

Health & Hospitals Corp.
(Coler-Goldwater Specialty Hospital & Nursing Facility)
v. Peña

OATH Index No. 1944/12 (Dec. 14, 2012)

Coordinating manager of building services found guilty of sexual misconduct for engaging in a sex act with a patient. Hearsay statements of patient who refused to appear at the hearing were determined to be reliable. ALJ recommends termination of employment.

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

In the Matter of
**HEALTH AND HOSPITALS CORPORATION
(COLER-GOLDWATER SPECIALTY HOSPITAL
AND NURSING FACILITY)**

Petitioner
- against -
CARLOS PEÑA
Respondent

REPORT AND RECOMMENDATION

TYNIA D. RICHARD, *Administrative Law Judge*

This disciplinary proceeding was referred by petitioner Coler-Goldwater Specialty Hospital & Nursing Facility (“Coler-Goldwater”), a member of the Health and Hospitals Corporation (“HHC”), pursuant to section 7:5 of the Personnel Rules and Regulations of the Corporation. Respondent Carlos Peña, a Coordinating Manager of Building Services, is charged with having sexual contact with a patient and other misconduct. Respondent denies the allegations.

The hearing on the charges was conducted before me on October 3, 4, and 5, 2012. At trial, petitioner presented the testimony of five hospital employees. Respondent testified on his own behalf.

The evidence proved respondent’s guilt of sexual abuse of a patient, for which I recommend termination of his employment.

PRELIMINARY MATTER

At the commencement of trial, respondent sought to preclude the admission of hearsay statements made by the complainant, patient “JRD”, who would not be testifying at the hearing.¹ In particular, respondent sought to preclude statements made by the patient to hospital employees in which he claimed to have engaged in a sex act with respondent in a hospital men’s room on February 18, 2012. Patient JRD came to the hospital’s attention after a hospital police officer discovered, on February 18, a dildo inside the men’s room underneath a trash can. Video surveillance tapes showed that respondent and the patient had entered the alcove where that men’s room is located around 10:30 a.m. and remained there for more than 20 minutes. In an interview conducted on February 23, hospital police and administrators questioned the patient to determine whether he went into the men’s room with respondent and what if anything occurred there. The patient admitted engaging in a sex act with respondent, for which he was paid five dollars. There was no indication that the dildo was involved in the sex act and hospital police never discovered its origin.²

Pursuant to this tribunal’s order dated September 28, 2012, petitioner served patient JRD with a subpoena requiring his testimony at trial and twice requested his appearance, but the patient refused to appear (Tr. 4-5, 123; Pet. Exs. 1, 2).

In his motion, respondent contends that the hearsay to be offered does not bear the hallmarks of reliability, the statements are unreliable due to the patient’s dementia, and the patient gave conflicting accounts (Tr. 16). Patient JRD was described by the hospital as a dementia patient who is “one times oriented,” which means he is oriented as to self but not as to time or place (Tr. 16, 371). Respondent pointed out that JRD delayed reporting the alleged abuse for five days and argued that he did so under circumstances that were coerced by the presence of hospital police (Tr. 16-17). JRD had a history of altercations at the hospital and arrests by hospital police. Respondent contends that the centrality of the hearsay statements to the case, and the lack of corroboration, make the hallmarks of reliability even more critical (Tr. 17).

¹ The patient is being referred to here by initials to protect his medical privacy. *See Dep’t of Citywide Admin. Services v. H. M.*, OATH Index No. 1670/04 at 1 n. 1 (July 26, 2004). The tribunal also issued a memorandum decision in this case denying respondent’s motion for disclosure of JRD’s medical records. *Health & Hospitals Corp. (Coler-Goldwater Specialty Hospital & Nursing Facility) v. Peña*, OATH Index No. 1944/12 mem. dec. (Oct. 12, 2012) (citing the physician-patient privilege set forth in CPLR § 4504(a)).

² The dildo was sent for fingerprint testing prior to the hearing and no prints were found on it (Tr. 209, 212).

Respondent further contends that the admission of such hearsay, without any ability to cross examine the accuser, denies him due process. Acknowledging the right of the employee to a fair due process hearing, the Court of Appeals held in *Brown v. Ristich*, a case involving allegations of abuse lodged against an employee by a patient with a mental disability, that “unsworn testimony” may be received in evidence “provided a sufficient foundation exists to support the hearing officer’s determination that the witness possesses rudimentary testimonial capacity.” *Brown v. Ristich*, 36 N.Y.2d 183, 190 (1975). This tribunal, which has sustained the admissibility of hearsay statements of a similarly sensitive nature, submits such statements to a rigorous assessment of their reliability, as a means of protecting employee due process. See *Dep’t of Juvenile Justice v. James*, OATH Index No. 847/06 (July 28, 2006) (ALJ admitted hearsay statements alleging sexual abuse of a juvenile resident and based its termination recommendation upon that evidence after finding it reliable); *Dep’t of Juvenile Justice v. Haywood*, OATH Index No. 1201/06 (May 11, 2006), *rejected*, Comm’r Dec. (Dec. 13, 2006) (ALJ admitted hearsay evidence of sex abuse but did not find it sufficiently reliable to sustain the charges; the agency rejected this view and found the misconduct was proven).

Petitioner argued that its burden at the time the statements are offered in evidence is to establish their admissibility -- far less a burden than that required to sustain the charges with hearsay evidence (Tr. 18). The contention is correct.

Under the Civil Service Law, “[c]ompliance with technical rules of evidence” is not required. Civ. Serv. Law § 75(2); see *Health & Hospitals Corp. (Kings County Hospital Ctr.) v. Bobbitt*, OATH Index No. 949/04 at 10 (May 19, 2004) (section 75 of the Civil Service Law is the analog for section 7:5 of the Corporation’s Personnel Rules and Regulations). It has long been established that hearsay is admissible and may form the sole basis for a finding of fact in these administrative proceedings. *Police Dep’t v. Ayala*, OATH Index No. 401/88 (Aug. 11, 1989), *aff’d sub nom. Ayala v. Ward*, 170 A.D.2d 235 (1st Dep’t), *lv. to app. den.* 78 N.Y.2d 851 (1991); *Gray v. Adduci*, 73 N.Y.2d 741 (1988); *People ex rel Vega v. Smith*, 66 N.Y.2d 130, 139 (1985) (hearsay may constitute substantial evidence if sufficiently probative and reliable). The hearsay, however, must be sufficiently reliable and carefully evaluated before it is relied upon. See *Human Resources Admin. v. Muniz*, OATH Index No. 445/88 (Nov. 17, 1988).

Finding the hearsay statements properly admissible, I denied respondent's motion to preclude them from evidence (Tr. 19-20).³ My assessment of their reliability is discussed below.

ANALYSIS

The five specifications in the charges allege that on Saturday, February 18, 2012, respondent (i) abandoned his work assignment for 25 to 30 minutes, (ii) was in an unauthorized area during that time, (iii) had inappropriate sexual contact with patient JRD, (iv) gave the patient money in exchange for such sexual contact, and (v) failed to notify hospital police or other authority that he suspected a patient possessed an illegal substance.

Coler-Goldwater is located on New York City's Roosevelt Island and is comprised of two campuses, one for each facility. Coler is a residential nursing home facility that treats patients with motor disabilities, spinal cord injuries, dementia, cancer, and other illnesses and medical conditions (Tr. 128, 184, 302). The Coler campus has 915 licensed beds housed in four buildings, designated "A", "B", "C", and "D", which are connected to one another by "T" sections. According to respondent's supervisor, Director of Building Services Joseph Bernasz, respondent oversees operations in B and C buildings, and the supervisors of each building report directly to him (Tr. 130-31). Although housekeeping staff receive daily assignments, respondent typically walks the halls of the buildings to spot areas that need attention and sends staff to attend to them (Tr. 152-53).

The sexual contact alleged was reported to have occurred in a staff men's room located in an alcove on the second floor of B building.

Sergeant Victor Morales, of Coler's hospital police department, testified that on February 18, 2012, around 1:45 in the afternoon, he found a small vinyl pouch with a plastic penis (or dildo) inside it underneath the trash can in the staff men's room located on the second floor of B building (Tr. 33). He had gone in to use the restroom, and he found the pouch when he moved the trash can in front of the men's room door (Tr. 35). He went to the police command center to secure the items and he contacted hospital police director Vito Aleo, who was not in the office that day, a Saturday. He also reviewed video taken by hospital surveillance cameras installed on that floor (Tr. 36-37). The video showed respondent entering the alcove that leads to the men's

³ Though referred to as preclusion, respondent's motion was not properly a motion to preclude since a preclusion motion seeks a sanction for a party's failure to comply with an order, and here respondent did not claim that petitioner had failed to comply with any order.

room three times that day; twice he was alone, and once he was accompanied by a hospital resident (Tr. 37-38). The surveillance camera has a clear view of the second floor corridor that opens onto the alcove where the men's room is located. It does not provide a view of the alcove itself or of any of the doors inside the alcove, including the men's room door (Tr. 93). Watching the video again as he testified (Pet. Ex. 3-3), Sergeant Morales identified respondent entering the alcove at 8:57 a.m. and leaving a few minutes later, and entering again at 9:58 a.m. and leaving a few minutes later (Tr. 45-47). He identified respondent and JRD entering the alcove together at approximately 10:38 a.m. and noted JRD leaving at 11:02 a.m. and respondent leaving at 11:04 a.m. (Tr. 49-51; Pet. Ex. 3-3).

Upon further review of the video from the day, Morales noticed respondent in the company of this particular hospital resident "at various locations in the facility" (Tr. 38, 98). He advised Director Aleo of his findings and prepared an incident report (Pet. Ex. 9; Tr. 79-80).

Sergeant Morales said he was familiar with the resident, "JRD", because hospital police had had several encounters with him during the two years he had lived there (Tr. 39). He recalled JRD's attempted elopement, a physical altercation JRD had with another resident, his arrests at the facility for disorderly conduct, possession of marijuana, and smoking cigarettes in an unauthorized area, and some violent outbursts (Tr. 109-10; Resp. Exs. G-N).

Vito Aleo is Director of Coler's hospital police department, a position he has held since 2006 (Tr. 174-75). He joined HHC in 2002 after a 20-year career with the NYPD and retiring as a detective. He recalled that Sergeant Morales called him on February 18, and told him he had discovered a dildo inside a pouch and was reviewing the surveillance video (Tr. 179-80). The sergeant was struck by the fact that respondent and patient JRD spent about a half hour alone in the alcove area (Tr. 180-81). Aleo instructed Morales to review and preserve the day's video from 7:00 a.m. to 4:00 p.m.

Upon his return to work, Director Aleo viewed the video himself. He found it "out of the norm" and "strange" for a patient and employee to be alone in a secluded area for 30 minutes (Tr. 182). He asked Morales to search other video in an attempt to trace respondent's and JRD's movements before the men entered the alcove. The additional video showed respondent and JRD in close proximity to one another at other locations in the hospital: entering and exiting the first floor bathroom, entering an elevator together, in the smoke room area, and on the floor where JRD resided (Tr. 182-83, 227-28, 270). He noted that JRD was just "a step or two"

behind respondent as they walked down the corridor to the second floor alcove where the patient said the sexual encounter occurred (Tr. 228).

After reviewing the tape, he scheduled an interview of patient JRD to take place in his office on Thursday, February 23 (Tr. 185). Also present were Captain Alago, Sergeant Morales, and Jenny Rosario, the Director of Patient Relations who was invited because of the possibility that the patient had been a crime victim (Tr. 186). The patient was brought in for the interview around 2:00 p.m.⁴

JRD's Interview - February 23

Director Aleo led the interview by asking JRD a series of questions about where he was on the previous Saturday, what he was doing, and who he was with (Tr. 186). The patient was evasive and answered most of the questions with "I don't know" or "I don't remember" or "it was nothing" (Tr. 187, 256). JRD denied knowing respondent (Tr. 264). Director Aleo decided to show JRD the video clips of him walking down the second floor corridor of B building behind respondent, entering the alcove, and then leaving much later (Tr. 188; Resp. Ex. 3-3). JRD said he did not know respondent's name but he knew that he worked there (Tr. 189). Watching the tape with him, Aleo pointed out that they had been in the alcove for a long time and JRD had left with something in his hand that was not there before (Tr. 191). He told JRD that he must know respondent because he was talking to him and was with him on other floors as well (Tr. 192-93). Observing JRD's nervousness and unwillingness to make eye contact, Aleo believed he was afraid to answer questions, so he asked his officers to leave the room (Tr. 190, 193). Asked if JRD could have been nervous because he was being questioned by police who had arrested him before, Aleo said it could have been a factor (Tr. 255).

With Ms. Rosario still present, Director Aleo told JRD that he was not in any trouble. Their main purpose was to make sure that no one had harmed him, and they needed to know exactly what had happened (Tr. 193, 255). At this point, JRD apologized for not answering sooner and told them he had engaged in a sex act with respondent in a room with a sink. JRD said respondent approached him on the first floor of the hospital and offered five dollars to give JRD a "blowjob" (Tr. 194, 259). They went upstairs into a room "where a sink was" and respondent opened JRD's zipper, took out his penis and placed a condom on it, and performed

⁴ February 18 was the Saturday before the President's Day holiday, and Director Aleo next reported to work on Tuesday, February 21 (Tr. 181-82). The interview was not conducted on Wednesday because Ms. Rosario was not at work that day (Tr. 253).

oral sex on JRD. JRD said this was not the first such encounter with respondent (Tr. 195). Although he could not pinpoint the date, time or location, he said the previous encounter had been in a room where beds were stored. Director Aleo testified that the housekeeping department would be responsible for storing beds (Tr. 196). When asked what he did with the five dollars, JRD said he purchased cigarettes from another patient in the smoke room (Tr. 259). Aleo testified that videotape showed JRD leaving the alcove area and going straight to the smoke room.

At this point in the interview, Aleo and Rosario took JRD to the second floor of B building and he took them down the corridor to the location seen on the video (Tr. 199). At the alcove, when asked what room they were in, he pointed to the men's room (Tr. 200; Resp. Ex. B-6).

All the doors on the alcove, including the men's room, should have been locked and inaccessible to patients that Saturday. The alcove is home to several offices – the Patient Relations Office, the Medical Library, and a Community Board room – as well as staff men's and women's restrooms (Pet. Exs. 4, 5, 6, 7; Tr. 75-76, 89, 156). Although patients are allowed in the alcove, on weekends all of the offices are locked and closed to patients and the restrooms are accessible only by key (Tr. 96, 118, 121, 133). Keys to the offices and restrooms in the alcove area are kept on the "twilight key ring" located in the housekeeping supervisor's office in the A building, because the twilight shift cleans that area. However, respondent possessed his own key that he requested specially from hospital police, he said, because this bathroom was cleaner than others (Tr. 149, 416, 516).

Before JRD left his office, Director Aleo asked him to refrain from speaking to anyone about their conversation and told him he would be contacting law enforcement (Tr. 202). The hospital contacted NYPD and the Inspector General's office (Tr. 203-04). When NYPD arrived later that day, JRD became agitated about having to discuss the incident with someone else and he refused to make a report. NYPD eventually closed the case because the SVU detective was never able to interview JRD (Tr. 271).

Director Aleo found JRD to be credible and believed his statement. Having interviewed several thousand crime victims in his tenure with the NYPD and HHC, he considered JRD's demeanor, as well as corroborating and contradictory information available to him (Tr. 175). He said that JRD was straightforward, direct, and detailed in his description of the encounter with respondent, rather than evasive as he had been in his earlier denials (Tr. 196-97). As JRD spoke,

he looked directly at Aleo and Rosario. Director Aleo considered whether JRD might have been giving him answers he thought would please him, but decided that the video evidence showing respondent's proximity to JRD at various locations in the building corroborated JRD's statement (Tr. 257). He also believed that JRD had had a previous encounter with respondent (in a room with beds, as he described) because JRD would not otherwise know that respondent had access to such locations (Tr. 258). JRD was not able to identify that location.

Director Aleo said his job was to ensure the patient was in no danger (Tr. 253). Thus, on the basis of the complaint, respondent was placed on immediate suspension (Tr. 206). Respondent was not interviewed or asked why he was in that alcove area (Tr. 252).

Although unaware that JRD suffered from dementia, Director Aleo and Sergeant Morales knew he was categorized as "a wanderer," that is, a patient who was restricted for his own safety from leaving the Coler campus unless accompanied by staff or an authorized family member (Tr. 103, 106, 184, 253). JRD was known for walking around the facility a great deal (Tr. 97, 338). Director Aleo learned of his dementia diagnosis shortly after the interview (Tr. 272).

Jeannette Rosario is Director of Patient Relations at Coler, where she has worked for 23 years (Tr. 300-01). In that role, she oversees all complaints and grievances from patients, residents, families and visitors. She receives approximately 15 complaints each month from the Coler campus and substantiates a small percentage of them, perhaps 1% (Tr. 308). Her office happens to be located on the second floor of B building, in the alcove.

She was aware at the time of the interview that JRD suffered from alcohol-related dementia, which involves difficulty with short term memory as well as cognitive loss (Tr. 336). JRD resided in the dementia unit for about a year before his psychiatric assessment was upgraded and he was moved into a regular unit (Tr. 303-04, 332). Coler's dementia unit is a confined unit for dementia residents, located in C building (Tr. 302-03). Patients assigned to that unit are restricted to the unit because they cannot safely wander about hospital premises without monitoring or staff supervision (Tr. 334). Once reassigned, JRD remained designated a restricted patient (or "wanderer") which meant he was not allowed outside of the Coler facility because he would not know his way back (Tr. 335-36). These patients are not restricted in their access within the facility, but they must wear a green identification wristband (Tr. 337, 364).

Ms. Rosario was familiar with patient JRD prior to February 2012, because of altercations he had in the dementia unit (Tr. 308-09). Many involved verbal or physical provocation, but JRD tended not to report such incidents, even when he was the victim of others'

aggression. Having worked with respondent for years, she had never received a complaint about him. She interacted with him periodically when he complained that a patient was interfering with housekeeping staff performing their duties (Tr. 310).

Ms. Rosario learned about the allegation of sex abuse involving JRD on February 23 when she returned to work after the President's Day holiday (Tr. 311). She received a call from Vito Aleo who asked her to attend a patient interview and described to her the findings of the police investigation up to that point (Tr. 312). It is common practice for a patient representative to be present for such interviews (Tr. 313). She was familiar with JRD's mental status and had been present for interviews of other dementia patients. She testified that JRD's diagnosis on February 18 indicated that he was "oriented times one", which means oriented as to self but not as to time or place (Tr. 371). To determine his orientation at the beginning of the interview, she asked JRD his birth date, which he recalled; she asked him to identify his residential unit, which he did not recall although he remembered the floor and location of the unit; he did recall the exact length of time he had been a resident of Coler (Tr. 316, 370). She was satisfied with this display of memory.

Ms. Rosario's testimony was consistent with Director Aleo's description of JRD's interview (Tr. 314-15, 317-18). She recalled that they asked the uniformed officers to leave the room when it became obvious that JRD was uncomfortable: he was giving no eye contact, held his head down, and nervously shook his leg (Tr. 315). He kept saying "nothing, nothing." They showed him the video and she reassured him that they were not seeking to blame him but wanted to know what had happened (Tr. 317-18). He suddenly apologized and said he would tell them the truth. He told them that he saw respondent wave his hand for him to come out of the smoke room and, when he did, respondent told him he would give him five dollars for oral sex. JRD said he followed respondent to the location and went into a room with a sink where respondent pulled down JRD's pants, put a condom on him, and performed oral sex on him (Tr. 319).

Ms. Rosario was shocked to hear of it. She asked JRD if he was forced, and he said "no" (Tr. 319). He said he was willing to go with respondent and that it had happened before in a room "where there's a lot of beds". She and Aleo then took JRD to the second floor of B building and asked him where this incident occurred, and he went "straight to the male's

bathroom” (Tr. 320; Pet. Ex. 7).⁵ He told them that he stood against a wall inside a bathroom stall as respondent knelt down in front of him (Tr. 322-23). He said that afterward he went down to the smoke room and purchased cigarettes (Tr. 325).

Although the hospital does not sell or permit the sale of cigarettes, residents do sell loose cigarettes (called “looseys”) to each other (Tr. 325-26). Rosario said that JRD “smokes all the time” and described him as a “chimney smoker” (Tr. 325). Since JRD was not allowed off the facility, getting cigarettes from other patients was his only means of supply. He received \$5.00 per week, a portion of his social security income that was distributed to him by the hospital. He was not given his full allotment, she said, because he is incapable of managing money and would spend it all at once (Tr. 327).

Before ending the interview, she explained again to JRD that she was there to offer support and protection, and the incident would be reported to her superiors (Tr. 323). She contacted risk management as well as a staff psychiatrist to provide him with emotional support. Ms. Rosario also prepared case sheets documenting the interview, which lasted 40 minutes to an hour (Tr. 324; Pet. Ex. 14; Resp. Ex. O).⁶

Ms. Rosario noted that, in contrast to his initial nervousness, after JRD said he would tell them the truth, “he was fine” and “everything just started coming out” (Tr. 325). She has a master’s degree in rehabilitation counseling and knows about varying degrees of disability and alcohol abuse (Tr. 332-33). Ms. Rosario found his story credible and consistent (Tr. 329). Though aware that individuals who suffer from alcohol-related dementia sometimes “confabulate”, or fabricate stories, she did not believe that JRD was making this up. The fact that she did not see respondent motion to JRD in the videotape, as JRD reported, did not make her concerned about whether he was telling her the truth (Tr. 350, 352).

The patient’s hearsay statements accusing respondent of sexual misconduct were admitted over his objection. An assessment of the reliability of these statements and the credibility of the witnesses reporting them is to be determined by the tribunal.

⁵ Noting that the videotape showed that respondent tended to be slightly in front of JRD whenever they were walking in the same direction, Ms. Rosario recalled that when she and Aleo went with the patient to the second floor of B building, they had to lead him because he did not know how to get there (Tr. 369-71). She attributed this to his one times orientation.

⁶ Ms. Rosario wrote the narrative accounts in both exhibits. Petitioner’s Exhibit 14 is her narrative of JRD’s interview. Respondent’s Exhibit O additionally reports findings police made prior to the interview (Tr. 358, 360).

In analyzing credibility, this tribunal may consider such factors as witness demeanor, consistency of the witness's testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which the witness's testimony comports with common sense and human experience. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *adopted*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998); *Dep't of Correction v. Hansley*, OATH Index No. 575/88 at 24 (Aug. 29, 1989), *aff'd*, 169 A.D.2d 545 (1st Dep't 1991). Under these criteria, I found Directors Aleo and Rosario to be very credible witnesses.

They gave no hint of bias against respondent. Their questioning of the patient was sensitive and not at all suggestive and the investigation was handled professionally. They were measured and straightforward in their demeanor on the witness stand, and their testimony was consistent, corroborating each other's description of the interview and JRD's statements to them.

Their testimony also comported with common sense and human experience. That is, JRD's initial claim that "nothing" happened was not an atypical victim response; I credited Director Aleo's view that it appeared to be an attempt to avoid discussion rather than a denial of sexual contact. It is understandable that a patient, particularly one who had frequently been in trouble with hospital police, would be hesitant to report the misconduct of a hospital employee with broad authority in the facility. It made sense that the patient would open up and give a fuller account of what happened after the uniformed officers left the room and he was reassured that Aleo and Rosario were there to protect him.

Inasmuch as petitioner put on a circumstantial case, a critical part of it is the hearsay. Courts rely upon eight factors to assess the reliability and probative value of hearsay, including the identity of the hearsay declarant, the availability of the declarant to testify, the declarant's personal knowledge of the facts, the independence or bias of the declarant, the detail and range of the hearsay, the degree to which it is corroborated, the centrality of the hearsay evidence to the agency's case, and the magnitude of the administrative burden should the hearsay be excluded. *See Calhoun v. Bailar*, 626 F.2d 145 (9th Cir. 1980), *cert. den.*, 452 U.S. 906 (1981); *Richardson v. Perales*, 402 U.S. 389 (1971); *Dep't of Correction v. Jackson*, OATH Index No. 134/04 (May 5, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 05-67-SA (Sept. 14, 2005). The application of these factors to the hearsay evidence presented by the hospital supports a determination that it was reliable and probative.

First, the hearsay declarant, JRD, was identified and known to the hospital, and to respondent, prior to the hearing. Thus, respondent was able to describe his relationship to JRD, the fact that he knew JRD as a long term resident of the hospital and a chain smoker, that he gave him a nickname due to his smoking, and he had given him spare change in the past. The patient's statements, though unsworn, were made to hospital executives in the context of a formal interview requested by hospital police, not in a casual atmosphere. Although the statements were made five days after the incident, they were made at JRD's first meeting with hospital staff, and Ms. Rosario recorded them in contemporaneous written reports (Pet. Ex. 14; Resp. Ex. O). This factor weighs in favor of reliability.

Second, the declarant was unavailable, but his unavailability was caused by his refusal to appear at the hearing despite being served with a subpoena. It is understandable that the patient might be intimidated to appear at a public hearing of an allegation of sexual abuse, particularly given his medical condition and limited exposure outside of the nursing home. In this case, not only would he have to make public disclosure of the sex act, and publicly accuse respondent with whom he had been friendly, but he would have to testify in a formal proceeding.

Third, the declarant has personal knowledge of the facts. He was the victim of the sexual misconduct alleged. This factor weighs in favor of reliability.

Fourth, there is no evidence of the declarant having any bias against respondent or reason to lie about him. This factor weighs in favor of reliability.

Fifth and sixth, the detail of the hearsay and the degree to which it is corroborated, particularly by the videotape, are strong elements in favor of its reliability. The description of the sex act was detailed in a way that made it believable. The video showing respondent's movements for an hour and proximity to the patient during that time provides substantial corroboration of the allegations and are discussed in detail, below, in the summary of respondent's testimony.

Seventh is the centrality of the hearsay; the more central and important the hearsay is to the hospital's case the more serious the question of basic fairness and the more critically it should be assessed. *Calhoun*, 626 F.2d 149-50; *see also Transit Auth. v. Francis*, OATH Index No. 234/02 (Dec. 19, 2001), *modified on penalty*, Auth. Dec. (Feb. 11, 2002); *Police Dep't v. Kelk*, OATH Index No. 540/00 (June 7, 2000); *Transit Auth. v. Maloney*, OATH Index No. 500/91 (Apr. 19, 1991), *aff'd sub nom. Maloney v. Suardy*, 202 A.D.2d 297 (1st Dep't 1994). In the present case, where the statement accuses a hospital employee of sexual misconduct with a

patient on hospital grounds while on duty, the hearsay evidence is largely determinative of the outcome, which weighs against reliability. Its centrality is only one of eight factors considered, however, and should not preclude its use where other factors support its reliability. *Police Dep't v. Ayala*, OATH Index No. 401/88 at 9 (Aug. 11, 1989), *aff'd sub nom. Ayala v. Ward*, 170 A.D.2d 235 (1st Dep't), *lv. to app. den.*, 78 N.Y.2d 851 (1991).

Finally, the administrative burden placed upon the hospital should the hearsay be excluded is significant in this case where the only witness to the abuse is the declarant – a patient/victim unwilling to tell his story in a public forum. JRD refused even to report it to the NYPD. The hospital's ability to heal and protect the sick is at risk if it could never use hearsay in instances of alleged abuse by hospital staff, particularly because the vulnerable are easy targets. *See Brown*, 36 N.Y.2d at 191-92 (noting the need to protect from unscrupulous attendants “institutional residents, especially those incapable of eloquent expression and abstract thought” who also deserve to fairly be heard in a disciplinary proceeding). This factor also weighs in favor of reliability.

In opposition, respondent argued that the hearsay statements were inconsistent with other statements made by the patient in the interview with hospital staff. Aleo and Rosario testified that JRD initially denied knowing respondent and said that “nothing” out of the ordinary happened before he admitted being taken to the men's room to engage in a sex act with respondent. Aleo explained, on cross, that JRD never denied that respondent engaged in a sex act with him; rather, he initially tried to avoid speaking about what happened by saying that nothing had happened (Tr. 253-54). Once Aleo and Rosario sent the uniformed officers out of the room, JRD's statements implicated respondent in the misconduct and, once he told the story, he never retracted it.

Respondent argued that the patient's accusation lacked credibility because dementia patients “are very prone to suggestibility because they like to cover up the lack of memory” (Tr. 13). While this theory may have intuitive appeal (if not the support of expert evidence) there was no indication that suggestibility played a role in the patient's statements. Hospital staff did not “suggest” any part of the story that JRD told: that he was asked for oral sex in exchange for a \$5 gratuity. Staff merely showed him the video of respondent and him walking around the facility in relative proximity to one another and asked him what happened and whether he was harmed. JRD's detailed statement about a sex act being performed on him by respondent was not suggested either by the questioning or the surveillance video. There was no indication that

JRD was incapable of recalling an event that was five days old or of truthfully retelling it. Aside from counsel's theory that people with dementia engage in "confabulation", there was no indication that JRD lied about what happened or had a history of lying about such things.

I was unpersuaded by respondent's arguments challenging the reliability of the hearsay. Moreover, having considered respondent's testimony about what happened that day, I credit the patient's statement that respondent led him to participate in a sex act inside the men's room on February 18 and offered him \$5 in exchange for doing so.

Respondent has worked for HHC for 19 years (Tr. 382). During that time, he was presented with Certificate of Service awards in 2003 and 2009, in recognition of efficient service to the hospital (Resp. Exs. T, U; Tr. 398). He was twice recognized as Employee of the Year, most recently in 2009 (Resp. Ex. R; Tr. 395, 399). He received outstanding performance appraisals for the last three annual reporting periods: 2009, 2010 and 2011 (Resp. Exs. E, P, Q; Tr. 391).

As Coordinating Manager at Coler-Goldwater, respondent is responsible for oversight of B and C buildings and it is his job to ensure that everything is in order: every unit, ward, dining room, bathroom, corridor, office, clinic, and cafeteria in every building (Tr. 392-93). His work requires him to conduct rounds during which he checks the wards and rooms and makes sure the hand towel and soap dispensers are full, the garbage is removed, and the floors are swept and mopped (Tr. 446). His regular workdays are Monday through Friday and alternate weekends.

Respondent categorically denied having sexual contact with patient JRD, or any other patient (Tr. 399-400, 471). He said that, due to injuries from an automobile accident in 2010, which required him to take six months of medical leave, he cannot be on his knees for any length of time without experiencing "a lot of pain" (Tr. 432).⁷ He also denied propositioning JRD or any other patient for sex. He denied knowing anything about the dildo found in the staff men's room on the second floor of B building (Tr. 434). He denied going into any unauthorized areas of the hospital, and he denied seeing patient JRD smoking or possessing anything that he suspected was an illegal substance (Tr. 400).⁸

⁷ Medical records were introduced indicating a "tear of the lateral meniscus" in his right knee in July 2010 (Resp. Ex. X). Nevertheless, he conceded his ability to perform his job which requires him to walk "constantly" as he conducts rounds throughout the facility (Tr. 461).

⁸ These allegations were made in specifications 2 and 5. Petitioner presented no evidence that the second floor area where respondent took the patient was unauthorized to him, thus specification 2 should be dismissed.

He said the hospital's contractor has offices on the third floor of B building where they repair hospital beds and other mechanical equipment (Tr. 430). Though they store beds there, he has no authority or access to the office. Beds are also kept in the hospital's "S" wing in an area he has no access to (Tr. 431).

The Videotape

Petitioner's circumstantial case is supported by the videotaped evidence obtained from surveillance cameras installed at locations throughout the Coler facility. Four CD's containing the video were introduced in evidence, as Petitioner's Exhibits 3-1, 3-2, 3-3, and 3-4. The video tells its own story even without witness testimony; the testimony was sometimes aided and sometimes tested by the images on the tape. In the case of respondent, there were many inconsistencies. The following summary of respondent's testimony is also a chronology of his movements on February 18 between 10:10 and 11:04 a.m., as shown on the tape.

The Smoke Room – 1st Floor of B Building

Respondent said he was familiar with patient JRD prior to February 18, 2012. He said he had given the patient the nickname "Smokey" because he smoked constantly (Tr. 400). He said he used that name when speaking about him to others but did not call him by that name (Tr. 486). He said JRD asked people for money all the time and checked pay phones for loose change (Tr. 445). When JRD was not smoking, he could be seen sitting near someone waiting to see if they would give him a cigarette. Despite knowing all of this, respondent's said he was unaware that JRD had dementia (Tr. 501) even though the patient had resided in the dementia unit for the first year of his stay at Coler.

Respondent frequently walks past the main smoke room located on the first floor of B building because it is on his way to the C building, and he usually sees JRD smoking inside the smoke room or nearby (Tr. 403). He said he was on his way to conduct rounds in C building when he walked past the smoke room at around 10:10 a.m. on February 18 (Tr. 447, 450). His rounds take 30 to 45 minutes to complete, he said (Tr. 449). He said he crossed paths with JRD outside the smoke room as he was conducting rounds, but he denied motioning to him or having conversation with him (Tr. 404, 428).

On the videotape, from approximately 10:10 a.m. to 10:20 a.m., respondent is seen walking past the smoke room four times, walking out of camera range and returning a few minutes later (Pet. Ex. 3-4 - Camera 26). The smoke room has large picture windows that make the room visible from the hallway, and vice versa. At 10:10:33, respondent walks southward

down the hallway, past the smoke room, toward C building (Tr. 451); at 10:12:33, respondent retraces his steps walking northward up the hallway, past the smoke room, toward A building (Tr. 456). At 10:15:43, respondent walks southward past the smoke room, and at 10:18:43, he walks northward, again, past the smoke room. This time he stops in front of the smoke room window at about 10:18:56 and leans against the wall looking inside the smoke room until the video ends at 10:19:12. He testified that he was “resting” but admitted he was not on a break at the time (Tr. 464). As he passed the smoke room at 10:10, 10:15 and 10:18 a.m., it is clear that respondent looked into the smoke room window as he walked by. He stated, in cross, that “I always glance into the smoke room” (Tr. 459). At 10:18:43, as respondent approached the smoke room, JRD walked out of the smoke room, crossing paths with respondent, and then walked out of the frame toward C building.

After testifying that he was going on rounds in building C and then seeing himself walk away from building C only two minutes later, respondent said six units in C building had been shut down due to construction so his rounds took less time to complete (Tr. 453). When asked whether he meant to testify that he had actually conducted rounds in the two minutes that elapsed, respondent stated that he was on break at the time – not going on rounds (Tr. 454). He said his earlier testimony that he was going on rounds at 10:10 a.m. was mistaken (*i.e.*, he “misspoke”) (Tr. 455-56).

Respondent said that housekeeping staff goes on break from 9:45 to 10:00 a.m. and he takes break from 10:00 to 10:15 a.m. (Tr. 455). When seen passing the smoke room again at 10:15, respondent testified that he was then on his way to conduct rounds in C building, noting that his break had ended (Tr. 460). At this time, he estimated that his rounds in C building would take 10 to 15 minutes to complete. But at 10:18 a.m. he was seen walking away from C building again and back toward the smoke room. This is when he and JRD crossed paths, at 10:18:38 (Tr. 461). He admitted that he did not conduct rounds at this time either.

JRD’s Ward – 3rd Floor of C Building

When respondent crossed paths with the patient outside the smoke room at 10:18 a.m., he testified, he did not know where JRD was going (Tr. 462). He was aware that JRD’s room was located on the third floor of C building (Tr. 464, 467).

The camera at the third floor elevator bank of C building shows JRD getting out of an elevator at 10:20:05 and walking out of the frame; it then shows respondent exiting a different elevator at 10:21:06 and walking in the same direction as JRD, which respondent admits is

towards JRD's ward (Pet. Ex. 3-1; Tr. 467, 470). The video time stamps make it clear that shortly after both men appeared outside the smoke room, in physical proximity but not speaking to one another, they both appeared in the third floor elevator bank walking toward JRD's ward (Tr. 464-67).

Respondent testified that his destination was not JRD's room and he denied going into the patient's room or speaking to him at this time. He also denied propositioning JRD for oral sex at this time (Tr. 471). He stated that he proceeded through the ward to the B building and returned to the elevator bank through a different corridor that comes from B building (Tr. 428, 468-71).

However, at approximately 10:23 a.m., respondent is seen on the video returning to the elevator bank from the direction of JRD's ward, not from the B building corridor (Pet. Ex. 3-1). When asked about the discrepancy, which he conceded, he testified that he had misspoken (Tr. 472-73). He admitted having spent time on the patient ward where JRD lives. He said he was making his rounds and was not with JRD. The video shows respondent getting back on the elevator at approximately 10:24 a.m. (Pet. Ex. 3-1). JRD returns to the elevator bank and gets on an elevator at about 10:26 a.m. (Tr. 475).

To get to the second floor of B building from the third floor of C building, respondent testified, he would go down one floor by elevator or stairs, where he could easily enter the B building at a nearby T section (Tr. 477).

Visit to the Men's Locker Bathroom – 2nd Floor of B Building

At 10:28:25, respondent is seen on the second floor of B building entering the men's locker bathroom (Pet. Ex. 3-3; Tr. 477-78). Thirty seconds later, he exits the room. He denied having a locker in that room or getting anything from the room, such as a condom (Tr. 479). As he leaves, he walks in the direction of the elevator, which he said is the quickest way to return to the first floor (Tr. 479-80; Pet. Ex. 3-3).

Encounter in the Men's Room – 1st Floor of B Building

On the first floor, JRD is seen standing in the area outside the men's room when respondent walks in his direction at about 10:30 (Pet. Ex. 3-2 – Camera 49; Tr. 484). JRD walks into the men's room and respondent follows 30 seconds later. Respondent testified that he followed JRD into the bathroom because he suspected he went in there to smoke marijuana; there were "rumors throughout the hospital that he's one of the patients that [smokes] in the bathrooms" (Tr. 400-01, 485-86). He did not see JRD smoking marijuana in the bathroom that

day, nor did he smell it.⁹ He testified that he walked around the bathroom and did not see JRD. Before leaving, respondent stated, “I better not see or smell marijuana in here” and JRD said “fucking shit” and popped out from behind a curtain where the toilets are (Tr. 401, 488-89). Then JRD said, “Oh, it’s you. Do you have any money?” to which respondent replied “no” and walked out (Tr. 402). Respondent testified that JRD had asked him for money before, that he constantly asks for money and would ask anyone for it.¹⁰

According to the video, respondent came out of the bathroom at 10:33:45, and continued to stand in the area just outside for several minutes (Pet. Ex. 3-2 – Camera 49). He appeared to be leaning against a wall and admitted that he “just stood there” (Tr. 493). The patient came out of the bathroom around 10:35:18 and, at 10:36 a.m., they both proceeded down the corridor to the elevator, walking steps away from each other, with respondent slightly behind JRD (Tr. 499; Pet. Ex. 3-2 - Camera 49). At about 10:36:20, respondent is seen from a different camera angle, now walking ahead of JRD about two feet away from him, as they approach the first floor elevator bank (Pet. Ex. 3-2 – Camera 50). Respondent presses the call button as JRD walks to the pay phone and returns (Tr. 503); they stand side by side as the elevator arrives and they enter it at 10:36:46 (Pet. Ex. 3-2 – Camera 50). They do not appear to be talking to one another.

Respondent originally testified that he was on his way to C building, but he went into the bathroom just to make sure that JRD was not smoking marijuana (Tr. 500). He conceded that he never got to C building to conduct rounds (Tr. 500, 532). He had no answer for why he did not proceed to C building after he left JRD in the bathroom, and, instead, waited outside and then walked to the elevator with him (Tr. 494).

Elevator Bank – 1st Floor of B Building

Contrary to the video which showed them walking in tandem toward the elevator, respondent testified that JRD “came from behind” him as he stood waiting at the first floor elevator (Tr. 405). JRD walked toward the pay phone, dug into the coin slot looking for loose

⁹ Specification 5 alleges that respondent failed to notify hospital police of his suspicion that a patient possessed an illegal substance. According to respondent, he was acting on a rumor rather than particularized reasonable suspicion. Even assuming he had an obligation to act based on reasonable suspicion, which is unclear since petitioner did not offer a rule to address this specification, there was no evidence of misconduct. *See Dep’t of Correction v. Jackson*, OATH Index No. 1346/04 at 7-8 (Aug. 3, 2004), *modified on penalty*, Comm’r Dec. (Jan. 4, 2005), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 06-07-SA (Jan. 9, 2006) (finding no duty to report where petitioner failed to establish that respondent was aware of criminal activity). This specification should be dismissed.

¹⁰ On cross, he testified that JRD also stated, “You have to pay me for what had happened” (Tr. 489) and he replied, “I don’t wanna hear it” and walked out (Tr. 490). Respondent testified he did not know what JRD meant by the statement (Tr. 492).

change, and then “shot back towards the B building elevator” where respondent was standing (Tr. 405-06). They did not talk as they waited (Tr. 504). The doors opened and, according to respondent, he got in and pressed the button for the second floor and JRD got in and pressed the button for the third floor (Tr. 406). Inside the elevator, JRD again asked him for money (Tr. 408), and respondent told him “I don’t want to hear it”; he was tired of JRD asking him for money and he felt harassed by it (Tr. 410). Respondent said when asking for money JRD would follow the person until they relented and gave it to him (Tr. 411). Respondent said he had never given paper money to any patient, but out of compassion he had given loose change, as he saw other staff members do (Tr. 409-10).

A pattern emerges in respondent’s testimony: he would give testimony about his actions, then the video would be played showing him engaged in acts different from his original description, and he would amend his testimony to account for the difference on the tape. His efforts to explain the discrepancies often were unsuccessful. For example, his testimony that the patient “came from behind” him was consistent with his claim that JRD was following him to harass him for money, but inconsistent with the video which clearly showed him leading the patient as they walked to the first floor elevator and then standing next to him as they waited. Similarly, he testified repeatedly that he was on his way to conduct rounds in C building when rounds were never done and, instead, he can be seen pacing up and down the hallway outside the smoke room.

The Alcove – 2nd Floor of B Building

At the elevator, respondent testified, he was on his way to the second floor to make rounds (Tr. 406). He said he always inspected the alcove area on the second floor of B building because occasionally he would find urine or defecation in that area as it is somewhat secluded (Tr. 407-08).

When he exited the elevator on the second floor, he said, he walked toward the A building. He noticed over his shoulder that JRD also got off the elevator (Tr. 411, 506). As he walked, Ms. Paulino who was pushing a cleaning cart asked him to open the men’s locker room for her and he did (Tr. 412). When he proceeded, he saw JRD walk toward Ms. Paulino’s cart and thought he might take something from the cart. Two years earlier a patient had stolen from housekeeping a set of keys that included a master key; he was told to write up the employee for the loss until he found video showing that a patient had actually taken the keys from the cart (Tr. 413-15). So he went back to warn Ms. Paulino to be careful because JRD might take something

from her cart.¹¹ He then turned back toward A building and noticed that patient JRD had “started to pursue” him, so he “shot into the alcove and . . . went into the bathroom” to avoid an argument with the patient (Tr. 415). He said hospital staff had been trained to avoid confrontation with a patient who “is getting agitated” (Tr. 418). So he entered the bathroom, alone, and locked the door.

On the video, respondent appears at Ms. Paulino’s cart at approximately 10:37:32 (Pet. Ex. 3-3). JRD is only seconds behind him. Ms. Paulino is at the men’s locker room which (from the number of steps respondent takes to reach it) appears to be 10 feet away from the alcove (Pet. Ex. 3-3; Tr. 286). Respondent unlocks the door for Ms. Paulino and assists her with the cart and then walks away. JRD is adjusting his pants wasteband as he follows and, as Ms. Paulino turns toward her cart, he walks over to her and faces her; he backs away from the cart but continues to face her, as if talking to her. The video is not of sufficient quality to show whether individuals are talking to one another and there is no audio. Respondent turns around and walks back to the door where Ms. Paulino is working and appears to say something to her as JRD looks on. After Paulino walks completely inside the room, at 10:38:12, the two men walk away down the hallway and turn into the alcove, JRD following behind respondent.

Respondent testified that when he reached the men’s room, he took out his key, unlocked the door and opened it, entered the room, closed the door, and engaged the secondary latch, all before JRD reached the door (Tr. 518). He said he sat on the toilet watching a shadow, which he assumed was JRD, move back and forth underneath the door (Tr. 421, 521). As he waited, there was no conversation (Tr. 524). He had his hospital phone with him and could have called security or hospital police, but he did not (Tr. 425). He said that, except for a few seconds, he saw JRD’s shadow pace back and forth outside the door continuously the entire time he was in the bathroom (Tr. 530). The video shows and respondent acknowledged that when JRD walked out of the alcove at 11:02:40, he had two items in his hands; respondent said he had “no idea” where they came from (Tr. 529). Respondent finally walked out of the alcove at 11:04:45, toward A building (Tr. 532; Pet. Ex. 3-3).

Mr. Bernasz, respondent’s supervisor, testified that there was no reason for respondent to be alone with a patient in the B building alcove for 20 minutes (Tr. 151).

¹¹ Despite this lengthy explanation given in his direct testimony, he denied on cross having a concern that JRD would steal something from the cart (Tr. 505-06).

Rosa Paulino was the only housekeeping aide assigned to B building on the morning of February 18 (Pet. Ex. 13). She did not clean the second floor alcove or the rooms in the alcove because the area is not cleaned on weekends (Tr. 282-83, 285). Though not assigned to clean it, Ms. Paulino was assigned to check the alcove to see whether it needed attention (Tr. 140, 164). She has cleaned that area on the weekend only once or twice, when she saw urine outside the patient relations office (Tr. 284, 292). Ms. Paulino knew the location of the dementia unit (Tr. 279).

She said she encountered respondent on the second floor of B building on February 18, around 10:37, when she asked him to open the men's locker room so she could clean it (Tr. 286; Pet. Ex. 3-3). She did not notice JRD at the time and paid no attention to him (Tr. 287-88). She noted that respondent was polite to her and smiled. He did not indicate that JRD was following him nor did he appear to be in distress. She had no recollection of him telling her to keep an eye on her cart, and she denied that patients regularly take things from her cleaning cart, which contained cleaning chemicals, toilet paper, hand towels, mops and the like. She was not aware of that type of theft ever happening (Tr. 291, 298). As she went into the men's locker room, she did not notice where respondent or the patient went.

Ms. Paulino described respondent as "very respectful", helpful, and nice; she said he never told "stupid jokes" or acted disrespectfully (Tr. 294-96). She had never seen him act inappropriately with patients. She said a petition had been circulated among Coler employees in support of him and she had wanted to sign it but did not see it when it was being circulated.

Respondent's claimed concern that JRD would take something off the cleaning cart seemed fabricated and was contradicted by Ms. Paulino. He testified that he warned Ms. Paulino "you gotta watch this patient" around the cart, even though the cart contained only cleaning supplies and chemicals (Tr. 508). But Ms. Paulino, who held a high opinion of respondent, disputed that he said this to her, and the video seems to confirm her testimony: after we see respondent lean over and speak to her, she turns her back to JRD and walks inside the locker room and away from her cart, showing no concern at all about his presence there (Pet. Ex. 3-3). JRD made so little impression on Ms. Paulino that, later, she did not recall his being present in the hallway at all.

The video proved to be an instrumental part of petitioner's circumstantial case. It demonstrates the concerns raised by hospital police who first viewed the tape and saw respondent's consistent, though subtle, contact with the patient over the course of an hour.

Having heard respondent's explanations for his actions, whereabouts, and intentions that day, in conjunction with the video, I was struck by the number of times they were contradicted by the video.

The video does not corroborate respondent's claim that he was being harassed by JRD or that he went into the men's room to escape the patient. From the video, there is no indication of distress in respondent's actions, gestures or body positioning. He does not motion JRD away from him. What I can see of his facial expression does not display alarm. His gait and demeanor show no urgency; indeed, both men appear calm and easygoing throughout the video. Respondent described himself as "shoot[ing] towards the alcove" to escape the patient (Tr. 512), when the video showed him walking at a leisurely pace.

In fact, respondent admitted he did not feel harassed by JRD during much of their encounter (Tr. 507). Though it is not clear when his feeling changed, respondent testified that he eventually "felt . . . that he's behind me, he's not gonna stop following me or harassing me" (Tr. 512). When asked to explain when JRD made him feel so harassed that he decided to turn into the alcove and lock himself in the bathroom, he said it was when they were inside the bathroom on the first floor (Tr. 511). This drastically departed from testimony he had offered only moments earlier in which he denied feeling harassed even at 10:38, the time that he and JRD turned into the alcove (Tr. 510).

In an attempt to explain why he stayed inside the men's room for so long (24 minutes), respondent said he did not want to be "badgered anymore for money", so in order to avoid an argument or fight with the patient he waited in the bathroom and left only when the shadow stopped moving outside the door (Tr. 421-22). Although hospital training procedures instruct staff to walk away from a patient who becomes confrontational or aggressive and to return after they have calmed down (Tr. 338), there is no indication on the video that the patient was agitated or aggressive. Moreover, staff are advised to report any aggressiveness to hospital police (Tr. 342), which respondent admittedly did not do despite having a phone with him. He explained his failure to call hospital police or security by saying that he did not want to "escalate" the situation "just because he's asking me for money", that he did not feel "threatened by this patient" (Tr. 425), and there was nothing to report (Tr. 525, 527). He said he did not feel trapped and he could have left if he had wanted to, but he was trying to "diffuse the situation" (Tr. 526). On the other hand, he said he did not come out until he felt it was "safe" (Tr. 521). In 19 years at Coler,

he had never been trapped in a bathroom by a patient (Tr. 524). In hindsight, he thought it may have been a “bad judgment call” (Tr. 422).

It was simply not believable that a supervisor, or any level employee, would think that hiding inside of a bathroom for 24 minutes was a solution even to the problem that respondent described. And, in this case, there was no evidence that respondent’s description was accurate: the patient, who has a slight physical stature,¹² appeared unconcerned and unimposing.

There were so many contradictions in respondent’s testimony that I deemed it wholly unreliable. If he had felt unsafe enough to lock himself inside a bathroom for 24 minutes, the matter reasonably required police involvement. If he did not feel “threatened” and thought there was “nothing to report” to police, he should have simply walked away from the patient. The two sets of conditions cannot coexist in the same moment. The only logical conclusion to draw is that they are falsehoods offered to cover up respondent’s actual conduct inside the men’s room for those 24 minutes.

I have found petitioner’s witnesses credible and the hearsay statements detailing respondent’s performance of a sex act upon a patient of the facility reliable. I have also found respondent’s testimony generally and the explanations for his actions, in particular, wholly unreliable. Therefore, petitioner has sustained its burden of proof and established by a preponderance of the credible evidence that respondent committed misconduct by having sexual contact with a patient. The fact that the patient claims the sex act was not unwanted does not mitigate the finding that it was misconduct.

FINDINGS AND CONCLUSIONS

1. Respondent is guilty of engaging in a sex act with patient JRD in a staff men’s room on February 18, 2012, for which respondent paid \$5, as alleged in specifications 3 and 4.
2. Respondent was engaged in this improper act for approximately 24 minutes during work hours, constituting abandonment of his work assignment, as alleged in specification 1.
3. Petitioner failed to prove that respondent was in an area that was unauthorized to him, as alleged in specification 2.

¹² Director Aleo estimated that JRD was five feet six inches tall and weighed 130 pounds (Tr. 268), whereas respondent said he was five feet eight inches tall and weighed about 260 pounds (Tr. 533).

4. Petitioner failed to prove that respondent had an obligation to notify hospital police of a suspicion that a patient possessed an illegal substance, as alleged in specification 5.

RECOMMENDATION

Upon making the above findings, I obtained and reviewed an abstract of respondent's personnel record as maintained by the hospital. He commenced his employment with the hospital on January 4, 1993. He was Employee of the Year in 1997 and 2009, and received Certificate of Service Awards in 2003 and 2009. He received outstanding performance reviews in each of the last three annual reporting periods. His prior disciplinary record is without blemish. He received a 30-day pre-hearing suspension without pay as a result of the present charges and has remained suspended, with pay, since then.

For the misconduct sustained here, the hospital seeks termination of his employment.

In mitigation of his penalty, respondent has cited his clean disciplinary history and offered his outstanding performance reviews, awards, and a number of character references. Respondent introduced six letters of support written by co-workers who have known him to be "hardworking and dedicated", "willing to help", "respectful", "responsible", "courteous" and "a good supervisor" (Resp. Ex. Y; Tr. 435-36). In addition, he submitted a petition signed by 128 hospital staff members attesting to his good character (Resp. Ex. Z; Tr. 439).

The misconduct proven here is of the severest kind, however, and overwhelms any possible mitigation. Awards and even excellent work performance are no counterweight to the perfidy committed by respondent against this patient.

As a general rule, any public employee found to have committed sexual misconduct in the workplace is dismissed from service. *See, e.g., Health & Hospitals Corp. (Harlem Hospital) v. Thurman*, OATH Index No. 1651/11 (July 21, 2011) (termination of hospital housekeeping worker who sexually assaulted a patient); *Fire Dep't v. Hardy*, OATH Index No. 1430/10 (Jan. 21, 2010) (termination would be recommended if EMT guilty of sexual assault of patient had not already resigned); *Dep't of Juvenile Justice v. James*, OATH Index No. 847/06 (July 28, 2006) (termination of juvenile counselor guilty of sexual abuse for rubbing juvenile resident's foot against his penis). Certainly, a hospital employee who sexually abuses a patient poses a serious threat to future patients, co-workers, and the facility as a whole. Such a worker must be terminated from his employment.

Although patient JRD stated in his interview that the sexual contact was not unwanted, it is not clear to what extent this view was influenced by a meager five-dollar weekly income and need to finance his cigarette smoking habit, which was the first thing he attended to after leaving the second floor bathroom with the five dollars respondent gave him. Even if it were true, respondent's actions were clearly exploitative of a patient whose illness is characterized by loss of cognition and judgment, and whose medical needs have required his long-term convalescence in the facility.¹³ It is no surprise that JRD would not see himself as a victim of respondent's actions. Counsel for the hospital aptly summarized in closing: as a dementia patient, JRD is in some ways the "perfect victim" because he is unlikely to report an offense against him, and, if anyone learned of it, they would be unlikely to believe him. If someone did believe him, he might not remember enough to be a good witness, and if he did remember, he might not testify because, having been confined to the facility for two years, the world outside has become foreign (Tr. 564). These are the complications of protecting such patients. The callous disregard for this patient's welfare is why the ultimate penalty, termination of employment, must be imposed. *See also Brown v. Ristich*, 36 N.Y.2d 183, 190 (1975) (upholding termination of a school aide found to have struck a patient at a state hospital for the mentally disabled).

In consideration of the foregoing, I recommend respondent's dismissal from the civil service.

Tynia D. Richard
Administrative Law Judge

December 14, 2012

ROBERT K. HUGHES

Executive Director

APPEARANCES:

RICHARD WASHINGTON, ESQ.

Attorney for Petitioner

TRAUB & TRAUB, P.C.

Attorneys for Respondent

BY: DORIS G. TRAUB, ESQ.

¹³ Respondent's assertion that he was unaware JRD had dementia was not worthy of belief, particularly given the knowledge he otherwise demonstrated of respondent and his habits.