, 84 (3rd Dept. 1975) ("The proper manner in which to develop [a selective enforcement] defense is to raise it initially in an article 78 proceeding subsequent to the administrative hearing"); *Dep't of Finance v. Rodriguez*, OATH Index No. 430/10 at 2 (Mar. 5, 2010) (OATH does not have jurisdiction to hear respondent's retaliation claim); *Dep't of Sanitation v. Yovino*, OATH Index No. 1209/96 at 3 (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 only available if based upon claim of constitutionally suspect criteria and can be asserted only upon judicial review of an adverse administrative determination).

Moreover, a retaliation defense does not apply if the employer has an independent basis for disciplinary action. *Brey v. Bd. of Education*, 245 A.D.2d 613, 615 (3rd Dep't 1997); *Health & Hospitals Corp. (Seaview Hospital Rehabilitation Ctr. & Home) v. Cantres*, OATH Index No. 1142/03 at 2 (May 29, 2003), *modified on penalty*, Chief Operating Officer's Determination (July 1, 2003), *aff'd*, 30 A.D.3d 164 (1st Dep't 2006); *Yovino*, OATH 1209/96 at 3-4; *see also Dep't of Education v. Kielbasa,* OATH Index No. 658/05 at 5 (July 11, 2005) ("An employee defending administrative charges may adduce evidence to establish that no misconduct was committed, but may not adduce evidence to show that any misconduct resulted in administrative charges only because of misconduct by the employer."). Here, respondent engaged in misconduct when she did not answer questions after being granted use immunity and was warned that the failure to do so could result in her termination from employment under MEO-16.

For these reasons, respondent was required to respond to questions posed by Mr. Klopman on May 26, 2011, that related to her conduct on October 23, 2009, and she refused to do so. Accordingly, the charges should be sustained.

FINDING AND CONCLUSION

Petitioner demonstrated that respondent refused to answer questions on May 26, 2011, in an interview conducted under Mayor's Executive Order No. 16. By refusing to answer these questions, respondent violated Mayor's Executive Order No. 16 and Department rules and regulations requiring employees to cooperate in such investigations.

RECOMMENDATION

Upon making these findings, I obtained and reviewed an abstract of respondent's work history for purposes of recommending an appropriate penalty. Respondent has been a correction officer since 1987 and does not have any formal disciplinary history.

Petitioner seeks a recommendation that respondent be terminated from her employment as provided by MEO-16, which requires that employees cooperate fully with investigations at the risk of termination. Petitioner argues that as a peace officer, respondent must be held to a higher standard of care (Tr. 354-55). Respondent argues that her years of service and lack of disciplinary history merit a penalty short of termination (Tr. 345-47).

A City employee's refusal to answer questions under oath relating to employment after being directed to do so and being granted use immunity has resulted in the termination of employment. *Waugh,* OATH No. 678/05 (termination for refusing to answer questions during an MEO-16 interview); *Dep't of Buildings v. Orsini*, OATH Index No. 1753/96 (May 24, 1996), *modified on penalty*, Comm'r Dec. (June 24, 1996), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 97-21 (Apr. 14, 1997) (termination of elevator inspector who refused to answer questions in MEO-16 interview); *Dep't of Buildings v. Purrier*, OATH Index No. 1744/96 (May 29, 1996), *modified on penalty*, Comm'r Dec. (June 24, 1996), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 97-20 (Apr. 14, 1997) (same); *Dep't of Buildings v. Mogg*, OATH Index No. 1757/96 (May 31, 1996), *modified on penalty*, Comm'r Dec. (June 24, 1996) (same); *Galatro,* OATH No. 1741/96 (same); *see also Eck v. County of Delaware*, 36 A.D.3d 1180 (3d Dep't 2007) (termination of

deputy sheriff who failed to answer questions in an investigatory interview); *Dep't of Correction v. Melendez,* OATH Index Nos. 237/05 & 240/05 at 15 (Aug. 25, 2005) (termination recommended for officer found guilty of making false statements in a report and in an MEO-16 interview); *Dep't of Correction v. Wilder,* OATH Index No. 1636/00 (June 20, 2001), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 03-63-SA (Sept. 22, 2003) (termination of correction officer for lying under oath at an investigatory interview).

Here, respondent's refusal to answer questions related to conduct while on approved release time is particularly egregious and was accompanied by aggravating factors. As a correction officer with more than 20 years experience and as a COBA delegate who has represented officers in disciplinary proceedings, respondent knew or should have known about the obligation to answer questions under MEO-16. Moreover, in response to her motion to enjoin the interview, Justice Jaffe told respondent that DOC has broad powers to question employees under oath about criminal or unethical conduct and that such testimony can be compelled so long as it was not used in a subsequent criminal proceeding. *LaSonde*, 2011 NY Slip Op 30837U at *5-6. At the interview, respondent, in the presence of counsel, was granted use immunity and was informed of her duty to answer questions and of the consequences of such a refusal. Despite having ample notice, respondent defied her obligation without any basis to do so. Such conduct violated the public trust and constituted substantial insubordination.

Moreover, this misconduct demonstrated that she is untrustworthy and a liability in a paramilitary organization designed to uphold the law and maintain order among inmates. The Department simply cannot tolerate such conduct by a correction officer.

In keeping with the above precedents and DOC's need to emphasize the importance of its officers' honesty and integrity, I find that termination of employment is the only proper penalty for this breach of trust. Unfortunately, neither respondent's tenure with the Department nor her disciplinary history constitutes compelling mitigation.

Accordingly, I recommend that respondent be terminated from her position as a correction officer with the Department.

Alessandra F. Zorgniotti
Administrative Law Judge

August 18, 2011

SUBMITTED TO:

DORA B. SCHRIRO
Commissioner

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