

# ***Dep't of Health & Mental Hygiene v. Dillon***

OATH Index No. 108/14 (Feb. 14, 2014)

Petitioner established that computer specialist assigned to the IT Help Desk, answered the phone in a robotic voice, created and abandoned service desk requests, failed to provide complete ticket descriptions, and failed to assign tickets to the proper group. 20-day suspension recommended with credit for time served.

---

## **NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS**

*In the Matter of*  
**DEPARTMENT OF HEALTH & MENTAL HYGIENE**  
*Petitioner*  
*- against -*  
**RONALD DILLON**  
*Respondent*

---

### **REPORT AND RECOMMENDATION**

**KARA J. MILLER**, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, the Department of Health and Mental Hygiene, pursuant to section 75 of the Civil Service Law. Respondent, Ronald Dillon, is a computer specialist in the Bureau of Operations. Petitioner alleged that respondent has engaged in several acts of misconduct between October 2012 and April 2013. In one charge involving 24 specifications,<sup>1</sup> petitioner alleges that respondent was inefficient, negligent, or careless in performing his duties and that his conduct was prejudicial to good order and discipline. Petitioner specifically charges that respondent: answered the phone in an unprofessional, robotic voice; created and abandoned service desk requests; failed to provide a supervisor with an explanation of why he transferred a ticket request; failed to timely resolve tickets; failed to provide complete ticket descriptions; and failed to assign tickets to the proper group (ALJ Ex. 1).

---

<sup>1</sup> The complaint includes 25 specifications, but petitioner withdrew specification P at the hearing (Tr. 96-98).

Following a one-day hearing, I find respondent guilty of answering the phone in an unprofessional, robotic voice; creating and abandoning service desk requests; failing to provide complete ticket descriptions; and failing to assign tickets to the proper group. The remaining charges, however, are dismissed. Based on the following, I recommend that respondent be suspended without pay for 20 days with credit for time served.

### **ANALYSIS**

Respondent began working for the City of New York in 1975 as an analyst with the Board of Education. Since 1976 he has been employed by the Department of Health and Mental Hygiene. He was initially hired as a program analyst by the Department and his duties included management analysis and setting up accounting systems (Tr. 106-07). A few years later, he became a computer specialist with the Management Information Systems Unit, specializing in financial applications (Tr. 107-08). In the late 1980's, he was promoted to computer specialist (software) level 3, which is his current title (Tr. 108).

Respondent currently works at the IT Help Desk, which provides customer service for technical problems (Tr. 12). The IT Help Desk has two lines, the Help Desk line which is predominately for employees, and the NYCMED Help Desk line which is for calls from the public (Tr. 12, 103-04, 109-10). About three years ago when respondent was reassigned to the Operations Unit from the Management Information Systems Unit, he began answering service calls made to the NYCMED Help Desk (Tr. 13, 63, 108-09). In December 2011, when Barry Novack became the deputy director of the Call Center and respondent's direct supervisor, everyone in the unit other than respondent was answering both IT Help Desk and NYCMED calls. Respondent was only answering NYCMED calls (Tr. 11-13, 61-63). Mr. Novack changed respondent's duties to include answering calls from both the IT and the NYCMED Help Desk lines (Tr. 64, 104).

Majita Dalton, the Supervisor of the IT Help Desk, supervises the day-to-day operations of both the IT and the NYCMED Help Desks (Tr. 63, 74, 103). This includes monitoring the telephone calls and the service tickets that are created by the Help Desk employees (Tr. 74-75).

She does not address issues with respondent directly but informs Mr. Novack of any technical expertise problems that he should discuss with respondent (Tr. 63).

The analysts at the Help Desk, including respondent, take approximately 40 calls per day (Tr. 75). Respondent's duties include assisting callers with technical problems, attempting to troubleshoot the problems, and opening and timely resolving tickets in the tracking system (Tr. 13, 34). If respondent is unable to resolve an issue after troubleshooting, he is expected to either escalate the issue to a higher area within the IT unit or seek guidance from a supervisor (Tr. 13). Mr. Novack has discussed these tasks and expectations with respondent on several occasions (Tr. 13-14). Mr. Novack testified that he considers the most important part of respondent's job is customer service, to ensure that issues are resolved quickly during the call, rather than having somebody else respond later (Tr. 13).

Petitioner contended that respondent refuses to answer calls in a normal voice and to address simple IT issues or to assign those issues to the correct division in the Department. Petitioner claimed that respondent's interaction with the public has embarrassed the Department. Respondent, on the other hand, contended that he is a dedicated long-term employee, but that there has been restructuring in the Department and his current job is different from what it had been for most of his tenure. Respondent acknowledged that customer service is not one of his strengths but maintained that he had not received proper customer service training. Respondent testified that he had asked Mr. Novack for help with job assignments on two occasions, but Mr. Novack responded that it was not his job and that he was not going to assist respondent (Tr. 115-16).

Respondent further contended that some of his conduct is an appropriate self-defense mechanism in trying to be consistent and following Mr. Novack's instructions. Respondent testified that Mr. Novack is constantly "harassing" and "belittling" him (Tr. 114-15). Respondent noted that on one occasion when he was taking notes during a meeting with all of the Call Center employees, Mr. Novack interrupted the meeting to ask whether respondent was paying attention (Tr. 115). Respondent went to the Employee Assistance Program to address these issues, but he was only advised to mitigate the situation by giving Mr. Novack less of an opportunity to harass him (Tr. 114, 115). He also wrote to the agency's Equal Employment

Opportunity unit, but he contended they had informed him that he is not a protected employee so he does not have standing to make a complaint (Tr. 115).

The following are the 24 allegations against respondent, grouped by the type of misconduct.

*Answered calls in an unprofessional, robotic voice (specifications A, B, C, D, E, F, G, H, I)*

Petitioner charged respondent with answering calls in a robotic manner four times on February 26, and once on April 10, 2013. Petitioner alleged that it had received complaints from callers regarding respondent's tone of voice on February 12, 26, and 28, 2013, and that respondent was instructed verbally and in writing by his supervisor that it was unacceptable to answer the phone in such an unprofessional manner (ALJ Ex. 1).

Respondent testified that when he began answering IT Help Desk calls, he initially greeted callers the way he had done with the NYCMED calls, which included either good morning or afternoon followed by, "how could I help you" (Tr. 110, 111). Generally, respondent would not provide his name unless asked by the caller (Tr. 110). After Mr. Novack received customer complaints regarding the tone in which respondent answered calls and that he did not provide his name, he asked respondent to state his name in the greeting (Tr. 14, 110). Respondent asked Mr. Novack what he wanted him to say when he answered the telephone, so Mr. Novack provided respondent with a brief scripted greeting (Tr. 14, 66, 111, 138). Respondent testified that before Mr. Novack provided him with a script, he had never received training about how to answer the phone (Tr. 111, 140-41).

Mr. Novack testified that respondent's customer service skills are unsatisfactory. Particularly, the way that he consistently answers the phone, which Mr. Novack described as an unprofessional, robotic tone of voice (Tr. 14, 19, 24). Ms. Dalton testified similarly that respondent answers the phone in a "very monotone, almost robotic voice," and then as the call progresses he resumes his normal tone of voice (Tr. 76, 99-100).

At the hearing, petitioner submitted five audio recordings of respondent answering phone calls made to the Help Desk to corroborate that respondent uses a robotic tone of voice to answer service calls (Pet. Ex. 1; Tr. 17). The first recording is from April 10, 2013, and the last four are from February 26, 2013 (Pet. Ex. 1). In the first, second, and last recordings, respondent states in

a slow, monotone, and over-enunciated manner, “You have reached the Help Desk. This is Mr. Dillon. How may I help you?” He then speaks in a regular tone and speed during the rest of the conversation with the caller. In the third and fourth recordings, respondent is heard saying, “You have reached the Help Desk,” in a similarly stilted way, and then the caller hangs up the phone (Pet. Ex. 1).

Mr. Novack has spoken to respondent in person about his conduct and also via e-mail. In a January 22, 2013 e-mail, Mr. Novack stated that it appeared respondent was “saying the greeting in a deliberately robotic fashion” and noted that his voice changed to a “normal tone” as the call progressed (Pet. Ex. 2). He informed respondent that since he was now accustomed to using the greeting, it was expected that he would use a normal tone of voice (Pet. Ex. 2). According to Mr. Novack, respondent explained that he reads the greeting very slowly to ensure that he does not deviate from the script (Tr. 14; Tr. 14, 19, 25-26).

Petitioner has received customer complaints, both verbal and in writing, mentioning the manner in which respondent answers the phone (Pet. Exs. 3, 4, 5; Tr. 26, 78, 110). On February 12, 2013, in an e-mail with the subject, “R. Dillon Telephone Etiquette,” Ms. Dalton informed Mr. Novack that a caller had asked whether there was a new automated answering system, and had hung up when she heard “the robot” answer the phone because she needed to speak to a human about her issue (Pet. Ex. 11). Ms. Dalton concluded the e-mail by stating that, “[t]his is not the first time users have commented on the ‘script’ he is reciting as he picks up calls” (Pet. Ex. 11). On February 26, 2013, a caller complained by e-mail that Mr. Dillon spoke in a “robotic voice” (Pet. Ex 5; Tr. 30-31). In another e-mail dated February 26, 2013, Ms. Dalton informed Mr. Novack that a caller called the IT Help Desk, both times she was connected to respondent and both times she hung up on him (Pet. Ex. 4; Tr. 80-81). When she spoke to someone else at the IT Help Desk, she imitated respondent’s robotic voice (Pet. Ex. 4). Ms. Dalton noted, “[t]his is truly getting out of hand now – more people are calling on the daily [sic] with complaints about his telephone manner . . . .” (Pet. Ex. 4). On February 28, 2013, another caller made a complaint that when respondent answers the phone he is “very unprofessional,” and that she usually has to hang up and call again to speak to someone more professional (Pet. Ex. 3).

Respondent denied greeting callers in a “robotic fashion” (Tr. 139). He testified that after Mr. Novack gave him the script he began providing his name and reading the script in a “neutral tone” and speaking “distinctly” and slowly (Tr. 111-12, 113-14, 139). He contended that he articulates each word because he speaks fast and has a Brooklyn accent which is sometimes difficult to understand. He further asserted that he uses this tone to eliminate accusations that he treats callers differently (Tr. 113-14, 139-40). According to respondent, Mr. Novack was initially satisfied that respondent followed the script, but eventually asked whether respondent needed to continue reading the script (Tr. 114, 138). Respondent told Mr. Novack that he “needed to follow the script to ensure that [he] was in compliance” since Mr. Novack had raised an issue about his tone and providing his name (Tr. 114, 138). Respondent testified that he has “tried to minimize the variance in what [he] did so that there would be less opportunity for [Mr. Novack] to constantly harass [him]” (Tr. 115). Additionally, he asserted that he is not a “people person” and does not have the special talents and skills that customer service requires (Tr. 134, 135-36).

It is well established that in order to sanction an employee for misconduct under section 75 of the Civil Service Law, petitioner must make a showing of fault on the employee’s part, either that he acted willfully or intentionally, *Reisig v. Kirby*, 62 Misc. 2d 632, 635 (Sup. Ct. Suffolk Co. 1968), *aff’d*, 31 A.D.2d 1008 (2d Dep’t 1969), or negligently or carelessly, *McGinige v. Town of Greenburgh*, 48 N.Y.2d 949, 951 (1979). Errors in judgment, lacking in willful intent and not so unreasonable as to be considered negligence, are not a basis for finding misconduct. *See Berardi v. City of New York*, 12 N.Y.2d 1061, 1065 (1963); *Ryan v. NYS Liquor Auth.*, 273 A.D. 576, 581 (3d Dep’t 1948); *Dep’t of Correction v. Messina*, OATH Index No. 738/92 at 10-11 (July 9, 1992).

It may be true that respondent is not a “people person” and relatively new to customer service, but the audio recordings show that respondent is capable of speaking to callers in a normal tone. I did not find respondent to be a particularly credible witness. He appears to be disgruntled employee who is acting out because of the restructuring that has occurred within the Department over the last few years, which has led to a change in his duties and being assigned a new supervisor. Respondent’s actions are willful and intentional. It is unnecessary for him to over-exaggerate the fact that he is reading a script to the point of sounding robotic. The fact that

he switches into a regular tone of voice as the call progresses, demonstrates that he is capable of communicating clearly without a deliberately monotone voice. It is almost as though respondent is purposely trying to provoke a reaction from Mr. Novack.

Respondent's dissatisfaction with his new duties and supervisor has negatively affected the manner in which he does his job. I find his conduct to be insubordinate. An employee is obligated to obey the lawful order of a supervisor and, if he disagrees with it or feels it to be improper, to grieve it at a later time through available procedures. *See Ferreri v. NYS Thruway Auth.*, 62 N.Y.2d 855 (1984); *Strokes v. City of Albany*, 101 A.D.2d 944 (3d Dep't 1984); *Health & Hospitals Corp. (Bellevue Hospital Ctr.) v. Tanvir*, OATH Index No. 797/10 at 6 (Dec. 17, 2009). To establish disobedience of an order, the employer must prove: (1) that an order was communicated to the employee, (2) the contents of the order were clear and unambiguous, and (3) the employee willfully refused to obey. *Dep't of Correction v. Hipp*, OATH Index No. 337/00 at 3 (Dec. 3, 1999).

Mr. Novack spoke to respondent on several occasions about his phone etiquette and demeanor. He directed him numerous times both verbally and in writing to cease answering calls in a robotic manner. Mr. Novack's orders were clearly communicated and unambiguous. Nevertheless, respondent disregarded Mr. Novack's directives and continued to answer the calls in an inappropriate manner. Although respondent testified that he felt he needed to read the script distinctly and slowly to eliminate accusations by Mr. Novack that he was treating callers differently, there is a difference between speaking slowly and distinctly and speaking so robotically that callers did not believe that they were speaking to a person. Respondent's belief that he needed to speak this way in order to protect himself against unfair accusations does not constitute a defense to insubordination. *Dep't of Correction v. Joseph*, OATH Index No. 196/12 at 13 (Apr. 5, 2012), *modified on penalty*, Comm'r Dec. (Aug. 7, 2013) (Even though respondent testified that his superiors "were biased against him and looking for an excuse to write him up, that does not constitute a defense to insubordination, nor to inefficient performance of duty."); *see also Dep't of Correction v. LaSonde*, OATH Index No. 2526/11, mem. dec. at 6 (July 8, 2011) ("a selective enforcement or retaliation claim is not a proper defense in an administrative proceeding").

I find that respondent willfully disobeyed his supervisor's orders by answering calls in a robotic voice. Petitioner established that Mr. Novack instructed respondent by e-mail on January 22, 2013, to use a normal tone of voice when greeting callers, and that respondent continued to use a robotic-like voice when answering calls on February 26 and April 10, 2013. The manner in which respondent answered Help Desk calls negatively impacted the Department, as it received complaints from callers regarding respondent's unprofessional, robotic voice on February 12, 26, and 28, 2013. Furthermore, the evidence showed that respondent is capable of answering calls in a normal voice but that he chooses to recite the greeting portion in an automated tone. Therefore, these specifications should be sustained.

*Created and abandoned service desk requests (specifications J, K, L, M, N, O, Q, R, S, T, U)*

Petitioner charged respondent with creating and abandoning service desk requests in the queue for other Help Desk staff members to resolve on October 15 and 17, 2012, December 10 and 26, 2012, January 8 and 28, 2013, and on February 4, 2013 (ALJ Ex. 1).

When a caller calls the Help Desk the caller's request is identified in the service desk tracking system as a ticket, which is a summary of the caller's issue, how it was handled, and who resolved the issue (Tr. 33-34). The Help Desk analyst who opens the ticket should also be the person who resolves the issue and closes the ticket. If the analyst is unable to resolve the issue, he or she assigns it to the appropriate group for resolution or asks a supervisor for guidance (Tr. 34, 35, 117-18). If a ticket is abandoned in the queue, another analyst searching the queue for open tickets will eventually spot and address the ticket (Tr. 35, 38-39). Depending on the type of call, it can take anywhere from a few minutes up to a couple of hours to resolve a ticket but most tickets are resolved within two days (Tr. 35).

Mr. Novack and Ms. Dalton testified that respondent often abandons the tickets in the queue for other analysts to resolve (Tr. 34-35, 77, 93). Mr. Novack also testified that respondent has brought down the level of service of the Help Desk by constantly abandoning tickets, and that the callers do not receive the service they expect when he answers the call because they have to wait for another analyst to address the ticket (Tr. 55).

In an e-mail to respondent on October 15, 2012, Mr. Novack indicated that respondent left two password-related requests in the queue that morning to be handled by other staff



members (Pet. Ex. 6; Tr. 38). Mr. Novack informed respondent that he was capable of resolving these problems on his own, and he asked respondent to handle password reset requests and lockouts in accordance with his training (Pet. Ex. 6). Mr. Novack testified that respondent is the only analyst who fails to routinely handle password reset requests and leaves them in the queue for other analysts to resolve (Tr. 38). Petitioner submitted nine tickets created by respondent that were left in the queue unassigned on October 17, 2012, December 10 and 26, 2012, January 8 and 28, 2013, and February 4, 2013 (Pet. Ex. 12; Tr. 92-94). These were tickets that did not involve complex issues, and Ms. Dalton testified that when she closed some of these tickets, herself, it only took a few minutes to resolve them (Tr. 92-94).

Respondent testified that he has created tickets which his co-workers decided to resolve without asking him (Tr. 124-25). He testified that he was “a little taken back” initially when this happened because at the NYCMED Help Desk no one would take a ticket assigned to someone else (Tr. 125, 142-43). Respondent testified that he thought about it and then decided, “what difference does it make” because he takes enough calls and resolves enough tickets each month, even if a co-worker takes one or two of his tickets (Tr. 125, 143). Respondent testified that he used to handle two to three tickets a week from the queue regarding Biometrics even when the call was originally answered by a co-worker. He does it less now because the Biometrics software has been improved and there are fewer questions about it (Tr. 125-26).

I find that respondent willfully disobeyed his supervisor’s order to timely resolve tickets instead of leaving them in the queue unassigned. Even if respondent’s co-workers have closed his tickets without his permission, he could have prevented this by resolving the requests at the time they were made and by properly assigning tickets. One of respondent’s job duties is to resolve requests as quickly as possible and, if he is unable to do so, to assign the ticket to the proper group or seek assistance from a supervisor. The evidence, however, has established that respondent has left simple requests in the queue for others to resolve at a later time. Therefore, these specifications should be sustained.

*Failed to provide supervisor with explanation (specification V)*

Petitioner charged respondent with failing to provide his supervisor with an explanation, as requested in a January 24, 2013 e-mail, as to why he had transferred a ticket to a specialized IT group without first troubleshooting the call (ALJ Ex. 1).

Petitioner submitted an e-mail from Mr. Novack to respondent dated January 24, 2013. The e-mail explains that three tickets were returned to the Help Desk by a specialized IT group because respondent appeared not to have assisted the callers, as there were no notes to document what he had done. When the tickets were returned to the Help Desk, the specialized IT group requested that someone at the Help Desk first try to assist the caller and if they could not to provide additional information on the ticket before forwarding it. Mr. Novack stated in the January 24, 2013 e-mail that respondent had transferred one of the three returned tickets to the specialized IT group again, without obtaining or adding the additional information requested by the specialized IT group. Mr. Novack directed respondent to provide him with an explanation as to why he transferred the ticket again without the requested information (Pet. Ex. 7).

During the hearing, Mr. Novack explained what the e-mail meant, but he did not testify if respondent ever provided the explanation (Tr. 39-40). There is nothing in the record to establish whether or not respondent complied with Mr. Novack's request. Consequently, this specification should be dismissed.

*Failed to timely resolve tickets (specification W)*

Petitioner charged respondent with failing to timely resolve two of the tickets referenced in specification V (ALJ Ex. 1). Referring back to the Mr. Novack's January 24, 2013 e-mail, petitioner alleged that respondent failed to timely resolve the two reassigned tickets (Pet. Ex. 7). Petitioner asserted that the tickets were reassigned to respondent on January 24, 2013, and should have been resolved within a few days, but that respondent did not close the tickets until February 14, 2013.

While petitioner did establish that Mr. Novack reassigned two tickets to respondent in an e-mail dated January 24, 2013, there is no evidence to support a finding that respondent failed to close out the reassigned tickets until February 14, 2013. This specification should be dismissed.

*Failed to provide complete ticket descriptions (specification X)*

Petitioner charged respondent with failing to provide complete descriptions of reported problems and failing to note any actions he had taken to resolve the reported problems. Petitioner asserted that respondent's failure to note his actions made it difficult for anyone else to work on the tickets or decipher what the actual problems were. Petitioner listed four tickets (241781, 241407, 240694, and 239449) as examples of respondent's failure to provide complete descriptions (ALJ Ex. 1).

On Monday, January 28, 2013, Mr. Novack e-mailed respondent as a follow-up to a meeting they had on the previous Friday (Pet. Ex. 8). Mr. Novack informed respondent that a ticket he created on January 15, 2013 (ticket number 239449), with only three words, the caller's first and last names and the word "Create," was an insufficient description of the caller's problem (Pet. Ex. 8; Tr. 44-46). He asked respondent to use complete sentences in ticket descriptions, rather than just one word, to accurately describe the caller's problem (Pet. Ex. 8). Petitioner submitted documentary evidence of tickets opened by respondent on January 29 and 30, 2013, where one ticket had the word "Password" in the description (ticket number 240694) and the other had the employee's identification number "ERN: 60767" in the description (ticket number 241407) (Pet. Ex. 8; Tr. 44-45). Mr. Novack stated that the brief descriptions entered by respondent on those tickets were insufficient to identify the caller's problem (Tr. 45-46). Respondent should have "entered a more complete summary," stating whether the caller was having problems with his or her existing password or needed a new one and why he or she needed to either reset or change the password (Tr. 46).

Respondent recalled that initially when he wrote tickets he would put "not necessarily more detail but more of a narrative description" on the ticket (Tr. 129). However, regardless of whether the ticket was resolved correctly or incorrectly, often Mr. Novack "would come back and pick on some aspect of how it was written up" (Tr. 129). In an attempt to protect himself and not give Mr. Novack the opportunity to harass him, he provided the minimum information to indicate the type of ticket (Tr. 129-30). Respondent contended that even if the description was brief it was sufficient to identify the type of request (Tr. 129-30).

Petitioner presented evidence that respondent's supervisor informed him verbally on January 25, and in writing on January 28, that he was expected to use complete sentences to describe a caller's request. Mr. Novack clearly communicated his directive that respondent must provide a more detailed description of the caller's problem on service tickets. Nevertheless, respondent continued to provide one-word descriptions on three subsequent tickets, ticket numbers 241407, 240694, and 239449, on January 29 and 30. I find that respondent willfully disobeyed his supervisor's order to include a complete description of the caller's issue when opening ticket numbers. With respect to ticket number 241781, a copy of the ticket was not submitted into evidence nor was there any testimony regarding the incomplete description. Therefore, this specification should be sustained with respect to ticket numbers 241407, 240694, and 239449, and should be dismissed with respect to ticket number 241781.

*Failed to assign tickets to proper group (specification Y)*

Petitioner charged respondent with continuously refusing to assign tickets to the "NYCMED Help Desk" group as directed by his supervisor (ALJ Ex. 1).

Mr. Novack explained that all of the Help Desk tickets are assigned to a requested area and group which helps determine the type of ticket and who will resolve the ticket (Tr. 50). An incorrect assignment can affect system summaries and reports that are generated to categorize and track the tickets (Tr. 50). Respondent frequently receives NYCMED calls but leaves the tickets in the IT Help Desk group, rather than assigning the tickets to the NYCMED Help Desk group (Tr. 50-51).

In an e-mail dated July 17, 2012, Mr. Novack reminded respondent about Ms. Dalton's July 12 e-mail to respondent and his co-workers, which included instructions on how to ensure that NYCMED calls were properly documented (Pet. Ex. 9). In the July 17 e-mail, Mr. Novack informed respondent that over the past few days he had opened multiple tickets under the IT Help Desk group that should have been opened under the NYCMED Help Desk group. He asked respondent to "Please double check the group name before saving a ticket" (Pet. Ex. 9).

Despite receiving the two e-mails, respondent continued to assign the tickets to the wrong Help Desk. On July 30, 2012, Mr. Novack addressed a memorandum to respondent with the subject, "Refusal to Properly Categorize Service Desk Tickets" (Pet. Ex. 9). Mr. Novack

indicated that it “is important for Service Desk tickets to be properly categorized,” and that he had previously advised respondent that some of the NYCMED tickets he had created were being assigned to the wrong group (Pet. Ex. 9).

Mr. Novack met with respondent on July 26, to discuss the matter. During the meeting, respondent expressed that he believed it was falsifying City records to assign tickets to the NYCMED Help Desk group. Mr. Novack noted that, as he had previously explained to respondent, the NYCMED Help Desk is a legitimate group in the Service Desk. Mr. Novack concluded his July 30 memorandum by informing respondent that his “[c]ontinued refusal to properly assign tickets may result in disciplinary action” (Pet. Ex. 9).

Respondent testified that when he was assigned to the NYCMED Help Desk he only received NYCMED calls, so the calls were categorized that way (Tr. 131). However, eventually the NYCMED Help Desk ceased to exist and he was reassigned to the IT Help Desk (Tr. 132). Respondent believes that it is falsifying records to categorize calls to the NYCMED Help Desk since it no longer exists (Tr. 133). He testified that he has spent 30 years analyzing data and he does not “falsify data” and this is a “big issue” for him (Tr. 133, 134). He stated that Mr. Novack’s justification for falsifying the data is because he “want[s] reports to come out a certain way” (Tr. 133). Respondent insisted that Mr. Novack and Ms. Dalton are mis-categorizing the calls and he refuses to do that because the “integrity of the data” is “paramount” (Tr. 133). I found respondent’s testimony regarding categorizing the calls to be self-serving and exaggerated, given Mr. Novack’s and Ms. Dalton’s credible testimony that some tickets must be assigned to the NYCMED Help Desk group.

Petitioner submitted documentary evidence of 28 tickets<sup>2</sup> that respondent incorrectly assigned to the IT Help Desk, instead of the NYCMED Help Desk, and required correction by Ms. Dalton on January 4, 9, 14, and 29, 2013 (Pet. Exs. 9A-D; Tr. 51-54).

I find that respondent has willfully disobeyed his supervisor’s directives to assign NYCMED calls to the NYCMED Help Desk group. Respondent was provided with instructions on how to properly identify NYCMED calls on July 12, 2012, and Mr. Novack reminded respondent of the instructions in an e-mail on July 17, 2012. In a memorandum dated July 30,

---

<sup>2</sup> Specification Y indicates that respondent refused to assign 29 tickets to the “NYCMED Help Desk” group. However, petitioner did not submit ticket #231683 into evidence.

2012, Mr. Novack warned respondent that his continued failure to properly assign tickets could result in disciplinary action. Petitioner submitted tickets opened by respondent during January 2013, which demonstrated that on 28 occasions he failed to properly assign a ticket to the NYCMED Help Desk. As a consequence, Ms. Dalton had to correct the errors and transfer the tickets to the correct Help Desk. Moreover, respondent admitted that he has not complied with his supervisor's order, because he believed he would be falsifying records.

It is well settled that once an order or directive is issued, an employee must comply. If he disagrees with the order, then he has the right to grieve the order with his union. The right to file a grievance does not waive the employee's obligation to obey the order. Petitioner's evidence amply demonstrated that respondent repeatedly failed to comply with Mr. Novack's directives about assigning calls to the correct Help Desk. Therefore, this specification should be sustained as to the 28 tickets submitted by petitioner, but should be dismissed as to ticket number 231683, which was not submitted into evidence.

### **FINDINGS AND CONCLUSIONS**

1. Petitioner established that respondent answered calls in a robotic voice on February 26 and April 10, 2013, and that it received complaints regarding respondent's unprofessional, robotic voice on February 12, 26, and 28, 2013.
2. Petitioner established that respondent created and abandoned service desk requests on October 15 and 17, 2012, December 10 and 26, 2012, January 8 and 28, 2013, and February 4, 2013.
3. Petitioner did not establish that respondent failed to answer a request made by his supervisor on January 24, 2013.
4. Petitioner did not establish that respondent failed to timely close tickets which were reassigned to him on January 24, 2013.
5. Petitioner established that respondent failed to include a complete description when opening tickets 241407, 240694, and 239449, on January 25, 29, and 30, 2013 but failed to establish that respondent provided an incomplete description on ticket number 241781.

6. Petitioner established that respondent failed to correctly assign 28 tickets to the NYCMED Help Desk during January 2013, but failed to establish that respondent incorrectly assigned ticket number 231683.

### **RECOMMENDATION**

Upon making the above findings and conclusions, I requested and reviewed a copy of respondent's personnel abstract in order to make an appropriate penalty recommendation. Respondent was appointed as a Program Research Analyst with the Department in 1976. During his lengthy tenure, respondent has never been disciplined. However, his performance evaluations for 2012 and March to June 2013 have an overall rating of unsatisfactory, and note that respondent is "uncooperative," and "resistant to following instructions and exhibits little regard for the overall good of the Help Desk."

Petitioner requested that respondent be suspended for 30 days, which time he has already served, and be demoted to computer specialist level 2 (Tr. 6, 153). Respondent has been found guilty of the majority of the specifications. Nevertheless, the imposition of the proposed penalty would be so disproportionate to the sustained misconduct as to be shocking to one's sense of fairness. *Pell v. Board of Education*, 34 N.Y.2d 222 (1974). A fair penalty must take into account the particular circumstances of the incident and individual mitigating factors, as appropriate. *Health and Hospitals Corp. (Kings County Hospital Ctr.) v. Gathers*, OATH Index No. 236/08 (Oct. 22, 2007); *see also Dep't of Correction v. Phoenix*, OATH Index No. 1543/08 (Apr. 14, 2008) (respondent's long tenure and clean record are mitigating factors which must be taken into account in assessing penalty); *Admin. for Children's Services v. Goodman*, OATH Index Nos. 986/05 & 1082/05 (Aug. 12, 2005) (respondent's lack of a prior disciplinary record is a mitigating factor). While respondent has engaged in continuous insubordination, it cannot be ignored that he has worked for the Department for 38 years without incident.

A 30-day suspension and demotion, besides being disproportionately severe to the proven misconduct, also violates the concept of progressive discipline because respondent has no prior disciplinary history. "It is a well-established principle in employment law that employees should have the benefit of progressive discipline wherever appropriate, to ensure that they have the opportunity to be apprised of the seriousness with which their employer views their misconduct

and to give them a chance to correct it.” *Dep’t of Transportation v. Jackson*, OATH Index No. 299/90 at 14 (Feb. 6, 1990). The theory of progressive discipline is to modify employee behavior through increasing penalties for repeated same or similar misconduct. *Police Dep’t v. Schaefer & McGrath*, OATH Index Nos. 1114/99 & 1169/99 (July 2, 1999), *aff’d*, 281 A.D.2d 163 (1st Dep’t 2001). Here, a 20-day suspension would place respondent on notice that his failure to comply with his supervisor’s orders will result in disciplinary action and should act as a deterrent against similar misconduct in the future.

Respondent’s misconduct goes beyond a personality conflict with Mr. Novack. It is clear that respondent does not accept Mr. Novack’s authority. Respondent does not have the prerogative to select his supervisor and even if he dislikes Mr. Novack, he must still comply with his directives. *See Health & Hospitals Corp. (Coler-Goldwater Specialty Hospital and Nursing Facility) v. Ramsey*, OATH Index No. 724/04 at 8-9 (Apr. 16, 2004); *Dep’t of Transportation v. Solli*, OATH Index No. 2888/10 at 23 (Jan. 26, 2011).

Despite his long tenure, respondent must accept that his conduct is insubordinate and understand that his continued insubordination could lead to more severe discipline in the future. *See, e.g., Short v. Nassau County Civil Service Comm’n*, 45 N.Y.2d 721, 723 (1978) (employee’s “persistent unwillingness to accept the directives of his superiors” warrants termination); *Office of Management and Budget v. Perdum*, OATH Index No. 998/91 at 28 (June 17, 1991) (19-year employee with no prior disciplinary record terminated who engaged in repeated insubordination and incompetence, where employee was “on clear notice that his conduct was unacceptable and was given ample opportunity to correct it”).

With minimal effort, respondent should be able to perform his job duties in accordance with his supervisor’s directives. Taking into account respondent’s long tenure and prior record of good service, I recommend a penalty of 20 days’ suspension without pay, with credit for time served.

Kara J. Miller  
Administrative Law Judge

February 14, 2014



SUBMITTED TO:

**MARY TRAVIS BASSETT, MD, MPH**

*Commissioner*

APPEARANCES:

**CARRIE ANN SHERIDAN, ESQ.**

**ROSE TESSLER, ESQ.**

*Attorneys for Petitioner*

**GLADSTEIN, REIF AND MEGINNISS**

**BY: WILLIAM S. MASSEY, ESQ.**

*Attorneys for Respondent*