

Dep't of Correction v. Reuter

OATH Index Nos. 1497/12, 1499/12, 1707/12 (Sept. 26, 2012)

Petitioner demonstrated that correction officers refused orders to cease distributing literature and to leave Rikers Island. Other sustained charges include filing a false report and refusing to surrender a parking pass. 10-day suspensions recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of

DEPARTMENT OF CORRECTION

Petitioner

- against -

**RICHARD REUTER, CHARLES WILLIAMS,
& MARK LONG**

Respondent

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORNIOTTI, *Administrative Law Judge*

This employee disciplinary proceeding was referred by the Department of Correction (“DOC” or “Department”) pursuant to section 75 of the Civil Service Law against Correction Officers Richard Reuter, Charles Williams, and Mark Long. Petitioner alleges that at various times in August 2011, respondents refused orders to cease distributing union literature on Rikers Island and to leave the island. Additional charges include Officer Williams filing a false report, Officer Long failing to obtain permission to hand out the literature, and Officer Reuter failing to turn over his parking pass as directed (ALJ Exs. 1, 2, 3). Respondents denied the charges and claimed that they were never given orders to cease distributing literature or to leave Rikers Island, that they complied with all orders given, and that, in any event, they have a First Amendment right to engage in concerted union activity.

A hearing was conducted on July 17, and August 16, 2012. Respondents failed to appear for the first day. Respondents’ counsel advised that respondents had not been properly served with the hearing notice and that they were not scheduled to work that day. Because respondents

had been notified of the hearing date at a previous conference, the hearing went forward over counsel's objection (Tr. 5, 7).¹

At the hearing petitioner submitted documentary evidence and the testimony of Assistant Deputy Warden ("ADW") Emans. Respondents were provided an audio recording of the hearing as well as a transcript prior to the next hearing date. On August 16, ADW Emans was available by telephone for additional cross-examination and respondents withdrew their objection to starting the hearing without them (Tr. 115). That day, petitioner also presented the testimony of Captains Patterson and Spry.

On August 16, respondents testified on their own behalf and offered videos of the disputed incidents that were located on Officer Reuter's laptop computer and Officer Williams' cell phone. Petitioner's counsel objected because the videos were undated, had not been produced in discovery, and were incomplete recordings of the incidents. The videos were admitted into evidence after petitioner's counsel was given an opportunity to view them, subject to copies being produced by August 24, 2012.

Following the close of the evidence, Officer Williams advised that he had additional video on his phone that respondents wanted in the record. Again, petitioner's counsel objected and was given an opportunity to view the video. The record was re-opened for the second video (Tr. 265-68). The parties were asked if either side had additional evidence to submit and they advised that nothing further was forthcoming (Tr. 271). After closing statements, Officer Long stated that he had additional testimony concerning one of the charges. Respondents' counsel advised that it was unnecessary and the hearing was concluded (Tr. 307-08).

Respondents' request to extend the time to August 27, 2012, to submit the videos was granted without objection. On August 28, 2012, the tribunal notified counsel that the videos had not been received. A disk containing three videos was received on August 29, 2012, and has been included as respondents' Exhibit A-B.

Upon careful review of the charges, the testimony, the documentary evidence, and the controlling case law, I find that respondents refused orders to cease distributing literature and to leave Rikers Island, that Officer Williams filed a false report about the incident, and that Officer Reuter failed to promptly turn over his parking pass as directed. The charges that Officer

¹ Another respondent, Officer Coles, appeared on July 17, 2012, and resolved his case through a settlement (Tr. 4).

Williams failed to follow orders to leave the George R. Vierno Center (“GRVC”) and that Officer Long failed to obtain permission to hand out the literature should be dismissed. I recommend that respondents each be suspended for 10 days.

BACKGROUND

Special Operations Division (“SOD”) patrols areas outside the correctional facilities located on Rikers Island and is responsible for checking people who enter and leave the island (Tr. 122). ADW Emans oversees SOD and Captains Patterson and Spry are assigned there.

Access to Rikers Island is via a bridge from Queens. On the Queens side is a booth and two checkpoints. There is also a parking lot for visitors and staff who cannot park on the island. SOD has jurisdiction over the checkpoints and bridge but not the parking lot unless it is called upon to do so because it is owned by another entity (Tr. 33-35).

Employees who have been issued a “gate one pass” can drive over the bridge, stop at the gate one checkpoint to have their shield, identification, and pass checked, and then park near their assigned command (Tr. 102, 137-38, 184). Gate one passes are usually issued to captains and higher ranking officers. They are sometimes given to correction officers as a privilege (Tr. 85, 99-100, 102). On August 12, 2011, Officer Reuter had a gate one pass because he was a union delegate for the Correction Officers Benevolent Association (“COBA”) (Tr. 174, 187).

Most employees and visitors cross the bridge by private vehicle or public bus and pass through a different checkpoint. They park in one of the main parking lots or exit the bus and pass through security at the Perry Center. The Perry Center is under SOD’s jurisdiction and is the first structure on the island. Security at the Perry Center includes checking people entering and leaving the island for proper identification, scanning all items in an x-ray machine, and walking through a metal detector. A route bus transports people to the various facilities (Tr. 27-30, 83-85, 123, 136-38, 140-42, 199).

On a given day there are 10 to 20 thousand people on Rikers Island (Tr. 28). According to petitioner’s witnesses, everyone must be accounted for to maintain security in the jails, including ensuring that inmates do not leave the island and that no contraband is brought there (Emans: Tr. 27-28; Patterson: Tr. 131-32, 141-42). Employees must report to their assigned commands and cannot visit other commands without permission (Emans: Tr. 42) *see also* DOC

Rule 3.20.250 (“Members of the Department visiting any facility/command shall first report and advise the Commanding Officer or designee of the nature and purpose of the visit, and shall sign and note the time of arrival and departure on the appropriate record.”). Employees must sign in at their commands at the start of their tour (Williams: Tr. 227). Moreover, employees on Rikers Island must be there for Departmental business only. They are not allowed to come to or remain on the island off-duty unless they have permission to be there (Emans: Tr. 31-32, 86-87, 101; Patterson: Tr. 131); *see also* DOC Rule 3.05.160 (“Employees who have been properly relieved from duty, shall not return to the place of duty unless directed to do so by proper authority.”). Employees are given a copy of DOC regulations when they start working for the Department (Patterson: Tr. 101; Reuter: Tr. 182; Williams: Tr. 198).

Respondents claimed that DOC does not maintain a count of the staff and that they never heard that employees are not allowed on Rikers Island off-duty. Respondents have been on the island for events such as retirement parties, ceremonies, and basketball games off-duty. Moreover, they have remained on the island after work without notifying anyone to resolve paycheck issues and to visit the gym or cafeteria (Reuter: Tr. 164-66; Williams: Tr. 198-99; Long: Tr. 229-30).

ADW Emans testified that individuals who want to engage in union activity on Rikers Island must obtain permission from DOC’s Labor Relations, which notifies SOD of the time, place, and manner of the activity (Tr. 73-75, 89). Individuals can also engage in union activity in the Queens parking lot without permission (Patterson: Tr. 157, 159-60).

Officers Reuter and Williams testified that they started Correction Officers Represented Equally (“CORE”) because some officers were unhappy with COBA. Officer Long joined in 2009 (Tr. 230). At some point they began “unionizing” by giving out information about COBA and CORE (Reuter: Tr. 166-67; Williams: Tr. 200; Long: Tr. 230). CORE was advised by their counsel that they could “unionize” while off duty on public property (Tr. 175, 200). The charges arise out of respondents’ unapproved union activities on August 11, 12, and 19, 2011, on Rikers Island.

August 11, 2011

ADW Emans testified that on August 11, 2011, he received a call to respond to GRVC because there were people handing out flyers. ADW Emans had never received such a call and was concerned about who the people were, who had authorized them to be there, and the overall security on Rikers Island (Tr. 91-94, 104-07).

ADW Emans testified that when he arrived at GRVC he saw two or three correction officers dressed in t-shirts that said CORE; they were handing out literature related to COBA. ADW Emans recalled seeing Officers Williams, Long, and Coles and stated that Officer Reuter may have been there. Officer Williams, who is assigned to GRVC, told ADW Emans that he was off-duty and was not doing anything wrong. ADW Emans testified that because the group was not authorized to be at GRVC, he told them to return to the Perry Center and to leave the island. The officers got on the route bus. After they left, ADW Emans received a call that the group was at the George Motchen Detention Center (“GMDC”) passing out literature. When ADW Emans arrived at GMDC the group had already been told to leave and had gotten back on the bus to the Perry Center (Tr. 37-38, 41-43, 48, 117-18). Captain Patterson testified that he was present at GRVC when the officers were told by ADW Emans to leave and that they got on the route bus (Tr. 129-32).

ADW Emans and Captain Williams went to the Perry Center. Captain Spry was also there (Tr. 46, 133). At the Perry Center the respondent officers met with now former Correction Officer LaSonde, who was also involved with CORE. ADW Emans and Captain Spry told them that they had to leave the island because they were not authorized to be there. According to ADW Emans, Officers LaSonde and Long responded that they were “not leaving,” that they were “not doing anything wrong,” that they were in a “public place,” and that they were within their “civil rights” to “enlighten correction officers as to what the - what was going on with COBA” (Tr. 46-47, 52, 97). The group continued to hand out flyers to officers passing through the Perry Center. Officer LaSonde used her cell phone to record ADW Emans telling her several times to leave the island. ADW Emans also testified that Officers LaSonde and Long were not assigned to Rikers Island and had no business being there. After about ten or fifteen minutes the group left (Tr. 47-53, 134). According to ADW Emans, the group was slowing down traffic at the Perry Center (Tr. 51).

Officer Williams testified that he did not go to Rikers Island on August 11, 2011 (Tr. 201, 210). Officer Reuter testified that he was there with other officers including Officer LaSonde, to “unionize” for CORE. When they were at GRVC, unidentified people spoke to Officer LaSonde and she told the group “let’s go.” They went to the Perry Center. Officer Reuter testified that at no time did any supervisor tell them to leave (Tr. 188-89, 191-92).

August 12, 2011, and related events

Captain Spry testified that on August 12, she responded to GRVC because members of CORE were handing out flyers. When she arrived, respondents were getting on the route bus to leave. Captain Spry saw them get off the bus at GMDC and she ordered them back on. She escorted the group to the Perry Center (Tr. 251). ADW Emans testified that he received a call that Officers LaSonde, Williams, Long, Coles, and Reuter were at the Perry Center handing out flyers. He responded with Captain Patterson (Tr. 56, 58).

ADW Emans, Captain Patterson, and Captain Spry testified that Officers LaSonde, Williams, Long, Coles, and Reuter were at the Perry Center in civilian clothes engaging in union activity. Respondents were repeatedly told to leave the island and they refused.

Specifically, ADW Emans testified that he gave the CORE group, which included Officers LaSonde, Williams, Long, and Reuter, specific instructions to leave the island and they responded that they were not doing anything wrong and had a constitutional right to “unionize.” ADW Emans acknowledged that he spoke mostly to Officer LaSonde but claimed that his orders were directed to everyone who was there on behalf of CORE (Tr. 56-58, 60, 103-04). According to ADW Emans the group was stopping people and was posing a security risk, because a prison must be a controlled environment (Emans: Tr. 61-62; Spry: Tr. 263).

Captain Patterson testified that he was called to the Perry Center by ADW Emans. When he arrived, Officers Long, Reuter, and Williams were talking to people and may have been handing out literature. It was approximately 2:45 p.m., which is one of the busiest times because it is when the tours change. The group was causing congestion, which could escalate into a problem for guards trying to check everyone entering and leaving the island. Captain Patterson testified that he told the group which included Officer LaSonde that they had to leave the island. They continued to stand around. Officer Long claimed that it was an unlawful order and that

they had a constitutional or First Amendment right to be there because it was a public space. Captain Patterson told them that it was a lawful order and that they had to comply. Captain Patterson testified that he also spoke to Officer LaSonde and that the other officers did not say anything to him (Tr. 128-29, 139-44, 148-49, 162).

Captain Spry testified that at the Perry Center she, ADW Emans, Captain Patterson, and Warden Davis told the CORE group, which included Officers LaSonde, Reuter, Williams, and Coles, several times to leave the island because they were not on duty and did not belong there (Tr. 251-54, 261-62). Captain Spry testified that Officers LaSonde and Williams began to video tape her and said they would not leave (Tr. 256-58). Captain Spry testified that the group was “holding up traffic” in the Perry Center (Tr. 263).

Petitioner’s witnesses further testified that the CORE group was at the Perry Center for at least 15 minutes before leaving (Emans: Tr. 61; Patterson: Tr. 143; Spry: Tr. 258). Officers LaSonde and Long left by bus and the others by car (Tr. 64, 258).

ADW Emans testified that after the group left the Perry Center, he asked Officer Reuter to surrender his parking pass in the parking lot and that he refused, saying that it was his pass. ADW Emans responded that it was DOC property and to hand it over. Officer Reuter again refused, asserting that the pass had his name on it. Officer Reuter took out his cell phone and taped ADW Emans speaking to him. Eventually, Officer Reuter telephoned someone, who told him to surrender the pass, and he did (Tr. 65-66, 99).

ADW Emans also directed Captain Spry to collect a parking pass from Officer Williams (Emans: Tr. 67). According to Captain Spry, Officer Williams initially refused and asked for a receipt but that after some discussion he gave it to her (Tr. 252-53, 260-61).

On August 16, 2011, ADW Emans prepared a report recounting Officer Reuter’s refusal to surrender his parking pass on the ground that it was his pass and he wanted a receipt. In addition, the report indicates that Officer Reuter continued to ignore ADW Emans’ order for approximately 20 minutes, during which Officer Reuter taped their conversation on his cell phone. After calling someone, Officer Reuter “waved” the pass out the driver’s side window and an SOD security officer collected it for ADW Emans (Pet. Ex. 6).

Respondents were subsequently issued command disciplines (“CDs”) for their failure to obey orders to leave the island (Tr. 59, 149-50). The narratives in the CDs are similar and state

that on August 12, 2011, respondents were in front of GRVC handing out literature, they were instructed to return to the Perry Center, and they complied. At the Perry Center they were joined by other officers and handed out literature. Respondents were ordered to leave Rikers Island and were told that they were not permitted to hand out literature on the island. They knowingly refused the order and continued to hand out the literature (Pet. Exs. 1, 3, 5).

The CD for Officer Long was forwarded to his command in Queens (Tr. 151-52). CD hearings for Officers Reuter and Williams were held on September 7, 2011. At the hearing, Officer Williams was directed to prepare a report for Warden Argo (Tr. 208). Officer Williams wrote that on August 12, 2011, "at no time did ADW Emans give this writer any order . . . to leave Rikers Island." Further, Officer Williams wrote that he complied with Captain Spry's order to surrender his parking pass (Pet. Ex. 4).

Officers Reuter, Long, and Williams testified that they went to Rikers Island on August 12, with other CORE members to tell correction officers that there were alternatives to COBA. When they arrived at the Perry Center they spoke to some officers and handed out flyers. Officer LaSonde was approached by Captain Patterson and other supervisors who told her that she was not allowed to enter because she was on modified duty. While the supervisors were speaking to Officer LaSonde, respondents passed through security after stating their intentions. They went first to GRVC and were told by Warden Argo to get back on the bus. They waited for the next bus and returned to the Perry Center. They did not hand out any literature at GRVC (Reuter: Tr. 167-70, 180; Williams: Tr. 201-02; Long: Tr. 231-35, 243).

Officers Reuter and Long testified that when they returned to the Perry Center they saw Officer LaSonde speaking to supervisors who were telling her that she was not allowed on Rikers Island. The only conversation Officer Reuter heard between Officer LaSonde and the supervisors was about her First Amendment right to be on Rikers Island even though she was on modified duty (Tr. 190-91). The group walked outside, on "public property," and talked to officers and distributed literature for about 15 minutes. Respondents denied that anyone told them to cease handing out literature or to leave the Perry Center (Reuter: Tr. 171-73, 179, 191; Williams: Tr. 207-08; Long: Tr. 235-37).

According to Officers Reuter and Williams, CORE developed a practice of taping the group's activities because CORE and in particular, Officer LaSonde, had been treated unfairly by

DOC (Tr. 175, 202). Respondents asserted that the videos are from August 12, 2011, and were taken in front of GRVC and inside the Perry Center (Tr. 177-78, 180, 205).

The first video lasts 54 seconds and is an outside scene of people, including Captain Patterson, standing around. There is a woman in the distance by a car who is presumably Warden Argo. Most of the video is inaudible, except towards the end, a woman is heard asking, “are you off” and a man, presumably Officer Williams, asking: “Yeah, I can’t be here because I am off?” This is followed by something about a “paycheck” (Resp. Exs. A-B). Respondents allege that the video shows that they were never given orders to leave GRVC (Tr. 202-03). DOC also videotaped this encounter but did not retain the tape (Tr. 291).

The second and third videos last 54 and 44 seconds respectively and are of the same moment when several supervisors, including Captain Patterson, are speaking to Officer LaSonde who is wearing a CORE t-shirt. Officer LaSonde is heard saying, “if it’s unlawful, I am not going to comply” and “I’m standing here.” Captain Patterson faces the cameras and asks who is assigned to Rikers Island and states that they are not allowed to make recordings on the island. Officer LaSonde is heard questioning this directive (Resp. Exs. A-B). Respondents allege that these videos show that Captain Spry was not present in the Perry Center as claimed (Tr. 270-71).

Officer Reuter acknowledged that he was asked to surrender his gate one pass and testified that he “merely” asked why it was being confiscated and requested a receipt. ADW Emans told him he did not have to provide a receipt. Officer Reuter closed the car window “for a second” and videotaped his pass. That was the last time he saw it (Tr. 192-94).

August 19, 2011

ADW Emans testified that on August 19, 2011, some of the previously identified officers returned to the Perry Center to hand out flyers on the sidewalk. ADW Emans and Warden Perez told them to leave and they refused, saying they were not doing anything wrong. Officers Long and LaSonde were immediately suspended (Tr. 68-72; Pet. Ex. 2). Officer Long admitted that he visited Rikers Island on August 19 to hand out literature on his vacation day (Tr. 237).

ANALYSIS

In a disciplinary proceeding petitioner “has the burden of proving its case by a fair preponderance of the credible evidence.” *Dep’t of Correction v. Hall*, OATH Index No. 400/08 at 2 (May 30, 2008), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 08-33-5A (May 30, 2008). Here, petitioner sustained its burden on most of the insubordination charges and the false reporting charge but failed to meet its burden on the other charges.

Insubordination

Petitioner alleges that: (1) on August 11, 2011, Officer Williams refused orders to cease distributing literature at GRVC and the Perry Center and to leave Rikers Island; (2) on August 12, 2011, Officer Reuter, after being observed handing out literature at GRVC and being told to cease his activities and to leave, continued to hand out literature at the Perry Center and refused orders to leave the premises and to turn over his parking pass; and (3) on August 12 and 19, 2011, Officer Long refused orders to leave the Perry Center and to distribute literature on the Queens side of the bridge.

As a preliminary matter, petitioner’s motion to amend the pleadings to reflect allegations that Officer Williams engaged in misconduct on August 12, rather than August 11, should be granted. *See* 48 RCNY § 1-25 (Lexis 2012). Officer Williams testified that he was on Rikers Island on August 12, not the day before. Officer Williams has not shown any prejudice to the proposed amendment and was on notice of the incident because he was given a CD and was ordered to file a report for acts that occurred on August 12 (Pet. Exs. 3, 6). *Dep’t of Correction v. Sostre-Valentin*, OATH Index No. 1923/99 at 7-8 (Sept. 22, 1999), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 00-94-SA (Nov. 14, 2000) (appropriate to conform charges to proof since respondent was not prejudiced and was on notice of the incident).

To establish a charge of insubordination, an employer must prove that: (1) an order was communicated to the employee and the employee heard and understood the order; (2) the contents of the order were clear and unambiguous; and (3) the employee willfully refused to obey. *Dep’t of Correction v. Centano*, OATH Index No. 857/11 at 13 (June 6, 2001), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 11-92-5A (Nov. 30, 2011).

A refusal need not be announced; it may consist of a deliberate, passive failure to comply. *See Human Resources Admin. v. Johnson*, OATH Index No. 637/01 at 9 (July 12, 2001). Moreover, a refusal to comply with an order may constitute insubordination even where the order is eventually complied with. *See Dep't of Transportation v. Solli*, OATH Index No. 2888/10 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); *Dep't of Correction v. Blount*, OATH Index No. 1054/04 at 9 (Jan. 20, 2005), *modified on penalty*, Comm'r Dec. (May 12, 2005) (finding misconduct where respondent had to be told several times to step out into the corridor before she complied with the order); *Health & Hospitals Corp. (Coler-Goldwater Specialty Hospital) v. Ramsey*, OATH Index No. 724/04 at 5 (Apr. 16, 2004) (insubordination found where respondent initially refused an assignment even though he ultimately completed it).

Once a directive has been given, an employee must obey the order and subsequently challenge it through formal grievance procedures if there are any substantive or procedural objections. *See Ferreri v. NYS Thruway Auth.*, 62 N.Y.2d 855, 856 (1984). There are a few exceptions to the "obey now, grieve later" principle, including orders that: (1) are clearly in excess of the agency's authority under the collective bargaining agreement; (2) are unlawful; or (3) would threaten the health or safety of any person if followed. *Health & Hospitals Corp. (Queens Health Network) v. Smith*, OATH Index No. 2019/08 at 4 (Oct. 17, 2008). The burden of proof is on respondents to demonstrate that an exception exempts them from compliance with an agency order. *Health & Hospitals Corp. (Coler-Goldwater Hospital) v. Hinkson*, OATH Index No. 163/04 at 4 (Nov. 21, 2003).

Contrary to the amended charges against Officer Williams, the testimony of Captain Spry, as corroborated by Captain Patterson and the CDs, demonstrates that at GRVC respondents followed orders to not engage in union activity and to leave GRVC. Thus, the charge that Officer Williams refused orders to cease distributing literature at GRVC should be dismissed. Thus, there is no need to reach respondents' request to draw an adverse inference because of DOC's failure to retain the video taken at GRVC (Tr. 288, 291).

The central charge is whether, upon returning to the Perry Center from GRVC, respondents refused orders to cease distributing literature and to leave Rikers Island. To the

extent resolution of charges rests on a determination of witness credibility, this tribunal has looked to witness demeanor, the consistency of a witness' testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness' testimony comports with common sense and human experience in determining credibility. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 3 (Feb. 4, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998).

Even though there were discrepancies in their testimony, I credit the consistent, credible statements of ADW Emans, Captain Spry, and Captain Patterson that, over a 15-minute period, respondents refused their multiple, unambiguous orders to cease distributing literature and to leave Rikers Island. There was no apparent motive for these witnesses to lie, there was no evidence that they bore any animus towards respondents, and their version comports with common sense. On the other hand, respondents had a motive to deny the charges to avoid a finding of misconduct. Moreover, respondents' claims that they were never given orders to cease distributing literature or to leave Rikers Island were not credible.

Respondents admit that they went as a group to "unionize" for CORE and were present at the Perry Center. At the time CORE was not authorized to engage in union activity and had been prevented from "unionizing" the day before and earlier that day. Respondents' claims that the supervisors' comments were directed to Officer LaSonde only and were limited to her being present on the island while on modified duty were not plausible. DOC is a paramilitary organization where strict obedience to orders is vital to protecting staff and inmates (Emans: Tr. 25-26; Patterson: Tr. 125-26). When an order is directed to a group of people, not every individual needs to be singled out by name; everyone is expected to follow the orders given.

The record also supports a finding that respondents understood the orders and refused to follow them. Captain Spry's testimony that Officer Williams, along with Officer LaSonde, said that they would not leave was credible. The fact that Captain Spry is not on respondents' videos and that none of the disputed orders are audible is not dispositive. The videos capture less than one minute of an incident that lasted about 15 minutes. I also credit Captain Patterson that Officer Long claimed they "were not doing anything wrong" and had "a constitutional right to unionize." Respondents testified that prior to going to Rikers Island they had been counseled that they could "unionize" off-duty on public property. These alleged statements are consistent

with respondent's alternative theory that they had an unfettered First Amendment right to engage in union activity on Rikers Island.

However, respondents have failed to demonstrate that the orders to cease distributing union literature and to leave Rikers Island were unconstitutional. Respondents' reliance on *Salmon Run Shopping Center, LLC v. National Labor Relations Board*, 534 F.3d 108, 114 (2d Cir. 2008) is misplaced. There the Second Circuit stated, "Absent special circumstances, employees have the right to engage in organizational activities at their employer's place of business in non-working areas during non-working hours." A correctional facility presents special circumstances.

In *Israel v. Abate*, 949 F. Supp. 1035 (S.D.N.Y. 1996), COBA claimed that DOC's decision to bar distribution of union-related literature in the Control Building (now known as the Perry Center) was unconstitutional. The district court held that DOC had a compelling interest in maintaining security and that it could bar distribution of union-related materials in the Control Building. As in *Israel v. Abate*, respondents here have failed to establish that their flyers were a matter of public concern or that their First Amendment rights outweigh DOC's compelling interest in maintaining prison security at the Control Building/Perry Center.

Furthermore, the First Amendment does not provide respondents with the right to distribute materials on all types of publicly owned property. As the Supreme Court has explained:

Protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities.

Cornelius v. NAACP Legal Defense & Education Fund, 473 U.S. 788, 799-800 (1985). Where a government owned property is not a traditional public forum, the government may restrict speech so long as the restriction is reasonable in light of the purpose served by the forum and viewpoint neutral. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (permissible to deny teachers' union access to non-public forum).

Thus, to the extent respondents sought to distribute union materials outside the Perry Center, the sidewalks, parking lots, and other outside areas on the secure penal island should not be considered public fora under the First Amendment. *See, e.g., United States v. Kokinda*, 497 U.S. 720, 727-29 (1990) (“the location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum”; sidewalk leading to post office entry not a public forum); *Cornelius*, 460 U.S. 788 (upholding prohibition against participation by political and policy organizations in employee charity drive as federal workplace not a public forum); *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 134 (1977) (prison is not a public forum, thus it was permissible to prohibit inmate solicitation, meetings or mailing of union material in correctional facility); *Greer v. Spock*, 424 U.S. 828, 838-39 (1976) (no generalized constitutional right to make political speeches or distribute leaflets at military base because it was not a public forum); *Lehman v. Shaker Heights*, 418 U.S. 298, 304 (1974) (display cases on public buses not public fora protected by the First Amendment); *Young v. NYC Transit Auth.*, 903 F.2d 146 (2d Cir. 1990) (subway system not a public forum); *Knolls Action Project v. Knolls Atomic Power Laboratory*, 771 F.2d 46, 49 (2d Cir. 1985) (neither government nuclear research facility nor its parking lot were a public forum).

In any event because “the realities of running a penal institution are complex and difficult,” the Supreme Court has given “wide-ranging deference to the decisions of prison administrators.” *Jones*, 433 U.S. at 126; *see also Israel*, 949 F. Supp. at 1044 (“state has a compelling interest in maintaining prison security with which courts have been reluctant to interfere.”). Thus, the orders to cease distributing union literature and to leave Rikers Island were not clearly beyond DOC’s prerogative to determine the methods and means by which its operations are conducted. *See Ferreri*, 62 N.Y.2d 857 (order to work overtime was not clearly beyond the power of management). Accordingly, the charges that on August 12, 2011, Officers Long, Williams, and Reuter failed to obey orders of their superiors to cease distributing union materials at the Perry Center and to leave Rikers Island should be sustained.

It is also undisputed that Officer Long returned to Rikers Island on August 19, with other CORE members to hand out literature on his vacation day. I credit the uncontroverted testimony of ADW Emans that he and Warden Perez told them to leave and again they refused, saying they

were not doing anything wrong. Accordingly, the charge that on August 19 Officer Long failed to obey orders to cease distributing materials and to leave Rikers Island should be sustained.

Finally, the record supports a finding that on August 12, 2011, Officer Reuter failed to turn over his gate pass as directed. I credit the testimony of ADW Emans that he asked Officer Reuter to surrender his parking pass and that Reuter argued with Emans about whether it belonged to him or DOC. ADW Emans's assertion that Officer Reuter videotaped him is consistent with Officer Reuter's testimony that he made it a practice of taping encounters with management. Furthermore, Officer Reuter admitted closing his window and using his cell phone to make a copy of the pass. While their conversation likely lasted less than 20 minutes, I credit ADW Emans that Officer Reuter argued with him and did not promptly turn over his parking pass as directed.

False report

Petitioner alleges that on September 7, 2011, Officer Williams filed a false report by denying that ADW Emans gave him an order to leave Rikers Island. In reviewing a false report claim, the first consideration is whether the underlying incident in question did in fact occur. The second is whether respondent made material deviations from the actual incident or intentionally misrepresented the actual events in question. *Dep't of Correction v. Rodriguez*, OATH Index No. 277/06 (Mar. 29, 2006).

As previously discussed, the record supports a finding that ADW Emans, Captain Patterson, and Captain Spry directed Officer Williams to leave Rikers Island on August 12, 2011, and that he refused. Thus, the first prong has been met. Officer Williams subsequently wrote in his report that on August 12, 2011, "at no time did ADW Emans give this writer any order . . . to leave Rikers Island." This statement was false and must be considered a material deviation from the actual incident or an intentional misrepresentation of the events in question.

Failure to obtain permission to hand out literature

Petitioner alleges that Officer Long failed to obtain permission from Warden Perez to hand out literature on behalf of the "self-proclaimed fraternal organization called CORE," and

that he failed to comply with the requirement in Operations Order 18/93, in that prior to handing out such literature he was not part of a fraternal organization recognized by DOC (ALJ Ex. 3).

Operations Order 18/93 provides in relevant part that while employee unions remain unaffected by this order, “only recognized fraternal organizations shall be afforded permission to conduct their business . . . on a Department-wide basis and in facilities.” CORE is not listed as a DOC recognized fraternal organization (ALJ Ex. 4).

The record supports a finding that union activity on Rikers Island must be approved in advance by DOC’s Labor Relations and that respondents’ distribution of union-related literature in August 2011 was unauthorized. However, there was no evidence that Warden Perez was the person from whom to seek permission regarding the distribution of literature or that Warden Perez was never contacted with such a request. With regard to the second charge, there was no explanation why Operations Order 18/93 is applicable and none is apparent from the document. These charges should be dismissed.

FINDINGS AND CONCLUSIONS

1. Petitioner failed to demonstrate that on August 12, 2011, Officer Williams refused orders to cease distributing literature at GRVC.
2. Petitioner demonstrated that on August 12, 2011, Officers Williams, Long, and Reuter refused orders to cease distributing literature at the Perry Center and to leave Rikers Island.
3. Petitioner demonstrated that on August 12, 2011, Officer Reuter refused orders to turn over his parking pass.
4. Petitioner demonstrated that on August 19, 2011, Officer Long refused orders to cease distributing literature on Rikers Island.
5. Petitioner failed to demonstrate that on August 12, and 19, 2011, Officer Long failed to obtain permission from Warden Perez and failed to comply with Operations Order 18/93 concerning distribution of literature on Rikers Island.
6. Petitioner demonstrated that on September 7, 2011, Officer Williams filed a false report.

RECOMMENDATION

Petitioner has requested a 20-day suspension for each respondent. Upon making these findings, I obtained and reviewed an abstract of respondents' disciplinary history for purposes of recommending an appropriate penalty.²

Officer Williams was appointed in 2006. In 2009, he forfeited 20 vacation days for having unauthorized items and insubordination, and in 2010, he was suspended for five days for conduct unbecoming. In April 2010, he was employee of the month.

Officer Reuter was appointed in 1991. He forfeited 15 vacation days in 2004 for medical incompetence, and 15 vacation days in 2010 for insubordination, conduct unbecoming, and leaving his post. He received unit citations in 2008 and 2011.

Officer Long was appointed in 1982 and has been disciplined in the past as follows: on an unidentified date, he forfeited two days for sleeping on post; in 1987 he was suspended for 20 days for insubordination; in 1988 he was suspended for 20 days for "serious misconduct"; and in 1990 he was suspended for five days for sleeping/leaving his post.

The penalties for insubordination vary depending upon a range of factors including the nature of the conduct, the context in which the conduct occurred, the employee's length of tenure, and his prior record of discipline. The range of penalties may be broad, from five days' suspension to termination. *See, e.g., Dep't of Correction v. Joseph*, OATH Index No. 196/12 (Apr. 5, 2012) (10-day suspension for officer with no record who refused orders to relinquish overtime post and refused orders in a profane manner to open and close security doors); *Dep't of Correction v. Fernandez*, OATH Index No. 1219/11 (Apr. 15, 2011) (20-day suspension for a Captain with one prior incident of discipline, for two incidents of insubordination); *Dep't of Correction v. Bee*, OATH Index No. 291/06 (May 19, 2006) (five-day suspension for officer with no record who failed 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-day suspension for officer with no disciplinary record who disobeyed order to participate in a search); *Dep't of Correction v. Buford*, OATH Index No. 388/02 (June 17, 2002), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 03-49-SA (June 12, 2003) (10-day suspension for veteran officer with one prior penalty for unrelated misconduct, for failing to obey an order to assume

² To the extent respondents' records reflect recent CDs or attendance issues, they have not been considered.

post, failing to submit an ordered report, and being disrespectful to a supervisor which included making threats and using profanity); *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-day suspension for officer with no prior record who failed 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-day suspension for nine-year veteran with no prior record who was disrespectful and failed to obey order to engage in a search); *Dep't of Correction v. Bowens*, OATH Index No. 172/91 (Dec. 10, 1990), *aff'd, sub nom. Bowen v. Sielaff*, 186 A.D.2d 494 (1st Dep't 1992) (termination from employment for officer with prior discipline and four-year tenure who was disrespectful toward supervisors on three occasions, failed to obey an order on two occasions, submitted a false report, and failed to properly supervise an inmate).

The penalties for officers who have made false reports or statements have generally ranged from 10 to 20 days' suspension. *Dep't of Correction v. Fernandez*, OATH Index No. 1219/11 (Apr. 15, 2011) (20-day suspension for an officer with no record who made false statements in a written report and in an interview); *Dep't of Correction v. Wells*, OATH Index No. 1421/96 (Dec. 5, 1996) (20-day suspension for an officer with no disciplinary record, who made false statements); *Dep't of Correction v. Butler*, OATH Index Nos. 876/92, 877/92 & 878/92 (Dec. 3, 1992) (20-day suspensions for two officers with minor or no disciplinary records for filing false reports); *see also Dep't of Correction v. Aquino*, NYC Civ. Serv. Comm'n Item No. CD 07-93-M (Sept. 25, 2007), *modifying on penalty*, Comm'r Dec. at 9 (Feb. 22, 2007), *modifying on penalty*, OATH Index No. 188/07 (Dec. 15, 2006) (officer with no prior discipline suspended for 10 days for addressing a captain twice in a profane manner, disobeying an order to leave, and filing a misleading report about the event).

There are several reasons why a lower penalty than the one requested should be imposed. First, the charges that Officer Williams was insubordinate at GRVC and that Officer Long failed to obtain permission to hand out flyers have been dismissed. Second, while steadfast in their refusal to follow orders, there was no evidence that respondents were ever loud or profane. Third, while supervisors found respondents' conduct to be disruptive to the flow of traffic in the Perry Center, there was no evidence that it caused a breach in security or that their conduct led to any harm. Finally, while the record supports a finding that respondents were on notice on

August 11, 2011, that they should not be on Rikers Island to distribute literature, it appears that their actions were based on the misguided belief that they had an unfettered right to engage off-duty in union activity there. In the spring of 2012, CORE members complied with DOC policy and obtained permission from Labor Relations to campaign on Rikers Island for an upcoming union election (Patterson: Tr. 160; Williams: Tr. 220).

Based on the nature of the misconduct and the context in which it occurred, I recommend that each respondent be suspended for 10 days. *Dep't of Correction v. Phoenix*, OATH Index No. 1543/08 at 10 (Apr. 14, 2008), *adopted*, Comm'r Dec. (June 6, 2008) (“A fair penalty must take into account the particular circumstances of the incident and individual mitigating factors, where appropriate.”); *Aquino*, OATH 188/07 at 8 (same). While the recommended penalties are at the lower end of the range given respondents’ prior disciplinary history, they are significant enough to impress upon respondents that they must comply with orders and grieve them later even if they disagree with them.

Accordingly, I recommend that Officer Williams, Officer Long, and Officer Reuter each be suspended without pay for 10 days. Officer Long should be given five days credit for time served.

Alessandra F. Zorghiotti
Administrative Law Judge

September 26, 2012

SUBMITTED TO:

DORA B. SCHIRO
Commissioner

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