Dep't of Correction v. Colon

OATH Index No. 229/14 (Feb. 24, 2014)

Correction officer committed misconduct when she failed to disclose income in order to maintain her Section 8 rent subsidy and when she engaged in unauthorized outside employment. The Department failed to prove that respondent established residency in New Jersey for purposes of engaging in outside employment. Termination of employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
DENISE COLON
Respondent

REPORT AND RECOMMENDATION

ASTRID B. GLOADE, *Administrative Law Judge*

This employee disciplinary proceeding was referred by the Department of Correction ("Department") pursuant to section 75 of the Civil Service Law. Petitioner alleges that respondent, Correction Officer Denise Colon: 1) tendered fraudulent documents bearing her signature to qualify for subsidized rent through the Department of Housing and Urban Development ("HUD") Section 8 program and established residency in New Jersey while continuing to receive the housing subsidy in New York City; 2) established residency in New Jersey for purposes of engaging in outside employment without permission or authority; and 3) engaged in unauthorized outside employment (ALJ Ex. 1).

At a two-day hearing, petitioner relied on documentary evidence and presented four witnesses. Respondent testified and offered documentary evidence. For the reasons set forth below, I find that respondent engaged in misconduct and recommend that her employment be terminated.

ANALYSIS

Respondent has been assigned to the George Motchan Detention Center ("GMDC") on Rikers Island since 2006. The Department alleges that respondent engaged in conduct unbecoming an officer and of a nature to bring discredit upon the Department by fraudulently underreporting her income to receive a Section 8 rental subsidy from 2006 to 2010 and by establishing residency in New Jersey in order to engage in outside employment without the Department's permission. The Department also alleges that respondent failed to efficiently perform her duties because she did not request permission before engaging in outside employment.

Submission of Fraudulent Documents to Qualify for Subsidized Rent - Charge 1

Petitioner alleged that respondent engaged in conduct unbecoming an officer and of a nature to bring discredit on the Department in that she signed and tendered fraudulent documents to qualify for a housing subsidy under the Section 8 program between 2006 and 2010 (ALJ Ex. 1).

Section 8 is a federal program that provides housing subsidies to income-qualified tenants (Tr. 39, 147). Funding for the rental subsidies are provided by HUD (Tr. 150). To receive a housing subsidy a Section 8 participant must provide documentation of his or her income to HUD (Tr. 39, 152). Section 8 participants are required to pay 30 percent of their income towards their rent and the balance is paid through Section 8 funds (Tr. 147-48, 178-79). Under the Section 8 program, the amount the landlord receives in rent is a fixed amount: the issue that is determined during the certification process is how much of that fixed amount is paid by the tenant and how much is paid by HUD (Tr. 178-79). Thus, an increase or decrease in the tenant's income does not affect the overall amount of rent the landlord receives, but affects the amount the tenant is required to contribute towards his or her rent (Tr. 149, 184, 244-46). HUD requires that Section 8 participants notify their landlords of changes in their income or household composition so the rent can be adjusted accordingly (Tr. 170-71). Section 8 participants are required to file an initial certification as to the residents in the unit and the income of all such residents (Tr. 226). Participants are also required to annually recertify their income and family composition to determine the amount they should be contributing towards their rent (Tr. 53-54). The recertification date is determined by the date the tenant moved into the building, so that the tenant must recertify each year around the anniversary of his or her initial move-in date (Tr.

152). As part of the recertification process, participants provide income information that is used to calculate how much rent the participant will be able to pay (Tr. 225-26). Calculation of the participant's rent obligation is based up on a projection of the tenant's income for the next 12 months (Tr. 164-65).

Joel Goldstein is a manager at E & M Associates, LLC, the company that manages the building in which respondent resided during the period in issue (Tr. 146, 224). His company managed the recertification process and he oversaw respondent's recertification between 2006 and 2010 (Tr. 157).

Mr. Goldstein testified that between 2005, when his company took over management of the building, and 2011, when respondent moved out of the building, she was a Section 8 participant (Tr. 157). Respondent moved into the building in November 2003 and was required to recertify every November (Tr. 159, 296-97). Mr. Goldstein met with the respondent and she provided documents to him as part of the annual recertification process (Tr. 157-58). His office maintained files containing copies of respondent's recertification forms, including several documents she signed in which she acknowledged her obligation to report in writing changes to her income and household size (Tr. 175).

Specifically, for each annual recertification between 2006 and 2010, respondent signed an Applicant/Tenant Certification form acknowledging that she knew she was "required to report immediately in writing any changes in income and any changes in household size" (Pet. Exs. 9-12, 14; Tr. 169-71, 395-96). In each Applicant/Tenant Certification form, respondent certified that all the information she provided was "accurate and complete" and that the HUD certification form that was completed based on the information she provided (form 50059) was "true and correct." She also signed documents captioned "Interim Reporting Requirements," in which she acknowledged her obligation to "report in writing . . . (within 10 days) if they occur between regularly scheduled recertifications" increases in household income of $200 or more per month (Pet. Ex. 9-11, 14). In addition, respondent signed documents in which she consented to the release of income and asset information to her landlord, which is required by HUD to verify the information submitted by Section 8 participants (Pet. Exs. 9-14). The HUD certification forms respondent signed during this period (HUD form 50059) included a tenant's acknowledgement that the tenant understood he or she could face criminal prosecution, loss of subsidy, increased rent, or fines for furnishing "false or incomplete information" (Pet. Exs. 9-14).

Mr. Goldstein testified that the management company uses a tenant's income to project income over the next year for an annual recertification and Section 8 participants are required to submit proof of income, such as a salary verification letter or four to six consecutive paystubs (Tr. 152, 177, 246). According to Mr. Goldstein, income for purposes of the Section 8 program includes salary, overtime, and bonuses (150-51). The portion of the rent a tenant must pay is calculated based on the income that the tenant reports (Tr. 149, 152-53). A tenant whose income increases after his or her annual recertification in an amount above $200 per month or $2,400 for a one-year period is required to notify the management company of the increase so it can adjust the tenant's rent accordingly (Tr. 153, 238). The management company relies on the tenants to notify them of a change in income that occurs between the annual recertifications (Tr. 153-54).

Rasove Ramirez, a Special Agent in HUD's Office of the Inspector General, conducts investigations into fraud, waste, and abuse within HUD-funded programs (Tr. 36). According to Agent Ramirez, his office initiated an investigation after its Employment Income Verification ("EIV") computer program detected discrepancies between the amount of income respondent disclosed in her certification forms and income reported by her employers (Tr. 40, 45-46, 48-49; Pet. Ex. 1). Specifically, the EIV revealed an employer, Ann Taylor, that had not been disclosed on the recertification forms respondent submitted. The EIV also showed Department income greater than the amount respondent reported on the recertification forms submitted to her landlord (Tr. 46-47, 55; Pet. Exs. 1, 2, 3).

Agent Ramirez testified that he obtained respondent's tenant file from the management company, and her W-2 wage and tax statements and employment verification forms from the Department and Ann Taylor (Tr. 46-47, 51-55, 63; Pet. Exs. 4-6). He compared the amounts respondent reported as income to the information he received from her employers and asked the management company to calculate the amount of rent subsidy respondent received to which she was not entitled (Tr. 46).

As part of his investigation, Agent Ramirez interviewed the respondent two times in November 2011 (Tr. 69-70; Pet. Exs. 7, 8). The first interview was conducted at the offices of HUD's Inspector General (Tr. 75; Pet. Ex. 7). In a memorandum summarizing the interview, Agent Ramirez wrote that the respondent took two leaves of absence, one in 2008 and the other

in 2009,[1] and that she did not earn any income or other funds or benefits when she was on those leaves of absence. He also wrote that the respondent notified "Joel" in the management company's office and he adjusted her rent based on whether she was working (Pet. Ex. 7). Agent Ramirez testified that after the first interview, HUD agents reviewed their files and decided to question the respondent a second time, this time focusing on her employment at Ann Taylor between 2008 and 2010 (Tr. 75-76; Pet. Ex. 8).

HUD agents conducted a second interview of the respondent on November 22, 2011, at respondent's home (Tr. 75, 112; Pet. Ex. 8). During that interview, respondent handwrote the following statement on a document called an "affidavit":

> The enclosed is a statement is of my own freely [sic] will. At the time of my employment at ATF [Ann Taylor Factory] I did not report income to Section 8 at which time my actions were not deem appropriately [sic]. I was under extreme stress and fear that the report would cause an unforeseen hardship to suffer my three children and self. I use the current address at Newark as an address because it was require [sic] for the employment. The residential address belongs to a [sic] old classmate. At my current residence I have only lived with my three children.

(Pet. Ex. 8; Tr. 392-94).

Agent Ramirez summarized the November 22, 2011 interview in a memorandum (Pet. Ex. 8). According to that memorandum, respondent was a part-time sales associate at Ann Taylor, where she earned $11 an hour. She did not report that employment to the Department or seek permission to engage in that employment because she was not aware that she was required to do so during a leave of absence. Agent Ramirez wrote that respondent "admitted that she never reported her second employment to the management office because she had a lot of expenses and was afraid that her rent would have gone up" and that she "also admitted that in 2009 she failed to go to the management office to properly report her income" (Pet. Ex. 8).

Based on his investigation, Agent Ramirez concluded that respondent underreported her income for 5 years. According to Agent Ramirez, the management company for respondent's building performed a loss calculation which determined that her underreporting of income resulted in a total loss to HUD of approximately $20,000 (Tr. 81-82).

[1] Respondent testified that the memorandum is inaccurate because her leave of absence extended from 2008 to 2009 (Tr. 357-60). She took a second leave of absence in October 2010 (Pet. Ex. 14).

HUD forwarded its investigative findings to the Kings County District Attorney's Office, which charged respondent with grand larceny in the third degree (Penal Law section 155.35(1)), seven counts of falsifying business records in the first degree (Penal Law section 175.10), seven counts of offering a false instrument for filing in the second degree (Penal Law section 175.30), and seven counts of issuing a false financial statement (Penal Law section 175.45(1)) (Pet. 15; Resp. Ex. I). On February 20, 2013, she plead guilty to disorderly conduct (Penal Law section 240.20) and agreed to pay restitution in the amount of $19,127 to the federal government within one year (Tr. 325; Pet. Ex. 16; Resp. Ex. I).[2] According to the transcript of the proceedings of that date, should respondent fail to make restitution within one year, the plea will be withdrawn and the felony charges reinstated (Pet. Ex. 16).

Respondent maintained that she was unaware, for purposes of Section 8, that overtime pay from the Department constitutes income she was obligated to report (Tr. 303, 346, 385-86). Respondent testified that she was never told that if she made more money than was stated in a salary verification letter from the Department she would have to report that income (Tr. 300). She also denied being informed that she was required to report her overtime income (Tr. 303-04). Respondent also suggested that overtime earnings are not a fixed amount, making it difficult to predict how much overtime income she would earn (Tr. 270-71, 402). In sum, respondent contended that she lacked the intent to defraud the government when she submitted the recertification forms. She acknowledged, however, that after seeing the definition of income contained in HUD's general program requirements, that HUD's definition of income includes money earned for overtime work (Tr. 349; Pet. Ex. 23).

Respondent contended that the Department relied on W-2 statements and income verification forms to establish that respondent underreported her income and suggested that this reliance is misleading because those documents provide annual wage data while respondent's annual recertification period runs from November to October (Tr. 397-98). However, the Department also submitted into evidence payroll records that provide monthly and annual

[2] Respondent's guilty plea to disorderly conduct does not establish that she engaged in the criminal acts with which she was charged because she did not, as part of that plea, admit to engaging in the crimes for which she was arrested (Pet. Ex. 16). *See Human Resources Admin. v. Williams*, OATH Index No. 1114/05 at 14 (Sept. 21, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD06-60-SA (May 2, 2006).

income information. These payroll records show that respondent's income exceeded the annual base salary that she disclosed on her Section 8 recertification forms.

Sonnett Swaby-Brizan, the Department's Supervisor of Payroll, testified that in addition to their base pay, correction officers typically receive compensation for working a rotating shift, a night differential for work after 4:00 p.m., and overtime pay. The Department's Payroll Management System ("PMS") records provide a monthly statement of respondent's income, including her base salary and additional compensation (Pet. Ex. 17). These payments are recorded and tracked by the PMS system (Tr. 133-34; Pet. Exs. 17-22).

A comparison of the income information respondent provided as part of the recertification process, the Department's payroll records, and other income information provided by the Department and Ann Taylor establishes that respondent consistently failed to disclose income on her recertification forms. For example, in the two months before respondent signed several of the recertification forms, which would correspond to approximately four paystubs, respondent earned income above her base pay that she failed to disclose on her recertification forms. In addition, she made no disclosure whatsoever of income she received from Ann Taylor in any of the forms she submitted. Specific examples are discussed below:

Annual Recertification Effective 11/1/06 – 10/31/07 (Pet. Ex. 9)

On August 23, 2006, respondent signed an annual recertification form in which her income is listed as $35,951, the annual salary reported by the Department in a letter dated August 14, 2006 (Pet. Ex. 9). Based on the information respondent disclosed, her landlord determined that she was responsible for paying $541 of the $1,324 total monthly rent. Respondent's PMS report shows that in June and July 2006, the months immediately preceding her annual recertification, respondent earned over $300 in overtime pay. In August 2006, the month of her annual recertification, respondent earned over $2,000 in overtime income (Pet. Ex. 17).[3] These amounts were not reflected on her annual recertification (Pet. Ex. 9). Moreover, the PMS report shows that respondent continued to earn overtime in excess of $1,000 per month for the

[3] The PMS reports include columns captioned "Earned Pay Amt" and "Cash Pay Amt." The record is devoid of any explanation of those two amounts, which are not identical. However, it is clear that in the time periods reviewed, overtime and/or night and shift differentials payments categorized as "Earned Pay Amt" and the "Cash Pay Amt" represent amounts in addition to respondent's base pay. The amounts referenced in this discussion are derived from the "Cash Pay Amt" column, as amounts in those columns, when added together, are nearly identical to the amount the Department reported to HUD on an employment verification form as respondent's annual income (Pet. Exs. 6, 17-21).

remainder of 2006, well above the $200 per month threshold that triggered her obligation to report her changed income. Officer Colon did not report that overtime income to HUD.

Annual Recertification Effective 11/1/07 – 10/31/08 (Pet. Ex. 10)

On October 29, 2007, respondent signed an annual certification in which her income is listed as $38,256, the annual base salary the Department reported in a letter dated October 9, 2007 (Pet. Ex. 10). Based on the information respondent disclosed, her portion of the monthly rent was determined to be $576 out of $1,409. The 2007 PMS report for respondent reveals that in August 2009, respondent was paid over $600 in overtime pay; in September 2007, the month before respondent signed the annual recertification, she was paid over $1,000 in overtime pay. In October 2007, the month of her annual recertification, respondent earned over $200 in overtime income (Pet. Ex. 18). These amounts were not included as income on her annual recertification.

Interim Recertification in September 2008 (Pet. Ex. 11)

On September 8, 2008, two months before respondent's next scheduled annual recertification, she signed an interim recertification, effective September 1, 2008, in which no income is listed (Pet. Ex. 11). Included in the interim recertification packet is a letter from the Department dated September 5, 2008, stating that respondent was on a leave of absence from August 20, 2008. Respondent's portion of the monthly rent was determined to be $0, effective September 1, 2008.

Annual Certification Effective 11/1/08 – 10/31/09 (Pet. Ex. 11)

It appears that respondent's annual recertification for the November 2008 to October 2009 period relied on the same information that had been submitted in September 2008 during her interim recertification (Pet. Ex. 11). Therefore, effective November 1, 2008, respondent's portion of the monthly rent was determined to be $0. In late November 2008, respondent started to work at Ann Taylor (Tr. 311). Her income from that employer for calendar year 2008 was $698 (Pet. Exs. 5, 6).

Respondent continued to work for Ann Taylor in 2009, earning $20,882 in that year (Pet. Exs. 3, 5, 6). Respondent resumed work at the Department in April 2009 (Tr. 359-60; Pet. Ex. 20). Therefore, for much of 2009, respondent earned income from both Ann Taylor and the Department (Pet. Ex. 3). There is no evidence that respondent submitted an interim recertification to reflect her Ann Taylor employment or the fact that in April 2009 she had

returned to the Department following her leave of absence and was again earning income from the Department.

Annual Certification Effective 11/1/09 – 10/31/10 (Pet. Ex. 12)

On September 23, 2009, respondent signed an annual recertification effective November 1, 2009 (Pet. Ex. 12). There is no employment income listed on the recertification form; however, child support income is listed (Pet. Ex. 12). Based on the information provided, it was determined that respondent would be responsible for $44 out of the total monthly rent of $1,650 (Pet. Ex. 12). The annual recertification did not reflect respondent's income from Ann Taylor, which she continued to earn in the third quarter of 2009, between July and September (Pet. Ex. 3). Nor did it reflect that respondent had resumed employment at the Department in April 2009, as is reflected in the PMS report for 2009 (Pet. Ex. 20). That PMS report shows that between April and September 2009 (September being the month respondent signed the annual recertification) she earned over $20,000 (Pet. Exs. 12, 20).

Respondent maintains that she submitted to the building management company a letter from the Department dated November 30, 2009, which states her income was over $57,080 and paid rent based on that income (Tr. 327-28; Resp. Ex C). Her purported disclosure of this significant increase in her income is not reflected in her November 2009 recertification (Tr. 328; Pet. Ex. 12).

Interim Certification Effective 3/1/10 – 10/31/10 (Pet. Ex. 13)

On March 3, 2010, respondent signed an interim recertification listing her employment income as $42,166, the amount the Department stated was her annual base salary in a letter dated February 19, 2010 (Pet. Ex. 13). Attached to the interim recertification is a school enrollment contract that respondent signed in November 2009, reflecting her obligation to pay her daughter's tuition, which exceeded $35,000 for the 2009-10 academic year (Pet. Ex. 13). It was determined that effective March 1, 2010, respondent would be responsible for rental payments of $319 per month out of the total monthly rent of $1,650 (Pet. Ex. 13).

It is unclear from the record why respondent submitted an interim recertification in March 2010, nearly a year after she had returned to work at the Department following her leave of absence. It is worthy of note, however, that the base salary reflected on the February 2010 salary verification letter she submitted with the interim recertification, $42,166, is significantly less than the $57,080 annual base salary reflected in the November 2009 Department letter,

which does not seem to have been submitted as part of any recertification (Pet. Ex. 14; Resp. Ex. C).

I do not credit respondent's claim that she submitted the November 30, 2009 letter to the management company. There is no evidence of her having done so, such as an annual or interim recertification that would have reflected the change in her income. The more plausible scenario, given respondent's financial and personal circumstances during this period as she described them in her testimony, is that respondent did not submit the letter because it would have resulted in an increase in her monthly rental obligation. Instead, she submitted the salary verification letter dated February 19, 2010, because it reflected a significantly lower salary than the November 2009 letter.

Annual Certification Effective 11/1/10-10/31/11 (Pet. Ex. 14)

On November 23, 2010, respondent signed an annual recertification in which she indicated she had no employment income. Included in the recertification packet is a letter from the Department dated November 10, 2010, stating that respondent had been on a family leave without pay under the Family Medical Leave Act ("FMLA") since October 29, 2010. It was determined that respondent would be responsible for $44 out of the $1,711 total monthly rent (Pet. Ex. 14). The PMS report for 2010 shows that between January and November 2010, respondent earned over $50,000. In November 2010, the month in which she signed the annual recertification indicating that she had no employment income, respondent earned over $3,000. In October, the month preceding respondent's annual recertification, she earned over $6,000 (Pet. Ex. 21). While respondent may have been on a leave of absence from October 29, 2010 to November 10, 2010, the date of the Department's letter, the PMS records show that she received income in November and December 2010 (Pet. Ex. 21).

With regard to the respondent's income from the Department, the Department established that respondent intentionally failed to disclose her Department income on the recertification forms she submitted for the Section 8 subsidy. At the time she executed the recertification forms, respondent was undoubtedly aware that in addition to her base salary from the Department she earned compensation such as overtime and shift differentials.

I was not persuaded by respondent's claim that she did not know that overtime counted as income. That claim is belied by the evidence and by common sense. Merriam-Webster's online dictionary defines income as "money that is earned from work, investments, business, etc."

(www.merriam-webster.com/dictionary/income?show=0&t=1392227526 (last visited Feb. 19, 2014)). This definition is inclusive of all earnings from work, and makes no distinction between regular and overtime pay. There is nothing to suggest that a common understanding of income would exclude money earned from overtime. Moreover, the paystubs she received from the Department, as well as the W-2 wage and tax statements she received, put respondent on notice that her employer included overtime and other compensation as part of her income and reported it as such to the federal government. There is no basis for respondent to believe that this would not be the case for the Section 8 reporting requirements.

Instead, I believe that respondent knew that full and accurate disclosure of the compensation she received from the Department would increase the portion of the rent she would have to pay, so she disclosed only her base salary. Mr. Goldstein testified that tenants could establish their income by submitting four to six paystubs or a letter from the employer stating their salary (Tr. 152-53). Respondent testified that when she recertified for the Section 8 program she provided a salary verification letter, rather than paystubs, because she was not diligent about keeping her paystubs (Tr. 300). The letters from the Department had a secondary benefit for respondent: it provided base salary information and did not include overtime or other compensation that she received. There is no doubt that when respondent completed the recertification forms she was aware that she earned compensation in addition to her base pay. However, respondent disclosed only her base pay; as a result, her overtime pay and any other additional compensation that she received was not considered in calculating the portion of the monthly rent that she had to pay.

While there is no direct evidence as to respondent's intent to commit fraud, respondent's intent can be inferred from the circumstances surrounding her completion of the forms, including her receipt of paystubs summarizing her income, her financial plight, and her admitted failure to disclose her Ann Taylor income. All of the circumstances strongly suggest that respondent knowingly underreported her income because she was concerned that her portion of the rent would increase. *See Dep't of Housing Preservation and Development v. Callistro,* OATH Index No. 361/85 at 8 (Jan. 10, 1986) (facts and circumstances surrounding respondent's submission of false documents and respondent's implausible explanation of her conduct establishes that respondent intended to commit fraud); *see also People v Swain,* 309 A.D.2d 1173, 1174 (4th

Dep't 2003) (intent to commit welfare fraud can be inferred from defendant's conduct and the surrounding circumstances).

Similarly, it is not credible that respondent lacked the intent to defraud when she failed to disclose the salary she received from Ann Taylor. Respondent admitted as much in her written statement to the HUD investigators in November 2011, and her effort to disavow that statement is unavailing.

According to the respondent, 2008 through 2010 were very difficult years for her (Tr. 304). Between August 2008 and April 2009, she took a leave of absence because her mother became ill and she was dealing with issues relating to her daughter's learning disability and finding an appropriate school for her (Tr. 304-07, 359-60). Respondent testified that she was awarded child support in August 2008 and it was her sole source of income after she went on leave from the Department (Tr. 307-08). In September 2008, respondent filed an interim recertification and her rent was reduced from $576 per month to zero dollars (Tr. 308-09; Pet. Exs. 10-12). In November 2008, respondent was notified that her landlord was suing her for back rent and, to make those payments, she used money from the child support payments, as well as money from her family (Tr. 309-11; Resp. Ex. B).

Respondent testified that she started to work at Ann Taylor in late November 2008 to help pay the rent arrears, legal fees, and other expenses related to her having to file a petition regarding her daughter's educational needs (Tr. 311-14). Respondent's daughter was eventually placed in a school where the tuition exceeded $35,000 per year, for which amount respondent was responsible (Tr. 316-17; Resp. Exs. F, G). Respondent testified on cross-examination that she stopped working at Ann Taylor in 2009 and did not work there in 2010, but received a W-2 statement for 2010 as payout of an accrued pension amount (Tr. 345-46, 385).

Respondent acknowledged that she wrote and signed the November 22, 2011 statement in which she admitted that she failed to report income from Ann Taylor for Section 8 recertification (Tr. 351-52; Pet. Ex. 8). She testified that she wrote the statement during a meeting with HUD agents in her home after Agent Ramirez assured her that it would not lead to her arrest (Tr. 324). She also maintained that when she wrote the statement she was in a rush to pick up her learning disabled daughter at school because Agent Ramirez was several hours late for their meeting (Tr. 322-24). Respondent testified that she wrote what the HUD agent told her to write because she wanted to leave to pick up her child (Tr. 323-24, 354-55).

Even if respondent's version of the events leading to her making the handwritten statement is true, however, the circumstances under which respondent claims she wrote the statement do not diminish the significance of her admission that she failed to report her income from Ann Taylor. The meeting occurred in respondent's home and she could have ended that meeting without writing the statement. Further, while respondent's desire to go to her then twelve-year old daughter is understandable, she does not claim that the agents prevented her from doing so, nor does she suggest that they conditioned her freedom to leave the interview on writing the statement. In sum, the circumstances under which respondent wrote the statement do not suggest exertion of any force, duress, or fraud that would render her statement coerced or involuntary. *See Dep't of Correction v. Blanc*, OATH Index No. 2571/11 at 8 (Feb. 2, 2012), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 12-40-SA (Aug. 10, 2012) (motion to suppress statements to the Department of Investigation denied because there was no evidence the statements were involuntary).

Even were I to credit respondent's claim that she did not know she was required to report as income overtime pay that she received from the Department, respondent's failure to report income that she derived from Ann Taylor is compelling evidence that she deliberately concealed income to retain the Section 8 subsidy. Respondent had regular employment at the store such that she was promoted to a management position (Tr. 363). Indeed, in 2009, respondent earned over $20,882 from Ann Taylor, which averages to approximately $1740 per month over the course of 12 months, yet she did not report this additional income to HUD in an annual or interim recertification.

Respondent claimed that she had ceased working at Ann Taylor by the time she recertified in November 2009 and intimated that Mr. Goldstein told her there was no need to include the Ann Taylor income in her November 2009 annual recertification income (Tr. 387). However, she was noticeably vague about when this conversation occurred (Tr. 388-92, 397). Moreover, as part of the annual recertification process, respondent acknowledged that she knew that she was required to report changes in her income in writing. She followed this procedure when she submitted interim certifications when her Department income changed in August 2008 during a leave of absence, and again in March 2010 (Pet. Exs. 11, 13). In addition, there is no discernible incentive for the managing company to advise a tenant to underreport income: the landlord is paid the full amount of rent, whether the tenant's portion increases or decreases.

There is simply no basis for crediting respondent's claim that she disclosed her Ann Taylor income to the management company in a conversation with the building manager, but failed to do so in writing.

While respondent's conduct occurred when she was off-duty, an employer may discipline an employee for off-duty misconduct where there is sufficient nexus between the conduct to be sanctioned and the employee's job position. *See Villanueva v. Simpson*, 69 N.Y.2d 1034 (1987); *Cromwell v. Bates*, 105 A.D.2d 699 (2d Dep't 1984); *Zazycki v. City of Albany*, 94 A.D.2d 925, 926 (3d Dep't 1983); *Dep't of Environmental Protection v. Tosado*, OATH Index No. 311/83 at 13-16 (Sept. 2, 1983). Correction officers are peace officers charged with law enforcement responsibilities; indeed, "[t]he very nature of a correction officer's job demands integrity." *Dep't of Correction v. Salik*, OATH Index No. 1304/13 at 11 (June 25, 2013). Therefore, this tribunal has held that sufficient nexus exists between a correction officer's position and off-duty fraudulent or deceptive conduct to warrant discipline. *See Salik*, OATH 1304/13 at 11-12 (finding sufficient nexus between correction officer's off-duty fraudulent business practices and his employment as a correction officer); *Blanc*, OATH 2571/11 at 32-33 (finding sufficient nexus between correction officer's off-duty misconduct relating to improperly cashing Section 8 checks and receiving public assistance subsidy benefits to which she was not entitled and her position). Here, too, sufficient nexus exists between respondent's failure to disclose income on forms she submitted in order to maintain her Section 8 rental subsidy and her employment.

In sum, petitioner has established that respondent signed and submitted Section 8 recertification documents in which she failed to disclose income she received from the Department and Ann Taylor in order to qualify for a rental subsidy. Her conduct is unbecoming an officer and was of a nature to bring discredit to the Department.

Outside Employment

Respondent is charged with failing to obtain Department authorization to engage in outside employment from July 2008 through the present, when she was working at an Ann Taylor store in New Jersey (ALJ Ex. 1). Department of Correction Directive 2250R-A (eff. December 22, 2005) ("Directive 2250R-A"), section II.A(1), requires all members of the Department seeking to engage in outside employment to obtain the written approval of the Chief of Administration prior to starting such employment (Pet. Ex. 25). Moreover, section III.A of the Directive provides that all members of the Department who want to engage in outside

employment must notify the commanding officer of their place of assignment using a form entitled "Employee Application Request to Engage in Outside Employment" (Pet. Ex. 25; Tr. 17-18).

It is undisputed that respondent worked at Ann Taylor in Linden, New Jersey, starting in November 2008 (Tr. 311; Pet. Exs. 5, 6). Respondent testified that at the time she started working at the store, respondent was on a leave of absence from her position with the Department (Tr. 304). Respondent's leave started on August 20, 2008 (Ex.11).

Respondent does not dispute that she failed to obtain the Department's written permission prior to starting her employment at the store. Her defense to the charge of unauthorized outside employment is, in essence, that she was not aware of the requirements of Directive 2250R-A and that, in any event, she was not required to obtain pre-approval of her outside employment because she was on an FMLA leave.

Respondent testified that she was not given a copy of the Department's directives when she became a correction officer and that the first time she saw a copy of the Directive 2250R-A was when she received a copy of the charges in this matter (Tr. 333-34, 340-42). Respondent acknowledged, however, that she was aware that all of the Department's directives are available on a compact disk (Tr. 342). She also acknowledged that although she knew the Department issued directives governing the conduct of its officers, when she obtained outside employment she did not determine whether the Department had any guidelines for non-Department employment (Tr. 342-43).

Respondent's claimed lack of knowledge of the requirement that she report outside employment to the Department is consistent with statements she made to HUD investigators in November 2011, when she told Agent Ramirez that she did not know she was required to report outside employment during a leave of absence (Pet. Ex. 8).

Clayton Augustus, a Department employee for nearly 30 years, is Deputy Warden of Administration at the GMDC and is responsible for all aspects of personnel, administration, and discipline (Tr. 15). According to Deputy Warden Augustus, Department employees are responsible for knowing all of the Department's rules and regulations (Tr. 15). He testified that Directive 2250R-A requires a correction officer to obtain approval from his or her commanding officer and from the Department's chief of administration prior to engaging in outside

employment (Tr. 19). Deputy Warden Augustus further testified that Department employees have access to all Department directives on the Department's website (Tr. 34).

I find that respondent knew or should have known of the provisions of the directives. Respondent, who has been a correction officer since 2005, admitted that she knew the Department issued directives to its officers. Moreover, respondent's testimony that when she joined the training academy she received voluminous information, including rules and regulations (Tr. 334), creates a strong inference that she was aware of the heavily regulated nature of her employment with the Department. Therefore, it is highly unlikely that respondent was unaware that the Department promulgated rules and regulations regarding an officer's ability to engage in outside employment. While she may not have known the precise scope of the restrictions, such ignorance is not an excuse. *See Business Integrity Comm'n v. Chrostowski,* OATH Index No. 1064/13 at 3 (Jan. 7, 2013) (respondent's claim that he did not know or understand that he needed permission to haul construction debris does not excuse his violation of the prohibition against unlicensed collection of trade waste).

Respondent testified that she believed that she was not required to report her outside employment to the Department because she was on an FMLA leave and was considered a civilian (Tr. 315). According to the respondent, she believed that while on FMLA leave she would be paid all of her accrued leave time, after which she was no longer part of the Department and was a civilian (Tr. 314-15). She maintained that this belief was supported by a letter she received from the Department stating that she would be on FMLA leave with health insurance for 12 weeks, after which she would be on a leave of absence that did not include health insurance (Tr. 315). Respondent turned in her shield, equipment, and identification to the Department when she went on leave and, according to respondent, she did not anticipate that she would have to report anything to the Department (Tr. 315-16).

Deputy Warden Augustus testified that Directive 2250R-A expressly excludes from its requirement that employees obtain approval before commencing outside employment those employees who are on suspension without pay and those who are on continuous vacation or terminal leave immediately after filing an application for retirement (Tr. 19; Pet. Ex. 25). According to Deputy Warden Augustus, under the terms of the Directive, officers who are on a leave of absence to care for an ill family member are required to request and obtain pre-approval to engage in outside employment (Tr. 19). Respondent seemed to suggest that the exemption

from the pre-approval requirement for outside employment that the Directive confers on Department employees during a period of suspension without pay should extend to those employees who are on leaves of absence. This contention is without foundation.

Directive 2250R-A provides that officers are not required to obtain prior approval for outside employment during a period of suspension without pay or while on continuous vacation and/or terminal leave immediately after applying for retirement. *See* Directive 2250R-A, section II.2. On its face, the Directive clearly does not exempt from its pre-approval requirement employees who are on FMLA leave. The drafters of the Directive could have added employees on FMLA leave to the list of those exempt from obtaining pre-approval had that been their intent. This is especially so given that, as Deputy Warden Augustus testified, a person who is suspended is essentially the same in terms of function as a person who is on a leave of absence (Tr. 32). Because the Directive lists specific categories of employees who are exempt and does not include those on FMLA leave, the exclusion must be considered intentional.

This conclusion is consistent with a canon of statutory interpretation, *expressio unius est exclusio alterius*, which means the expression of one thing implies exclusion of another. Ballentine's Law Dictionary (3rd ed.) (Lexis 2010). *See also Dep't of Buildings v. 27 Osgood Avenue, Staten Island, New York*, OATH Index No. 1705/99 at 22-23 (Jan. 18, 2000) (since a mortgage broker or consultant business is not one of the enumerated home occupations that are banned by zoning resolution, it is a permissible home occupation); *Matter of Gurkin*, OATH Index No. 489/12 at 20 (Dec. 14, 2012), *adopted*, Loft Bd. Order No. 4186 (Oct. 17, 2013) [Loft Bd. Dkt. No. TR-0792; 206 Bowery, New York, N.Y.] ("It is generally held true that what is left out of a law is presumed to be intentionally left out") (citations omitted). The drafters of Directive 2250R-A chose to expressly exempt from the pre-approval requirement only the enumerated categories of employees: those who are suspended without pay and those who are suspended without pay or while on continuous vacation and/or terminal leave immediately after applying for retirement. Respondent did not fall into either category and was thus ineligible for the exemption.

In sum, petitioner has established that respondent failed to obtain required pre-approval of her outside employment.

Residency

Petitioner alleges that respondent engaged in conduct unbecoming an officer and of a nature to bring discredit on the Department in that she established residency in New Jersey to gain outside employment at Ann Taylor (ALJ Ex. 1).

The evidence shows that respondent's address on her 2008 W-2 statement lists a New Jersey address for respondent (Pet. Ex. 5). Agent Ramirez testified that during an interview respondent told him she had to use a New Jersey address to get the job at Ann Taylor (Tr. 115, 121). Agent Ramirez's memorandum summarizing his interview of respondent on November 22, 2011, supports this testimony (Pet. Ex. 8). Most persuasive, however, is respondent's hand-written statement, dated November 22, 2011, in which she wrote: "I use the current address at Newark as an address because it was required for employment. The residential address belongs to a [sic] old classmate" (Pet. Ex. 8).

Respondent testified that Agent Ramirez dictated the statement to her and that it is untrue (Tr. 353-54). Officer Colon denied ever having lived in New Jersey (Tr. 330-31). She maintained that she gave the store manager an old resume with a New Jersey address and explained to the manager that the address was no longer correct. According to respondent, because she was hired on "Black Friday" in November 2008 and the position was temporary, the manager did not feel it was necessary to correct the address (Tr. 331). Respondent's W-2 statements for 2009 and 2010 reflect respondent's New York City address (Pet. Ex. 5).

While the Department has established that respondent gave the Ann Taylor store a friend's New Jersey address for the purpose of securing employment, it introduced no evidence to prove that respondent established residency in New Jersey. Therefore, I find that petitioner failed to prove that respondent established residency in New Jersey, as is charged.

FINDINGS AND CONCLUSIONS

1. Respondent underreported her Department income on recertification documents submitted between 2006 and 2010 to obtain a rental subsidy in the HUD Section 8 program.

2. Respondent failed to report income she earned from Ann Taylor in order to obtain a rental subsidy in the Section 8 program.

3. Respondent failed to request and obtain prior approval from the Department to engage in outside employment when she worked for Ann Taylor while on a leave of absence from her position with the Department.

4. Petitioner failed to prove that respondent established residency in New Jersey for purposes of engaging in outside employment.

RECOMMENDATION

Upon making the above findings and conclusions, I obtained and reviewed an abstract of respondent's employee performance service report (Form 22R) for purposes of recommending an appropriate penalty. Respondent has been employed by the Department since 2005 and has a clean disciplinary record. She was suspended from February 12, 2012, to March 9, 2013, during the pendency of criminal court proceedings relating to her arrest. Petitioner seeks respondent's termination, and that is appropriate.

Fraudulent receipt of Section 8 and other public benefits has been considered serious misconduct and has generally resulted in termination of employment. *See, e.g. Human Resources Admin. v. Battle-Black,* OATH Index No. 2272/13 (Sept. 10, 2013) (termination of employment recommended for a fraud investigator who had an unblemished disciplinary history over 17 years where she pled guilty to having failed to disclose her HRA employment to HUD and received Section 8 housing benefits to which she was not entitled)*; Blanc,* OATH 2571/11 (termination of employment recommended despite lack of disciplinary record where correction officer cashed Section 8 subsidy checks on which she was not the payee, forged the payee's name, and fraudulently received a public assistance subsidy from the Human Resources Administration); *Dep't of Sanitation v. Rosario,* OATH Index No. 2301/10 (June 11, 2010) (ALJ recommended termination of employment of a sanitation worker convicted of theft of public funds by falsifying application for section 8 housing).

Moreover, termination of employment has been consistently recommended for correction officers who engage in fraudulent or deceptive misconduct, even for those officers with minor or unblemished disciplinary records. *See Salik,* OATH 1304/13 at 13 (termination recommended for employee who engaged in fraudulent, deceptive, and unlicensed business practices despite his minor disciplinary history); *Blanc,* OATH 2571/11 at 38 ("Although the lack of a prior

disciplinary record would normally militate against termination, correction officers found to have engaged in act of larceny and fraud have typically been terminated from their positions because 'this type of dishonesty is inimical to service in law enforcement.'") (citing *Dep't of Correction v. Bivens*, OATH Index No. 2088/10 at 9 (Aug. 20, 2010) (termination of employment recommended for correction officer with a clean disciplinary history who submitted fraudulent financial affidavits over six years so she would qualify for a housing subsidy); *Dep't of Correction v. Fuller*, OATH Index No. 2144/05 (Nov. 28, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-120-SA (Nov. 14, 2006) (correction officer with an unblemished disciplinary history terminated from employment for defrauding HUD by signing statements that falsely claimed she was unemployed); *see also Dep't of Correction v. Santiago*, OATH Index No. 2163/09 (Aug. 4, 2009) (termination of employment recommended where correction officer stole insurance funds from his step daughter by submitting fraudulent documents to insurers).

I have little doubt that respondent was experiencing personal and financial hardship during some of the period in which she failed to disclose her income on the recertification forms. Officer Colon credibly testified that between 2008 and 2010, her mother became ill, her daughter's special needs required significant time and financial resources, and she was experiencing stress relating to her financial situation. She was often distraught during her testimony, as she described her personal circumstances and the choices that she felt had to make in order to ensure the well-being of her family.

While I am mindful of the personal stress and difficulties that respondent experienced, of paramount concern are respondent's obligations as a correction officer. *See e.g. Fuller*, OATH 2144/05 at 5 (correction officer's desire to help her mother and two younger siblings keep a subsidized apartment does not outweigh the Department's legitimate concerns about the officer's integrity) (citing *Human Resources Admin. v. Finley*, OATH Index No. 947/05 at 7-9 (Oct. 12, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD06-53-SA (Apr. 24, 2006) (where employee committed insurance fraud, health problems and financial desperation insufficient mitigation and termination of employment recommended); *Human Resources Admin. v. DeFreitas*, OATH Index No. 629/01 (Nov. 30, 2000) (termination of employment for welfare fraud warranted despite employee's tenure, financial hardship, and payment of restitution). Respondent's

misconduct gives the Department cause to doubt her integrity, an essential quality of a law enforcement officer.

For these reasons, I recommend termination of respondent's employment.

Astrid B. Gloade
Administrative Law Judge

February 24, 2014

SUBMITTED TO:

MARK CRANSTON
Acting Commissioner

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