Dep't of Correction v. Joseph

OATH Index No. 196/12 (Apr. 5, 2012)

Correction officer was insubordinate and disrespectful toward a captain who ordered him to secure the door to the "A" station and then to open the gate to the area to permit her access. Officer was also insubordinate on another occasion toward a different captain, who ordered him to relinquish an overtime post. Given officer's lack of prior disciplinary record, total of 10 days suspension without pay is recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
-against-
PATRICK JOSEPH
Respondent

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

This is a disciplinary proceeding referred by the petitioner, the Department of Correction, pursuant to section 75 of the Civil Service Law. Petitioner alleges that respondent, Patrick Joseph, a correction officer assigned to the Rose M. Singer Center ("RMSC"), inefficiently performed his duties and was insubordinate and disrespectful toward a superior officer on two occasions, on January 20, 2010, and April 4, 2011 (ALJ Ex. 1).

Trial was held over the course of four days, the first two of which focused upon a challenge to service of the charges relating to January 20, 2010. I rejected the challenge to service for the reasons set forth below and the matter proceeded on the merits. Petitioner presented seven witnesses while respondent testified on his own behalf. The record was left open for petitioner to produce copies of log books that had been requested by respondent. Petitioner produced the records, but neither party moved them into evidence.

As set forth below, the January 20, 2010 charge is sustained in large part. The April 4, 2011 charge is sustained. I recommend that respondent be suspended for ten days.

ANALYSIS

Challenge to Service

Prior to trial, respondent moved to dismiss the January 20, 2010 charge as time-barred, alleging that he was not served with the charge within the 18 month limitations period, as required by Sections 75(2) and 75(4) of the Civil Service Law. The charge contains an "acknowledgment of service" page indicating that Officer Baiardi served respondent with the charges on March 1, 2010, but that respondent refused to sign to acknowledge service (ALJ Ex. 1). Respondent contended that at the time of the alleged service, he had left the facility and thus could not have been served at the facility. An e-mail from petitioner's counsel confirmed that respondent's attendance sheet for March 1 showed that he had left the facility at approximately 2:05 p.m. (E-mail from Donzell Tucker-Nimrod, Esq., to Peter Troxler, Esq., dated Oct. 18, 2011). The handwriting on the acknowledgement of service is unclear, but it showed the time as either 1500 or 1900, or, in non-military time, either 3:00 p.m. or 7:00 p.m., after respondent seemed to have left the facility.

In addition to alleging that respondent was personally served at the facility in March 2010, petitioner alleged that respondent attended a pre-trial conference at the Office of Administrative Trials and Hearings ("OATH") on May 11, 2011, within the limitations period, and actively discussed the charge against him. Hence, petitioner argued that respondent had actual notice of the charges, satisfying the jurisdictional prerequisite for proceeding to trial at OATH (Pet. Legal Mem., November 14, 2011). Respondent disagreed, asserting that his appearance at the OATH conference was insufficient to constitute the requisite service.

Petitioner requested a ruling on service prior to trial on the merits, which was appropriate. *See Human Resources Admin. v. Morris*, OATH Index No. 1683/95 (May 7, 1998) (holding hearing on service prior to trial). Thus, hearing dates were scheduled purely on this issue. Petitioner presented three witnesses: Officer Scott Baiardi, who was assigned to the RMSC personnel office; Parmit Singh, the personnel supervisor at RMSC; and Tammy Wyche, the office manager in the Trials and Litigation Unit until March, 2010. Respondent testified on his own behalf. Testimony was adduced both regarding the issue of service at the facility and the conference at OATH.

Regarding service at the facility, petitioner asserted, for the first time, that the March 1, 2010 date shown on the "acknowledgment of service" was written in error, and that service was

actually made on March 2, 2010 (Tr. 15). Ms. Wyche testified that she first received the January 20, 2010 charges ("the charges") on March 1, 2010, and sent them by fax to the personnel office at RMSC (Tr. 27). At the bottom of the charges is a notation indicating, "Printed on Monday, March 01, 2010 4:12:01 PM" (Pet. Ex. 1). Officer Baiardi made a notation in the personnel log book which indicated that the charges were faxed to him on March 1, 2010 (Tr. 102; Pet. Ex. 8). Officer Baiardi also noted in the log book that he served the charges on March 1, 2010, and that respondent refused to sign (Pet. Ex. 8). While testifying that he served respondent, he acknowledged that he did not do so on March 1 (Tr. 103). He indicated instead that he did not "know the exact time and date," but was "pretty sure" that it was on March 2, 2010, that he served respondent (Tr. 103). The notation concerning the charges is dated March 2, 2010 (Pet. Ex. 8).

More specifically, Officer Baiardi testified that he called respondent "to the window" and "put the charges" in front of him. He told respondent that he had to sign for the charges. Respondent "pushed them back" and said he was not going to sign for the charges (Tr. 103, 114). Officer Baiardi further acknowledged signing an "acknowledgement form" with his signature and shield number; Mr. Singh, the personnel supervisor, signed as a witness. However, Mr. Singh was not actually a witness to the service, as he was in his office at the time that Officer Baiardi handed the charges to respondent (Tr. 115). Officer Baiardi also wrote the words, "Refused to sign." He did not include the time or date on this acknowledgment (Tr. 104-05; Pet. Ex. 4).

Mr. Singh testified that although the personnel log book indicated the charges were faxed on March 1, 2010, personnel did not get the charges until March 2, 2010 (Pet. Ex. 8). He explained that he was in his office when Officer Baiardi came to his door, holding the charges, and said that respondent did not want to sign for the charges (Tr. 70, 77). Mr. Singh got up to approach respondent, which is the "normal" procedure, but respondent was already walking away, empty-handed (Tr. 70, 77). Mr. Singh acknowledged that, "in hindsight," "maybe" he should have called respondent back to ask him again to sign the charges, but he did not (Tr. 77). Instead, Mr. Singh signed the "acknowledgement of service" as a witness, even though he was not a witness (Tr. 75, 76, 77, 89; Pet. Ex. 4). The acknowledgement was faxed to Trials and Litigation on March 2, 2010, at 3:47 p.m., as indicated by the fax time and date stamp (Singh: Tr. 76; Pet. Exs. 3, 4).

When she received the undated acknowledgement, Ms. Wyche forwarded it to counsel, who told her to have the form corrected so the witnesses signed in the proper location and to determine who wrote the words, "refused to sign" under the signature (Wyche: Tr. 31; Pet. Exs. 2, 3). She re-faxed the original charges and a blank copy of the acknowledgement to Officer Baiardi and told him to fill out the top portion of the form, sign it again, and send it back to her (Wyche: Tr. 32, 58; Baiardi: Tr. 106; Pet. Ex. 4). Officer Baiardi followed her instructions by signing and dating the blank form and signing his name. He wrote the date and time of service as March 1, 2010, at approximately 3:00 p.m. in error (Tr. 107, 110; Pet. Ex. 5). Mr. Singh acknowledged that he signed his name as a witness on this acknowledgement as well, and also wrote the words, "Refused to sign" (Pet. Ex. 5).

Respondent acknowledged working on March 2, 2010. The sign-in sheet contained a notation, next to his name, directing him to "see Personnel Captain" (Tr. 148-49; Resp. Ex. B). However, respondent had no recollection of reporting to her personnel office or seeing Officer Baiardi on March 2, 2010 (Tr. 151). He denied having been "served" with the charges on March 2 (Tr. 152). He testified that he has received charges previously, and has sometimes refused to sign an acknowledgement of receipt. On those occasions, even when he refused to sign an acknowledgement, he was given a copy of the charges and instructed that he was obligated to take them (Tr. 152, 153, 165).

Respondent acknowledged being at OATH with his attorney for the May 11, 2011 pre-trial conference and was "shocked" because he did not know anything about the charge and felt he had "zero" ability to participate in the conference (Tr. 158). He initially testified that he appeared to address two sets of charges: the January 10, 2010 charges, on which he disputes service, and the April 4, 2011 charges, on which he does not dispute service (Tr. 156). Respondent later testified, however, that he did not recall if the conference dealt with one or two sets of charges (Tr. 161, 172). In fact, however, the April 4, 2011 charges were not printed until June 7, 2011 (ALJ Ex. 1), so they could not have been discussed at the May 11, 2011 conference.

Respondent acknowledged that he had "discussed" or "conferenced" the January 10, 2010 charges on May 11, 2011 (Tr. 156). At one point he said he was "served" with the charges at the conference (Tr. 156); later on, however, he maintained that petitioner's counsel never presented him with the charges and told him to sign them (Tr. 174). He also said that the charges were "part" of his "lawyer's folder" when he and his lawyer attended the conference (Tr. 175).

Moreover, respondent testified that he told his lawyer that on the date referenced on the acknowledgment of service for the charges -- March 1 -- he thought he was not at work (Tr. 175).

Based upon the testimony and documentary evidence, I find that respondent was called to the personnel office on March 2, 2010. I credit the testimony of Officer Baiardi and Mr. Singh that on March 2, 2010 -- as indicated by the fax machine notation on the first acknowledgment of charges that they submitted – Officer Baiardi presented the charges to respondent by placing them on a window and pushing them toward respondent. Respondent pushed the charges back and said he did not want to sign for them. Officer Baiardi took the charges and went to find Mr. Singh, who left his office to talk to respondent. By that time respondent was leaving the office empty-handed. Neither Officer Baiardi nor Mr. Singh called respondent back to tell him that he had to take a copy of the charges even if he was refusing to sign to acknowledge them.

Notably, the testimony of respondent regarding March 2, 2010 was not inconsistent with either Officer Baiardi's or Mr. Singh's testimony. Respondent said that he was "never served" with the charges, but his description of "service" seemed to encompass being given a copy of the charges even when he refused to sign. Clearly, this did not happen here. When respondent said he was refusing to sign for the charges, Officer Baiardi took the charges and walked away. Officer Baiardi did not testify that he instructed respondent to wait or that he told respondent he was going to give him a copy of the charges.

Officer Baiardi's presentation of the charges to respondent on March 2, 2010 fell short of what is required to effectuate service. The Department's directives and rules require personal service of disciplinary charges and require the employee to sign an acknowledgement of the charges upon receipt in the presence of a supervisor. Dep't of Correction Directive No. 7502 § II(C)(2) (eff. Feb. 14, 1983); Dep't of Correction Rules & Regulations § 3.40.030 (1996). When personal service can not be accomplished, the charges must be sent to the employee by registered mail. Dep't of Correction Rules & Regulations § 3.40.030 (1996); *see also* 55 RCNY Appendix A, § 6.4.2(b) (Lexis 2012).[1] The Department's rules also provide that departure from the disciplinary procedures "shall not invalidate the proceedings unless it is conclusively shown in

[1] Although petitioner's counsel asserted that the charges were mailed to respondent by regular and certified mail on August 11, 2011 (E-mail from Donzell Tucker-Nimrod, Esq., to Peter Troxler, Esq., dated Oct. 18, 2011), that fell outside of the limitations period, which ended on July 20, 2010.

writing to the Commissioner . . . that such departure adversely affected the rights of the accused." Dep't of Correction Rules & Regulations § 3.40.080.

An employee cannot defeat notice by refusing to accept service of the charges. *Dep't of Correction v. Johnson*, OATH Index No. 1992/01 at 2 (Aug. 16, 2001) (refusal to accept service did not bar a finding of personal service where investigator handed the notice to respondent, who reviewed the papers, but would not accept them); *Dep't of Transportation v. Deloach*, OATH Index No. 2287/00 at 2 (Oct. 18, 2000) (respondent was properly served with the notice of hearing and charges when they were handed to her, even though she refused to sign an acknowledgment); *Human Resources Admin v. Morris*, OATH Index No. 1683/95 at 4 (May 7, 1998) ("Respondent had the opportunity to read the charges and his decision to refrain from doing so was a considered one, which did not vitiate the validity of the personal service.").

However, where an employee refuses to sign an acknowledgment of service for the charges, the agency must still attempt to leave the charges with the employee in order for service to be deemed proper. *See Yovino v. Dep't of Sanitation*, NYC Civ. Serv. Comm'n Item No. CD 2-29-R at 2-3 (Apr. 10, 2002) (finding service not effective where, after employee refused to sign acknowledgement of service, a copy of the charges was not left with the employee); *Dep't of Sanitation v.Yovino*, OATH Index No. 992/04, mem. dec. at 8-9 (Aug. 11, 2004) (service not proper where after employee refused to sign acknowledgement of service, supervisor refused to give the employee a copy of the charges); *see also Selby v. Jewish Memorial Hospital*, 130 A.D.2d 651, 652 (2d Dep't 1987) (finding that, even assuming defendant sought to evade service, "service would nevertheless be inadequate because the plaintiff failed to demonstrate both that the papers were left in the general vicinity of the defendant doctor and that [the defendant] was made aware of the fact and manner of service"); *cf. Bossuk v. Steinberg*, 58 N.Y.2d 916, 918 (1983) ("delivery of a summons may be accomplished by leaving it in the 'general vicinity' of a person to be served who 'resists' service"); *McDonald v. Ames Supply Co.*, 22 N.Y.2d 111, 115 (1968) ("where the defendant resists service, it suffices to leave the summons in his general vicinity").

Here, even though respondent was given the charges, and declined to sign an acknowledgment, service was not properly effectuated because Officer Baiardi did not leave the charges in the "general vicinity" of respondent. Rather, Officer Baiardi took the charges and walked away. Had he left the charges, or told respondent that he had to keep the charges even if

he did not want to sign for them, service would have been proper. But the evidence in the record is to the contrary as Mr. Singh admitted that when he saw respondent walking away, he did not attempt to stop him or give him a copy of the charges.

In an administrative proceeding such as this, however, technical defects in service do not defeat jurisdiction where there is actual notice of the charges within the limitations period. As the Nassau County Supreme Court held in *Drolet v. New York State Racing and Wagering Board*:

> The jurisdiction and powers of an administrative body derive from the statute which created it. Thus, while adequate notice is required in order to comply with constitutional guarantees of due process, service of notice in the administrative context does not fulfill the same jurisdiction-acquiring function vis-a-vis the parties to the proceeding as does a summons in a court proceeding. For this reason where there is actual notice, procedural irregularities are overlooked since the object of the procedural requirement has been achieved albeit in a technically improper manner.

115 Misc. 2d 7, 10 (Sup. Ct. Nassau Co. 1982); *see also Reda v. Dep't of Health*, 137 Misc. 2d 61, 62-63 (Sup. Ct. N.Y. Co. 1987), *aff'd*, 143 A.D.2d 1073 (1st Dep't 1988) (finding that though service of a violation on petitioner's father did not technically comply with the CPLR, it was sufficient as "[i]n an administrative proceeding the standard for service is whether the notice under all the circumstances is reasonably calculated to make the parties aware of the proceeding so that they have an opportunity to be heard."). *See Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

This tribunal has held, following *Drolet*, that the Department's failure to precisely comply with its rules is not fatal where respondent had "actual notice" of the charges within the statutory period because he "participated in the disciplinary process, including an informal conference held before this tribunal prior to the date of the instant hearing." *Dep't of Correction v. Gray*, OATH Index No. 930/03 at 3, 4 (May 29, 2003) (denying motion to dismiss for failure of the agency to comply with the rules regarding service). And in other cases, we have found "actual notice" to be established where a respondent appeared for either a hearing or a pre-trial conference. *See Taxi & Limousine Comm'n v. Nitram Cab Corp.*, Comm'r/Chair Dec. at 4 (Sept.

8, 2008), *adopting*, OATH Index No. 2809/08 (Aug. 4, 2008) ("proof of actual notice of a hearing might consist of the obvious inference to be drawn from a respondent's appearance at the time and place scheduled for the hearing"); *Human Resources Admin. v. Garrido*, OATH Index No. 213/94 at 2 (Sept. 14, 1994) (respondent's attendance at pre-trial conference established that he had actual notice of the charges); *Human Resources Admin. v. Rice*, OATH Index No. 455/93 at 5 (Mar. 1, 1993) (finding the respondent's appearance at an informal conference sufficient to show actual notice). *See also Dep't of Buildings v. 116 East 73rd Street, Manhattan,* OATH Index No. 1807/02 at 5 (Jan. 24, 2003) (finding respondent "had actual notice of the proceedings, having twice spoken by phone with petitioner's counsel regarding the proceedings in advance of the hearing date"); *Transit Auth. v. McManus*, OATH Index No. 1317/90 at 6 (June 28, 1990) ("No doubt exists that respondent received notice of the charges since he appeared at the hearing. Therefore, no basis exists to dismiss this case because of any problems with service.").

This line of cases is entirely consistent with section Department Rule 3.40.080, noted above, which indicates that "departure" from the procedures for service "shall not invalidate" the proceedings unless there is actual prejudice.

Here, respondent acknowledged that he had "discussed" or "conferenced" these charges at the pre-trial conference held on May 11, 2011. He also indicated that his attorney was present and had a copy of the charges. Moreover, respondent initially testified that he was "served" with the charges on May 11. Although he later amended his testimony to say that counsel never handed him a copy of the charges and asked that he sign for them, his testimony suggests that he saw a copy of the charges during the conference (Tr. 175). In sum, respondent's testimony established that he had "actual notice" of the charges on May 11, 2011, within the 18 month limitations period, which is sufficient under *Drolet* and its progeny to defeat his challenge to service.

Accordingly, respondent's motion to dismiss was denied and the case proceeded to trial on the merits on both sets of charges.

January 20, 2010 charge

Petitioner alleges that on January 20, 2010, respondent failed to obey a "direct order" to close and/or lock his "A" station door (specification one), as well as a direct order to open the front gate outside the "A" station (specification two). Petitioner further alleges that respondent

was disrespectful by disobeying the orders and by laughing at a captain when she directed him to submit a report (specification three).

Many of the facts in this case were undisputed. Respondent was assigned on January 20 to the "B" housing area, encompassing the 10 and 12 buildings, on the 3:00 p.m. to 11:00 p.m. tour (Mingo: Tr. 298, 299; Smith: Tr. 335; Joseph: Tr. 520, 522). His post was the "A" station, also known as the "control post" (Smith: Tr. 335) or "bubble" (Smith: Tr. 351). The "A" station is an enclosed area facing the entrances to two different housing areas, which are on either side of the bubble (Johnson: Tr. 369). Building 10 is a general population housing area, while building 12 is a "bing" or central punitive segregation area ("CPSU"), housing inmates who are locked in their cells for 23 hours a day for violating facility rules (Mingo: Tr. 288; Smith: Tr. 343). Respondent's supervisor at the time was Captain Alexandria Smith, the "B" house supervisor (Smith: Tr. 335).

Respondent's duties as an "A" station officer included keeping the census or inmate count, giving out passes, and opening and closing the gates to the housing areas (Smith: Tr. 335), as well as verifying inmate information, observing officers on the floor, and providing access as needed to inmates, officers, and captains (Tr. 512, 523). There is equipment inside the "A" station, including keys, personal body alarms, fire extinguishers, and control panels that can open the cell doors within both housing areas (Pressley: Tr. 229; Mingo: Tr. 288).

Captains Ada Pressley and Maxsolaine Mingo were working the same tour as respondent. Pressley was assigned as the "C" house supervisor (Tr. 221), while Mingo, who has since been promoted to an Assistant Deputy Warden, was assigned as the intake supervisor (Tr. 281).

At about 10:00 p.m., Captains Pressley and Mingo, who were conducting an inspection tour, drove past respondent's post on their way to the "C" house. They testified that they had to pass through the "B" house on their way to the "C" house (Pressley: Tr. 222, 244, 245; Mingo: Tr. 297). Captain Pressley saw respondent's "A" station door open and told him to close the door (Pressley: Tr. 251; Mingo: Tr. 297; Joseph: Tr. 585). Captain Mingo recalled respondent saying "Okay" when told to close the door (Tr. 297). The captains did not see if respondent complied with the order to close the door, because they kept driving toward the "C" house (Tr. 282, 296, 297, 298).

When the captains returned from the "C" house, about 25 minutes later, respondent's "A" station door was open (Pressley: Tr. 224; Mingo: Tr. 283; Joseph: Tr. 527).

Respondent maintained that he closed the "A" station door when Captain Pressley told him to (Tr. 527). However, respondent testified that Captain Smith came into the "A" station at about 10:00 that night, and that when she left, the door to the "A" station remained open (Tr. 521, 526). He said that the door to the "A" station remains open unless one physically pulls it closed; it does not close on its own (Tr. 521, 579, 580). Respondent also said he was "very busy" with inmates returning from court between 10:00 p.m. and 10:30 p.m. (Tr. 522). When they return, he must check their identification and ask for their personal information to verify their identify (Tr. 523). He asserted that "you can't" pedigree an inmate if the door to the "A" station is closed because you must speak to the inmate and the inmate "can't hear what you are saying" with the door closed (Tr. 524). Moreover, "you cannot see the inmate's face" through the hole in the control room window (Tr. 525). Thus, respondent asserted, he was so busy with the inmate returns and with the count that he did not "have the opportunity to reclose the door" (Tr. 526). "I could have done it but, like I said, it was count time… So I was really concentrating on the count" (Tr. 578-79). He acknowledged that Captains Mingo and Pressley saw the door open upon their return to the area (Tr. 526).

It was undisputed that Captain Pressley ordered respondent to open the gate when she saw the open door and that respondent did not open the gate until directed to do so by Captain Smith. Captains Pressley and Smith had similar recollections of what occurred. Captain Pressley testified that she wanted to go into the "A" station to counsel respondent about the door (Pressley: Tr. 224, 262; Mingo: Tr. 283-84). When ordered to open the gate, respondent said he would not. Captain Pressley repeated her order. Respondent replied, "You're not my area supervisor," and told Pressley to call his area supervisor (Pressley: Tr. 224, 225; Mingo: Tr. 284). Pressley borrowed a nearby officer's radio and notified the tour commander, Assistant Deputy Warden ("ADW") Randall Johnson, that respondent was refusing to open the gate (Pressley: Tr. 227, 268, 270; Mingo: Tr. 284). Although the captains were still outside the bubble, they heard the phone ring and believed that ADW Johnson had called respondent (Pressley: Tr. 228). This was confirmed by ADW Johnson's testimony that he recalled speaking to Pressley and respondent. ADW Johnson testified that when he asked respondent why he had not let the captain into the bubble, respondent laughed and said that everything was "okay" and he would let her in (Tr. 366, 367).

Captain Smith arrived and told respondent to open the gate. Respondent complied, but locked his "A" station door, preventing Captains Mingo and Pressley from accessing the control room. He opened the "A" station door when Smith told him to, and Captains Mingo and Pressley entered the control room (Pressley: Tr. 228, 230, 271; Mingo: Tr. 284). Respondent told Smith that he had not opened the door for Mingo and Pressley because they were not his supervisors, and that he had told them to call Captain Smith. He also said something about not wanting them to leave a use of force package for Captain Smith when she was not present (Mingo: Tr. 285). Captain Pressley told respondent to submit a report regarding the incident (Pressley: Tr. 230; Mingo: Tr. 286). According to Pressley, respondent was on the telephone with ADW Johnson at the time and was laughing, which she found inappropriate and disrespectful (Tr. 231). According to Mingo, she was trying to get respondent to apologize, but respondent was not receptive and kept "laughing and smirking," "like he thought this was a joke" (Tr. 286, 297).

Respondent did not deny not opening the gate before talking to Captain Smith, but explained that he did so "to protect himself" (Tr. 528). He did not think that the "intention" of either Captain Pressley or Captain Mingo was good, and questioned why they were in the area (Tr. 529). He testified that he went to the window to "get Captain Smith's attention," because he wanted to be sure that a "third party was present" (Tr. 528, 529). He explained that he had previously filed grievances against both Captains Pressley and Mingo. He filed a grievance against Captain Mingo in 2009, relating to disciplinary charges that were later administratively filed (Tr. 514, 515; Resp. Ex. C). The day after he filed a grievance against Captain Mingo, Captain Pressley, who was the administration captain, ordered him to go to toxicology for random drug testing. Respondent said he found this suspicious, even though officers are selected for random testing through a computer program which generates a list of social security numbers (Tr. 574, 575). Respondent filed an EEO complaint against both Captains Mingo and Pressley, which was ultimately dismissed (Tr. 518, 519). Respondent believed that his relationship with both captains degenerated as a result. He believed that both captains were basically "looking for excuses" to write him up (Tr. 517, 519). When Captain Pressley ordered him to "crack the gate," he found her demeanor "very aggressive and very intimidating" (Tr. 529).

Respondent testified that Captain Smith entered the area "less than a minute" after Captain Pressley told him to open the gate, and that he opened the gate "immediately" once Smith arrived (Tr. 536).

For her part, Captain Smith testified that when she heard Captain Pressley's communication over the radio regarding the gate, she entered the area and spoke to respondent. Respondent told her that Captain Pressley was not the area supervisor and he was not letting her in. Captain Smith directed respondent to open the gate, and he complied (Tr. 337-38).

Based largely on respondent's own admissions, specifications one and two are sustained.

Specification one alleges that respondent inefficiently performed his duties by failing to obey a "direct order" to close and/or lock his "A" station door. Respondent testified that he closed the door when Captain Pressley directed him to do so but that, soon afterwards Captain Smith came into the "A" station and that the door remained open when she left because it was not self-closing. Captain Pressley's order to close the door directed respondent to keep his "A" station door closed. Respondent admitted that he did not close the door. Thus, the elements of insubordination are met. *See Dep't of Sanitation v. Centeno,* OATH Index No. 857/11 at 13 (June 6, 2011), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 11-92-SA (Nov. 30, 2011); *Dep't of Correction v. Velez,* OATH Index No. 1655/02 at 5 (Dec. 3, 2002), *aff'd,* NYC Civ. Serv. Item No. CD 05-34-SA (Aug. 11, 2005); *Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Muniz,* OATH Index No. 1666/05 at 8 (Oct. 17, 2005) (an order must be communicated to respondent; the order must be clear and unambiguous in its context, and respondent must have willfully refused to obey).

Respondent's testimony that he was "too busy" to close the "A" station door does not withstand scrutiny. Respondent's testimony that there was a "defect" with the door that caused it not to close on its own was at odds with Captain Smith's testimony that she did not notice anything unusual about the door. However, even if respondent's testimony about the door was accurate, he acknowledged that it is his responsibility to secure the door (Tr. 585). The "A" station bubble is a confined, relatively small area. However busy respondent may have been with inmates returning from court, and the count, it is incredible that he could not take a moment to get up from his chair and pull the door shut, if that was required in order to close the door. Respondent's testimony that he needed the door open in order to see the inmates' paperwork was belied by the fact that there are slots in the control room window for inmates to submit their identification documents (Pet. Ex. 9), as well as the testimony of virtually every other witness that it is a security breach to keep the door to the "A" station open, because of the keys and control panels contained in the station. For example, Captain Mingo testified that inmates in

building 12 are not handcuffed as they walk to and from the vestibule to their housing area, and thus could access the control room if the door was open (Tr. 299).

In any event, whatever respondent's feelings may have been about the need to keep the door open, he was obligated to follow a supervisor's instructions and keep the "A" station door closed. He did not do so. I do not believe his failure to lock the door was merely inadvertent. Rather, in light of his testimony, I believe it reflected a deliberate choice about how he should go about performing his job. His choice, unfortunately, conflicted with security protocols and the direct order of Captain Pressley.

Although respondent testified that he felt that Captains Pressley and Mingo 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 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"). Similarly, I did not agree with his counsel's contention in summation that the order to open the door was "unlawful by virtue of the fact that it constituted harassment" (Tr. 599).

Captain Pressley and Captain Mingo testified that they did not know that respondent had filed a grievance against them at the time of this incident (Pressley: Tr. 248; Mingo: Tr. 293). However, even if they had known of the grievance, giving respondent an order to close his "A" station door would not constitute harassment. There was nothing unusual about Captain Pressley being in the area, as she testified without rebuttal that she has to pass through the "B" house on her way to the "C" house, where she was the assigned supervisor on the evening of January 20. Captain Mingo testified that captains often tour together (Tr. 295). Moreover, Captains Pressley, Mingo, and Smith, as well as ADW Johnson, all testified that a captain is permitted to access every area of the jail and can give an order to any officer, regardless of whether she is that officer's direct supervisor. Indeed, a captain is obligated to address deficiencies she observes during her tour. An open door or gate is a serious security breach, and if a captain observes an open door or gate, she must direct the officer to close it (Pressley: Tr. 225, 241, 251; Mingo: Tr. 289, 290; Smith: Tr. 349, 350; Randall: Tr. 368, 390-91). Captain Pressley credibly testified that the captains had been specifically directed in meetings that when they tour, they should make sure that officers keep their doors closed (Tr. 251). And she testified that she had passed by the

"A" station earlier in the tour, had seen the "A" station door open, and had told respondent to close the door (Tr. 262).

For these reasons, specification one, alleging that respondent was inefficient in his performance of his duties and failed to obey an order to keep his "A" station door closed is sustained. Specification two, which alleges that respondent inefficiently performed his duties and disobeyed a direct order of a captain to open the front gate, instead telling the captain to contact his area supervisor, is also sustained. Respondent admitted not opening the gate until directed to do so by Captain Smith. I credited both Captain Pressley's and Captain Mingo's testimony that respondent said he was not opening the gate because Captain Pressley was not his area supervisor, and that respondent told Pressley to call his area supervisor. This is consistent with Captain Smith's testimony about what respondent told her. The fact that respondent ultimately complied with the order does not negate his initial insubordination. *See Dep't of Transportation v. Solli*, OATH Index No. 288/10 at 15 (Jan. 26, 2011) (insubordination found where respondent initially refused to follow supervisor's directives, and did not comply until told to by a deputy director).

As discussed, respondent's claim that the captains were "harassing" him does not constitute a defense. The captains had the authority to give him a lawful order. Ordering him to open the gate to discuss the problem with the open door was a lawful order. Although respondent may have wished to have a third party present as a "witness," he was under an obligation to follow the captain's order. Moreover, to the extent that respondent claimed that he wanted to be sure that the captains were not leaving a use of force package for Captain Smith, Captain Smith testified that she had never given respondent any instructions regarding use of force packages (Tr. 341).

Specification three, which alleges that respondent was disrespectful to a superior officer, by refusing to obey direct orders to close the door and open the gate, and by laughing when directed to submit a report concerning the door, is sustained only as to the incident with the gate. Respondent told Captains Mingo and Pressley that he was not opening the gate for him and directed them instead to his area supervisor. That comment was discourteous and disrespectful. *Dep't of Correction v. Blount*, OATH Index No. 1054/04 at 10 (Jan. 20, 2005), *modified on penalty*, Comm'r Dec. (May 12, 2005) (finding that correction officer's conduct was

disrespectful when she refused to take a post as ordered, and instead argued with a captain, shouted at him, and accused of racism).

By contrast, there is no evidence that respondent directed any disrespectful or discourteous language toward Captain Mingo or Captain Pressley when told to close the door to the "A" station. Indeed, it is undisputed that he did not speak to them as they continued on their tour to the next housing area rather than stopping. Regarding the report, Captain Mingo and Captain Pressley's testimony established that respondent was laughing when directed to submit a report, but Captain Pressley's testimony suggested that respondent was on the phone with ADW Johnson at the time. It was unclear, therefore, whether respondent was laughing in response to Captain Pressley's order or in response to something that ADW Johnson said. Captain Mingo's testimony that he was "smirking" and "ignoring them" is too subjective to establish misconduct, particularly given the testimony that he was on the telephone with ADW Johnson. *See Dep't of Transportation v. Abad,* OATH Index No. 242/12 at 4 (Mar. 12, 2012) (finding witness's subjective assessment that respondent used "inappropriate and foul language" insufficient to establish misconduct); *Health & Hospitals Corp. (Kings County Hospital Ctr.) v. Meyers***,** OATH Index No. 1182/11 at 5 (Mar. 28, 2011) (a single subjective opinion was insufficient to prove misconduct when other testimony cast the opinion into doubt).

In sum, specifications one and two are sustained. Specification three, alleging disrespect, is sustained only as relating to respondent's refusal to open the gate.

April 4, 2011 charge

Petitioner alleges that on April 4, 2011, respondent disobeyed a direct order to report to a post in Building 10 and relinquish an overtime post to another officer. The charge alleges that Officer Ayuba arrived at the Building 2 post at approximately 11:40 p.m. and said she was relieving respondent in accordance with Captain Bowser's orders. Instead of reporting to Building 10, respondent telephoned Captain Bowser and said, "I am stuck for overtime on this post and I am staying right here," and "I'm telling you I'm staying right here on this post." Respondent also told Captain Bowser that he wanted to speak to the tour commander so he could tell him he was staying on the Building 2 post. He remained on the Building 2 post until approximately 12:30 a.m., when he signed off and reported to Building 10. Petitioner contends

that respondent was disrespectful to Captain Bowser and that he was insubordinate in not relinquishing the post.

It was undisputed that respondent was originally scheduled to work the 3:00 p.m. to 11:00 p.m. tour on April 4, 2011. Toward the end of his tour, Captain Johnson notified him that he was "stuck" for overtime on the midnight tour (11:00 p.m. to 7:00 a.m.), in Building 2 (Tr. 538, 545). Respondent reported to Building 2, where he was assigned as the "B" officer. He signed on to the post at 11:15 p.m. (Tr. 414; Pet. Ex. 20). At about 11:20 p.m., Captain Tandra Bowser, who had relieved Captain Johnson as control room captain, directed Officer Osiewundo Ayuba to instead assume the Building 2 "B" post (Tr. 407, 411). Captain Bowser told Officer Ayuba to tell respondent that she was relieving him (Ayuba: Tr. 477; Bowser: Tr. 411, 431).

By all accounts, respondent was not pleased when Officer Ayuba arrived and conveyed that message (Joseph: Tr. 545; Ayuba: Tr. 463). Officer Ayuba testified that respondent said he was "stuck" for this post and he was not leaving (Tr. 463). She said that she was unable to sign on to the post immediately because respondent was still holding the log book and needed to finish what he was doing (Tr. 465). Thus, while she signed on to the post at about 11:40 pm., writing that she was assuming the post and relieving respondent, the 11:40 entry was a "LE" or late entry, written after a 12:01 a.m. entry made by respondent (Ayuba: Tr. 465; Pet. Ex. 20). Respondent's 12:01 a.m. entry indicated that he had performed a tour of the area and taken a count of the inmates (Pet. Ex. 20).

Officer Tracy Daniels, who was also on the Building 2 post, as the "A" officer, similarly testified that respondent said that he was not leaving the post because the previous tour captain had stuck him for overtime and that respondent would not give Officer Ayuba the log book or the keys (Tr. 495, 500, 502).

The Department's directive calls for overtime to be distributed fairly and equitably (Mingo: Tr. 323-24; Bowser: Tr. 408). Respondent testified that he believed his overtime should not have been cut, because he had not worked any overtime in April (Tr. 542, 548).

Respondent went into the "A" station and called Captain Bowser about the situation. The substance of their conversation is in dispute. Captain Bowser testified that respondent was discourteous and disrespectful, which respondent denied. Captain Bowser further contended that she ordered respondent to report to a different post, which respondent also denied. Officers Ayuba and Daniels were also in the "A" station. Although they were not on the call, and thus

could only report what they heard respondent say, their testimony tended to support Captain Bowser to a significant degree.

Captain Bowser testified that respondent was "very aggressive" and "very hostile" (Tr. 415). He told her that he had been stuck for overtime and was "staying there" (Tr. 415). She replied, "Are you telling me or you asking me could you stay on the post?" (Tr. 417). Respondent said, "I'm telling you," and stated that he wanted to speak to the "Dep," or Deputy Warden (Tr. 417). Captain Bowser replied that if respondent wanted to speak to the Deputy Warden, he could call the Deputy Warden in the control room. However, she also said, "I'm giving you a direct order to report to Building 10" (Tr. 417). She explained to respondent that he was needed to assume a post in Building 10 because an officer had two hours "time due" and would not be reporting until at least 1:00 a.m. (Tr. 417). Captain Bowser testified that she hung up the telephone after telling respondent that he could call the Deputy Warden (Tr. 440).

By contrast, respondent testified that he told Captain Bowser that he had been "stuck" for overtime and would like to stay on post (Tr. 542). He was "very professional" and not angry (Tr. 543). He recalled Captain Bowser asking, "Are you telling me or are you asking me?" (Tr. 544). He replied, "I'm telling you, I would like to stay" (Tr. 544). Captain Bowser then asked if he would like to speak to the Deputy Warden. He replied, "Yes, please," and she hung up the telephone (Tr. 544). Respondent denied that Captain Bowser ever directed him to report to Building 10 (Tr. 545).

Officer Ayuba testified that respondent told Captain Bowser that he was not leaving the post because it was his post (Tr. 464). Respondent was "hyped" and his voice was louder than normal (Tr. 464, 470). Officer Daniels also testified that respondent was "raising his voice" (Tr. 496). He said that respondent "let her [Bowser] know he wasn't leaving because he was stuck for overtime" (Tr. 496).

Respondent remained on the Building 2 post until he signed off post at 12:24 a.m. (Pet. Ex. 20). In the interim, respondent spoke to Deputy Warden Grant, although it was unclear precisely when the conversation occurred or what was said. Respondent testified that five or ten minutes after he spoke to Captain Bowser, Deputy Warden Grant called him and asked if he wanted to stay on overtime. Respondent said he did and Deputy Warden Grant said he would "make sure" that respondent got eight hours of overtime (Tr. 546). According to Officer Daniels, however, Deputy Warden Grant telephoned respondent about ten minutes before

respondent left Building 2, or about 12:14 a.m. Deputy Warden Grant was returning respondent's call. Officer Daniels described respondent as "angry," even after the conversation was over (Tr. 503, 504).

Captain Bowser testified that Deputy Warden Grant came to the control room about midnight, examined the "stick list," and said that Officer Ayuba should keep the overtime assignment and respondent should be sent home (Tr. 417). She replied that she was sending respondent to Building 10 instead (Tr. 417). After that, Captain Bowser asked Captain White, who was leaving to do a tour of the "A" house, to notify respondent to report to Building 10 (Tr. 419).

It was undisputed that Captain White told respondent that he had to relinquish his post and assume another post. Respondent then signed off post and reported to Building 10 (Bowser: Tr. 419, 420; Ayuba: Tr. 468 Daniels: Tr. 498; Joseph: Tr. 547). Respondent worked several hours of overtime at Building 10 and then worked overtime at another post, thus working a full eight hours of overtime (Bowser: Tr. 420; Joseph: Tr. 546).

Respondent is charged with being insubordinate and disrespectful to Captain Bowser by remaining on the Building 2 post after she directed him to report to Building 10 and by telling the Captain that he would not obey her order to relinquish the Building 2 post to Officer Ayuba. There is no dispute that respondent did not leave his post when told by Officer Ayuba that she was relieving him for overtime. I credited Officer Ayuba's and Officer Daniels' testimony that respondent said he was not leaving. Even though she arrived at 11:40 p.m., he proceeded to make a tour of the area and would not relinquish the log book or keys promptly.

There is also no dispute that respondent telephoned Captain Browser to tell her that he had been stuck for overtime and wanted to remain. Specification one of the charge appears to suggest that telephoning the captain was itself misconduct, because respondent should have immediately assumed the post, once told by Officer Ayuba that he had been ordered to do so. However, the evidence does not support that proposition. All of petitioner's witnesses credibly testified that the captain on the midnight tour makes the final decisions about overtime for that tour and can reverse a decision made by the captain on the earlier tour. An officer is obligated to follow the last order given (Mingo: Tr. 323-24; Johnson: Tr. 376; Bowser: Tr. 406-07, 453-54; Daniels: Tr. 495). If another officer is sent to take an officer's overtime post, the officer whose overtime has been cut will typically call the control room and ask the captain what happened to

his overtime (Bowser: Tr. 454, 499-500). That is "not unreasonable" (Johnson: Tr. 379). According to Captain Bowser, "You are allowed to ask me why am I sending you home and I will explain to you what is the reason you're going home" (Tr. 454).

Beyond the mere fact of the call, petitioner has alleged that respondent was discourteous and insubordinate by virtue of what he said during the conversation with Captain Bowser. Both respondent and Captain Bowser testified that Captain Bowser said, "Are you asking me or telling me could you stay on the post" (Bowser: Tr. 416-17; Joseph: Tr. 544). Respondent has asserted that he told Captain Bowser only that he would like to stay on the Building 10 post, and that he then said, "yes," when she asked if he would like to speak to the Deputy Warden. However, I found it more likely, as Captain Bowser testified, that respondent said that he was "telling her" that he was going to stay on post because he had been stuck with the overtime post. Captain Bowser's testimony was consistent with her detailed explanation in the supervisor's complaint report, submitted April 8, 2011, four days later. There, she wrote that respondent said, "I was stuck for overtime on this post and I am staying right here." When she questioned respondent about whether he was "asking" or "telling" her, respondent replied, "I am telling you I'm staying right here on this post" (Pet. Ex. 16).

Captain Bowser's testimony was also corroborated by Officer Ayuba and Officer Daniels, who were in the "A" station and able to hear respondent's end of the conversation. Both Ayuba and Daniels testified that respondent said he was not leaving the post because it was his post. Neither of these witnesses had any discernible bias or motive to lie, and I found their testimony to be credible. Additionally, both gave prior statements (Pet. Exs. 18, 19) that were consistent with their testimony.

Moreover, respondent had strong feelings about his overtime being cut. Respondent testified that Captain Bowser previously had cut his overtime three or four times (Tr. 542). And he believed that the "stick list" upon which Captain Bowser was relying was incorrect, because he had not accrued any overtime in April (Tr. 548). In two-post incident memoranda (Pet. Ex. 17; Resp. Ex. E), as well as a grievance (Resp. Ex. D) filed after the incident, respondent accused Captain Bowser of violating the overtime directive. He believed Captain Bowser was harassing or retaliating against him because of her "close relationship" with another captain, against whom respondent had filed a lawsuit (Pet. Ex. 17; Resp. Ex. D). Thus, it is entirely plausible that respondent expressed his dissatisfaction by telling Captain Bowser he was staying on post.

In sum, I credited Captain Bowser's testimony that respondent told her that he was not leaving his post, rather than simply stating that he would like to remain on post and asking to speak to the Deputy Warden.

Respondent's statements to Captain Bowser were discourteous. *See Dep't of Correction v. Keys-Alston*, OATH Index No. 468/05 at 5 (Feb. 1, 2005) (finding disrespectful and insubordinate conduct where an officer told a captain that she was entitled to refuse the captain's mandatory overtime order assignment because it was "not her problem"); *Blount*, 1054/04 at 10 ("In a quasi-military setting, such as here, an officer must express disagreement with a supervisor in a more circumspect manner than an employee may do in a non-uniformed setting. An officer may not openly debate an order . . .").

The remaining issue is whether respondent was insubordinate by not leaving the Building 2 post until 12:24 p.m., 44 minutes after Officer Ayuba had signed on as his relief. Respondent's counsel has asserted in summation that "there was no clear or unequivocal order" by Captain Bowser to report to Building 10 (Tr. 605). Counsel contended that only when Captain White arrived and talked to respondent was respondent directed to report to Building 10 (Tr. 605). In order to find insubordination, there must be proof that an order is clear and unambiguous. *Transit Authority v. Wong*, OATH Index No. 1866/08 at 17 (Aug. 28, 2008) (where an employee "reasonably believed" that he was not given an order, he was not insubordinate, "because he lacked the intent necessary to disobey an order.").

Here, however, I find that Captain Bowser specifically ordered respondent to report to Building 10. Captain Bowser testified that she gave respondent such a direct order. She wrote a prior statement indicating that she told respondent, "I'm giving you a direct order to go to B10 post until Officer Bryant [the officer with the time due] comes in . . ." (Pet. Ex. 16). And as the control room captain for the tour, it makes no sense that Captain Bowser would willingly permit three officers to staff a post intended to be staffed by two officers, particularly where there was another post that needed staffing. Even if respondent felt that the captain was violating the overtime directive, he was required by the doctrine of "obey now, grieve later" to obey her order to relinquish his post. *Blount*, OATH 1054/04 at 10-11; *see also Ferreri v. NYS Thruway Auth.*, 62 N.Y.2d 855, 856 (1984).

It is undisputed that Captain Bowser told respondent he could speak to the tour commander, and that he could call the control room if he wanted to do that. However, telling

respondent that he could speak to the tour commander did not alter respondent's obligation to follow Captain Bowser's order, unless directed otherwise. Respondent was still required to report to Building 10, as ordered. *See Dep't of Correction v. Buford,* OATH Index No. 388/02 at 9-10 (June 17, 2002), *aff'd*, Comm'n Dec. (Aug. 15, 2002), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 03-49-SA (June 12, 2003) (officer was insubordinate by refusing to take a post for some fifteen or twenty minutes, while he waited to see the tour commander, who was otherwise occupied). There, Administrative Law Judge Merris wrote, "Respondent's attempt to speak to [the] ADW . . . does not excuse [his] obligation to comply with a direct order from a superior officer [who had] ordered respondent to take the post." *Buford,* OATH 388/02 at 9-10; *see also Dep't of Transportation v. Solli*, OATH Index No. 2888/10 at 15 (Jan. 26, 2011) (finding that "respondent should have followed the directives of her immediate supervisor without having to be coaxed into doing her job by a deputy director").

Accordingly, I find that respondent was insubordinate in refusing Captain Bowser's order to report to Building 10 until directed by Captain White to do so at approximately 12:24 a.m.

Thus, both specifications one and two of this charge are sustained.

FINDINGS AND CONCLUSIONS

1. Petitioner established by a preponderance of the credible evidence that on January 20, 2010, respondent failed to obey an order to keep the "A" station door closed.

2. Petitioner established by a preponderance of the credible evidence that on January 20, 2010, respondent failed to obey an order to open the front gate to his area. Petitioner further established that respondent was discourteous by telling a captain that he would not open the gate for her and to contact his area supervisor.

3. Petitioner failed to establish by a preponderance of the credible evidence that respondent was disrespectful on January 20, 2010 when ordered to submit a report about the door.

4. Petitioner established by a preponderance of the credible evidence that on April 4, 2011, respondent was insubordinate by disobeying an order to report to a different overtime post.

5. Petitioner established by a preponderance of the credible evidence that on April 4, 2011, respondent was disrespectful to

a captain who had ordered him to report to a different overtime post.

RECOMMENDATION

Having made these findings, I requested and reviewed a copy of respondent's personnel abstract. It indicated that respondent began his employment with the Department in 2006. He has no prior disciplinary history.

Petitioner has requested that I recommend that respondent be suspended for fifteen days without pay for the January 20 incident: five days for disobeying the order regarding the door, five days for disobeying the order regarding the gate, and five days for his discourtesy in speaking to the captains. Petitioner has also requested that I recommend a penalty of fifteen days for respondent's failure to relinquish his post on April 4, 2011, as well as his disrespectful language toward Captain Bowser (Tr. 612).

Thus, for the proven misconduct, petitioner seeks a 30-day penalty. In so doing, petitioner notes that the Department of Correction is a paramilitary organization whose efficient functioning requires that correction officers obey the lawful orders of supervisors (Tr. 615). Petitioner's concern is well placed. However, a 30-day penalty is excessive given respondent's lack of any prior disciplinary record and the fact that he ultimately complied with all the orders.

Respondent's lack of a prior disciplinary record should substantially mitigate any penalty. *See Dep't of Transportation v. Jackson*, OATH Index No. 299/90 at 14 (Feb. 6, 1990) ("it is a well-established principle in employment law that employees should have the benefit of progressive discipline wherever appropriate, to ensure that they have the opportunity to be apprised of the seriousness with which their employer views their misconduct and to give them a chance to correct it").

Indeed, in cases where a correction officer has no prior disciplinary record, this tribunal has generally recommended penalties of five to seven days for insubordination and/or discourtesy. *See Dep't of Correction v. Bee*, OATH Index No. 291/06 (May 19, 2006) (five days for failing to provide timely oral report regarding incident where fellow officer was injured); *Dep't of Correction v. Floyd*, OATH Index No. 1766/04 (Mar. 8, 2005) (five days for disobeying order to participate in a search); *Dep't of Correction v. Steward*, OATH Index No. 1915/01 (Jan. 9, 2002), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 03-32-SA (Apr. 15, 2003) (seven days for

failure to follow lawful order to assume post in addition to discourtesy toward supervisor); *Dep't of Correction v. Aiken,* OATH Index No. 797/95 (Mar. 8, 1995) (five days for failure to obey an order to report to a search, including the use of profanity).

Notably, in at least two cases where an officer refused an order to stay on a post, or to report to a post, this tribunal recommended a penalty of only five days, even though the officers had prior disciplinary records. *Dep't of Correction v. Clayton,* OATH Index No. 1067/03 (Dec. 31, 2003) (13 year employee with three prior disciplinary penalties, of one, two, and five days; one-day penalty involved insubordination); *Dep't of Correction v. Jones,* OATH Index No. 1126/03 (July 16, 2003) (13-year employee with three prior disciplinary penalties, including a 15-day penalty for conduct unbecoming).

By contrast, higher penalties have been imposed where the proven misconduct involved profanity or deception, or where the respondent had a particularly egregious disciplinary penalty. *See Dep't of Correction v. Aquino,* OATH Index No. 188/07 (Dec. 15, 2006),*modified on penalty,* Comm'r Dec. (Feb. 22, 2007), *modified on penalty,* NYC Civ. Serv. Comm'n Item No. CD 07-93-M (Sept. 25, 2007) (ten-day suspension recommended and ultimately affirmed by Civil Service Commission, where correction officer twice addressed a superior in a profane and aggressive manner, disobeyed an order to leave the area, and submitted a misleading report); *Dep't of Correction v. Keyes-Alston,* OATH Index No. 468/05 at 5, 7 (30-day penalty for refusal to work overtime and discourtesy, where officer had six prior disciplinary penalties, including a 60-day penalty for being out of residence; ALJ noted respondent was "devious" and "irresponsible" in "concocting" a story of a medical emergency to excuse her refusal to do the overtime); *Dep't of Correction v. Buford,* OATH Index No. 388/02 (June 17, 2002) (ten-day suspension where officer failed promptly to obey an order to assume post, was disrespectful to supervisor, and used profanity).

These aggravating factors are not present here. Respondent did not use profanity, he has no prior disciplinary record, and he ultimately complied with all the orders given to him.

In the first incident, while respondent showed extremely poor judgment, it appeared that only a few moments elapsed between the time that Captain Pressley ordered him to open the gate and when he opened the gate at Captain Smith's command. His discourtesy toward the captains was intertwined with his refusal to open the gate; he did not separately use profane or offensive language or resort to personal attacks. Petitioner has requested separate penalties of five days

each for respondent's failure to obey the order pertaining to the "A" station door, his refusal to open the gate, and his discourtesy. However, as the discourtesy charge is wholly duplicative of the insubordination charge, it would be impermissible to impose a separate penalty for it. *See Dep't of Finance v. Rodriguez,* OATH Index No. 430/10 at 9 (Mar. 5, 2010) (duplicative charges will not be considered separately for penalty recommendations); *Dep't of Homeless Services v. Chappelle*, OATH Index No. 1918/07 at 5 (Aug. 30, 2007) (same). Moreover, because the gate and door charges arise out of the same incident, it is appropriate to consider them together in assessing a penalty. *See Aquino*, OATH 188/07 at 9; *Buford*, OATH 388/02 at 20.

In the second incident, as the first, respondent showed poor judgment in refusing to obey the order of a captain but ultimately complied with the order to relinquish the Building 2 post and report to the Building 10 post. As in the first incident, his discourtesy toward his supervisor took the form of defiance of her order, but did not devolve into profanity or a personal attack.

Considering the circumstances of the misconduct, as well as respondent's lack of a prior disciplinary record, as well as the prior precedent, I conclude that respondent should be suspended for five days without pay for the January 20, 2010 incident, and an additional five days without pay for the April 4, 2011 incident. In sum, I recommend that respondent be suspended for ten days.

This penalty is significant enough to impress upon respondent that he must comply with orders, even if he believes them to be unfair or wrongly motivated. He must "obey now, grieve later." Respondent should understand that if he fails to do so, future disciplinary penalties may be substantially higher.

Faye Lewis
Administrative Law Judge

April 5, 2012

SUBMITTED TO:

DORA B. SCHRIRO
Commissioner

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