Dep't of Correction v. Massie

OATH Index No. 651/13 (Mar. 29, 2013)

Petitioner established that respondent was disrespectful towards his supervisors, refused to conduct workshops as required by his supervisors, completed significantly fewer discharge letters than other counselors in his unit, refused to complete the letters as directed, and displayed a pattern of unprofessional and unproductive conduct and refusal to follow his supervisor's orders. In addition, respondent's carelessness in entering information into his personal logbook constitutes misconduct. Charge that respondent failed to obey an order to submit a report is not sustained. Petitioner also failed to prove that respondent, with the intent to defraud, falsely and/or misleadingly stated he helped inmates and the total number of applications he processed. 45-day suspension without pay recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
RICHARD MASSIE
Respondent

REPORT AND RECOMMENDATION

ASTRID B. GLOADE, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, the Department of Correction ("Department"), pursuant to section 75 of the Civil Service Law. Respondent Richard Massie, an Associate Counselor I, is alleged to have been disrespectful towards a supervisor and to have failed to submit a report of the incident (ALJ Ex. 1). It is also alleged that he refused to complete social security applications in the manner directed, completed significantly fewer discharge letters than other counselors, refused to complete discharge letters in the required manner, and displayed a pattern of unproductive and unprofessional conduct and refusal to obey directives (ALJ Ex. 2). Finally, petitioner claims respondent falsely and/or misleadingly stated he helped inmates with social security and birth certificate applications, falsely and/or misleadingly stated

the total number of social security and birth certificate applications he processed in his monthly report, and made false entries into the Department's records or prevented the making of true entries with intent to defraud (ALJ Ex. 3).

During a four-day hearing conducted at this tribunal, petitioner presented documentary evidence and the testimony of four witnesses: Frankie Mitchell, Rudy Taylor, Arthur Harris, and rebuttal witness Correction Officer Patricia Steed. Respondent presented documentary evidence and the testimony of Ronald Moore, and testified on his own behalf.

Based on the evidence, I find that petitioner proved most of the charges and recommend a penalty of 45 days' suspension without pay.

ANALYSIS

Respondent has worked for the Department since 1990 and currently works at the Eric M. Taylor Center ("EMTC"), to which he has been assigned since October 2007. Respondent is an Associate Correctional Counselor I, a title he has held since early 2008 (Tr. 370-71). Respondent works in the counseling unit, which provides social services to inmates. A goal of the counseling unit is to equip inmates with identification they can use in making the transition back into the community after having served their sentences. In keeping with that goal, the counselors in the unit assist inmates with obtaining documents such as discharge letters, birth certificates, and social security cards (Tr. 13-14).

Frankie Mitchell, an Associate Correctional Counselor II who became respondent's immediate supervisor in May 2010, changed procedures whereby counselors rendered services to inmates (Tr. 136). The changes to the processing of discharge letters, social security and birth certificate applications set in motion the events that gave rise to the charges against respondent.

Disrespect towards a supervisor and failure to obey an order to submit a report

Petitioner alleges that on October 4, 2011, in a meeting with his supervisors, respondent was disrespectful in his tone and demeanor and failed to obey an order to submit a report about his behavior (ALJ Ex. 1).

Discharge letters, or letters of incarceration, are letters the Department provides to inmates that can be used to show the inmate has completed his or her incarceration. Inmates can also use the discharge letters to access services such as mental health and drug treatment

programs and social security benefits (Tr. 15). When Mr. Mitchell started working at EMTC, inmates requested discharge letters using sign-up sheets that were placed in each housing unit. The counselors collected the sign-up sheets, then generated and printed letters for each housing area, which were delivered to the housing areas by inmate workers. Mr. Mitchell became concerned that inmate workers who delivered the discharge letters had access to the social security numbers printed on the discharge letters (Mitchell: Tr. 17-19, 64-6; Massie: Tr. 375-6). He was also concerned that inmates who could not read and/or write were unable to use the signup sheets to request a discharge letter and inmates under mental observation or those who were unable to understand the need for a discharge letter were not getting them (Tr. 97-98).

Mr. Mitchell testified that after he began to supervise the counseling unit, in consultation with his supervisors, he changed the process for generating discharge letters (Tr. 18, 143-44). The new procedures required the counselors to retrieve a list from the facility's general office, referred to as an "alpha sheet" or "discharge list," of all the inmates who were to be discharged within a one-week period, identify the inmate's housing area within the facility, print out a discharge letter for each inmate, sign the letters and sort them by housing area, then deliver the letters to the inmates (Mitchell: Tr. 18; Moore: Tr. 361-62; Pet. Ex. 18). The counselor who was responsible for the discharge letters was to produce and distribute them by Wednesday of each week before the counselor left work for the day (Tr. 98-99).

The effect of this change to the process for providing discharge letters was an increase in the counselors' workload, as they had to generate and deliver discharge letters for all inmates scheduled to be released within a certain period, rather than produce letters only for those who requested it. Mr. Mitchell testified that as a result of the change in procedures, the counselors' workload went from processing 80 discharge letters per week to an average of 230 per week (Tr. 94-95).

According to Mr. Mitchell, respondent objected to the changes in the process for delivery of discharge letters, telling Mr. Mitchell he did not have the strength to deliver the letters, and sought to return to the system whereby inmate workers delivered the letters. Mr. Mitchell refused to revert to the prior system of inmate delivery of the letters. Respondent then tried to determine who was responsible for putting social security numbers on the letter (Tr. 65-66). He sent an e-mail to the Department's Information Technology ("IT") helpdesk on September 27, 2011, in an effort to have the social security numbers removed (Resp. Ex. A; Tr. 395). Upon

learning about respondent's communication with the IT department, Arthur Harris, Executive Director of the Program Management Unit and one of Mr. Mitchell's supervisors (Tr. 278-79), alerted Mr. Mitchell and respondent was told to stop contacting IT (Tr. 76, 189). Mr. Mitchell testified that respondent did not cease his efforts, which resulted in the need for a written directive (Tr. 76).

Mr. Mitchell and Rudy Taylor, supervisor of the counseling unit and Mr. Mitchell's immediate supervisor (Tr. 256), met with respondent at his cubicle on October 4, 2011, to discuss respondent's contacting the IT department and to have him sign an individual conference summary sheet (Tr. 72-73; Pet. Ex. 9; Resp. Ex. A). Mr. Mitchell testified that respondent became angry and told them they could "shove it up our asses, and that this wasn't Nazi Germany, he could contact who the heck he wanted" and they could "go fuck [themselves]" (Tr. 74). Mr. Mitchell also testified that respondent asked Mr. Taylor "what is this fucking paper?" and told him to "get the fuck" out of his face (Tr. 74-75). Similarly, Mr. Taylor testified that respondent referred to "Nazi Germany" and used the word "fucking" during the encounter (Tr. 261-63). It was Mr. Taylor's recollection that respondent crumpled up the conference summary sheet, said "stick it up your ass," and threw it in the garbage (Tr. 260).

Ronald Moore, another counselor in the unit, was present during this encounter and heard respondent's and Mr. Mitchell's voices escalating during their conversation. He testified that respondent said they could not tell him to refrain from calling a number that was for everyone to call, that "this is not a Fascist society," and that they cannot act like Fascists (Tr. 347-49). He also recalled that respondent called Mr. Mitchell and Mr. Taylor Fascists (Tr. 355). On direct examination, Mr. Moore denied hearing respondent use the words "out of their fucking minds" during the encounter (Tr. 354). Interestingly, Mr. Moore did not deny hearing respondent say "get the fuck" out of his face, but instead explained that "blue language," which he defined as cursing, is part of the regular interaction among the counselors in the unit (Tr. 354-55, 365-66). While Mr. Moore testified to the regular use of profanity within the unit, he drew a distinction between general use of profanity and cursing at a supervisor, explaining that although he might use profanity in the course of interaction with a supervisor, he would not curse at a supervisor (Tr. 366).

Respondent's testimony was largely consistent with that of the other witnesses. He readily acknowledged that during the October 4, 2011 meeting, he was upset and angry and that

he "called them a couple of fascists and a couple of Nazis" (Tr. 398). In response to a question about whether he had directed other profanity towards his supervisors, respondent denied using profanity, stating, "to me, calling somebody a Nazi is – that's enough profanity" (Tr. 399). Respondent admitted that his tone might have been loud, while Mr. Mitchell and Mr. Taylor were "very quiet…as if they knew that they had done something wrong" (Tr. 399). Respondent also testified that he asked his supervisors if their use of the expression "rectify" respondent's behavior in the individual conference summary meant he was "going to get a spanking afterwards" (Tr. 392; Pet. Ex. 9; Resp. Ex. B).

There is some discrepancy among the accounts of the witnesses to the events surrounding the October 4, 2011 meeting. Specifically, Mr. Taylor testified that he believed respondent crumpled up the conference summary sheet and threw it in the garbage, but respondent produced what he asserted is the original document handed to him on October 4, 2011, which had not been crumpled (Tr. 399-401; Pet. Ex. 9; Resp. Ex. B).[1] Whether respondent crumpled the document and threw it in the garbage, as Mr. Taylor suggested, or kept it in its original condition might go to Mr. Taylor's reliability as a witness; however, respondent's admissions regarding the charged conduct obviate the need to assess Mr. Taylor's reliability on this point.

Respondent admitted that he called his supervisors "Nazis," and "Fascists," and conceded he was "upset" and "angry" when he did so. During his testimony, respondent appeared to take delight in describing how he spoke to his supervisors in a manner that was insolent and disrespectful. He testified that the use of "Nazi" and "Fascist" to him amounts to profanity, signaling that his intent was to offend his supervisors. Respondent only expressed remorse that his statements, meant to be insults, might not have hit their mark because he "realized [his supervisors] didn't even know what [he] was talking about because they weren't even around when Nazis were current events" (Tr. 398). Respondent's own testimony established that he directed highly inappropriate remarks to his supervisors.

Petitioner's witnesses were credible in their testimony that respondent directed the word "fuck," or variations on that word, to them in the course of the encounter. Respondent's use of

[1] Petitioner argued that respondent's Exhibit A should be precluded on the grounds that the document should have been turned over during discovery and that petitioner had been unable to ask prior witnesses about the document (Tr. 403). Respondent and his counsel explained that respondent had only discovered the document over the weekend preceding his scheduled testimony (Tr. 404; 416-17). The document was admitted into evidence over petitioner's objection. *See Dep't of Environmental Protection v. Ginty*, OATH Index No. 1627/07 at 5 (Aug. 10, 2007) (motion to preclude evidence due to petitioner's failure to produce documents prior to trial denied where counsel was unaware of the existence of the documents until witnesses testified at trial).

profanity is consistent with the evident disdain he demonstrated towards his supervisors during the encounter.

This tribunal has held that not every disagreement with a supervisor constitutes misconduct, even if voices are raised and emotions vented during the disagreement. *See Transit Auth. v. Victor*, OATH Index No. 799/11 at 4 (Mar. 3, 2011), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-52-A (Aug. 9, 2011) (*citing Health & Hospital Corp. (Woodhill Medical & Mental Health Ctr.) v. Freeman*, OATH Index No. 1399/06 at 9 (July 20, 2006); *Transit Auth. v. Nixon*, OATH Index No. 2131/96 at 15-16 (Mar. 31, 1997), *modified on penalty*, Auth. Dec. (May 16, 1997); *Human Resources Admin. v. Bichai*, OATH Index No. 211/90 (Nov. 21, 1989), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 90-54 (June 15, 1990)); *Dep't of Correction v. Walker*, OATH Index No. 1394/08 at 6-7 (Oct. 17, 2008), *modified on penalty*, Comm'r Dec. (Dec. 4, 2008).

Indeed, it is permissible for an employee to disagree with a supervisor so long as the disagreement remains within the bounds of decorum and discretion. *Health & Hospital Corp. (Lincoln Medical & Mental Health Ctr.) v. Thomas*, OATH Index No. 531/04 at 5 (May 4, 2004). In determining whether a disagreement rises to the level of misconduct, the tribunal considers a number of factors, including: whether threats, insolence, or profanity were used, disruption to the workplace caused by the disagreement, and whether it occurred in front of coworkers and/or members of the public. *See Victor*, OATH 799/11 at 5.

Considering these factors, respondent's conduct in calling his supervisors "Nazis" and "Fascists" was offensive and inappropriate, and constitutes misconduct. *See Human Resources Admin. v. Seemer*, OATH Index No. 1651/10 at 7 (Feb. 26, 2010) ("[d]isplaying a Nazi salute is clearly offensive and inappropriate behavior for any workplace. Giving such a salute to one's supervisor is disrespectful and discriminatory behavior that should not be taken lightly"); *Dep't of Parks & Recreation v. Wallace*, OATH Index No. 864/93 at 6 (Aug. 3, 1993) (there can be little question that calling one's supervisor "a Nazi who used Gestapo tactics" is inappropriate and constitutes insubordination).

In addition, respondent's use of the word "fuck," or variations on that word, is misconduct. While respondent's witness, Mr. Moore, testified that cursing, or "blue language," is a regular part of interaction in the counseling unit, this does not excuse respondent's use of profanity under these circumstances. This tribunal has held that language must be considered

within its context because language might be inappropriate in one setting, but acceptable in another. *See Dep't of Correction v. Peterson*, OATH Index No. 2095/12 at 7 (Jan. 11, 2013). Indeed, this tribunal has drawn a distinction between the use of mild profanity that is a regular part of interaction in a "workshop" setting and obscenities in an office setting that result in a public display and/or is directed at a supervisor. *See Triborough Bridge & Tunnel Auth. v. McAllister*, OATH Index No. 1780/12 at 6-7 (Oct. 16, 2012), *adopted*, President's Dec. (Nov. 30, 2012) (respondent's posting of a note containing profanities on an employee bulletin board in a lobby area constitutes misconduct); *Health & Hospitals Corp. (Coler-Goldwater Specialty Hospital & Nursing Facility) v. Ramsey*, OATH Index No. 724/04 at 5 (Apr. 16, 2004) (while mild profanity may be permissible and expected in a workshop environment, maintenance worker went too far when he told his supervisor that he did not "know what [he is] fucking doing"); *Dep't of Sanitation v. Mitchell*, OATH Index No. 1823/00 at 3, 7 (Nov. 3, 2000), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 01-60-SA (July 27, 2001) (sanitation worker found guilty of misconduct for telling his supervisor, "Fuck you. Who do you think you are? You're a piece of S-H-I-T"). Given that respondent was in an office setting and speaking with his supervisors, his use of profanity was clearly inappropriate.

Petitioner, however, did not meet its burden of proving that respondent failed to obey an order to produce a report about his behavior. Respondent denied that he was told to write such a report and petitioner produced no evidence that such an order was given (Tr. 407-08). Indeed, respondent's immediate supervisor, Mr. Mitchell, testified that he did not ask respondent to write an incident report about the October 4, 2011 conference, nor did he hear Mr. Taylor or Mr. Harris direct respondent to write such a report (Tr. 186). Therefore, petitioner did not prove that respondent failed to obey an order to write a report about his conduct.

In sum, petitioner has established that respondent was disrespectful in tone and demeanor to his supervisors when he called them "Nazis" and "Fascists," and when he used the word "fuck" or variations on that word during a meeting on October 4, 2011. Petitioner has not established that respondent failed to comply with an order to write a report about his behavior.

Refusal to complete social security applications in the manner directed

Petitioner alleges that respondent failed to efficiently perform his duties, engaged in conduct unbecoming a Department employee and of a nature to bring discredit to the Department

and failed to obey lawful orders in that he refused to comply with directions to complete social security applications in batches of ten on June 21, July 12, August 8, August 30, September 20, and October 11, 2011, all of which dates are Tuesdays, except for August 8, 2011, which is a Monday (ALJ Ex. 2, Specification 1).

Respondent's unit assists inmates to obtain birth certificates and social security cards, which are available to inmates who are serving sentences of less than a year (Tr. 14). Inmates who were born within one of the five boroughs of New York City and have at least 30 days left on their sentences are eligible to receive birth certificates (Tr. 104). Inmates with as few as two days left on their sentence can apply for social security cards (Tr. 102). Prior to Mr. Mitchell's arrival, inmates wishing to receive assistance with birth certificate and social security applications submitted service request slips, which were available throughout the jail, and the counselors responded to the slips. Inmates indicated the specific service they desired and were summoned from their housing area to meet individually with a counselor about the request (Mitchell: Tr. 98; Massie: Tr. 372).

Under Mr. Mitchell's supervision, the process changed so that Tuesdays were dedicated to helping inmates complete birth certificate and social security applications in a workshop setting. (Tr. 98; Pet. Exs. 16, 18). During the workshops, which are held for groups of up to ten inmates, the counselors provide guidance on how to complete the applications and assist eligible inmates complete the applications. The counselors also review the completed applications and process them for submission to the Social Security Administration (Tr. 16, 98). When inmates submit applications, they are entered into the social security and/or birth certificate logbooks (Tr. 17, 148, 164). Mr. Mitchell testified that it takes between five and fifteen minutes to complete the social security application form, depending on the inmate (Tr. 100; Pet. Ex. 11), and about five minutes to complete the birth certificate application form (Tr. 103; Pet. Ex. 12).

There were different explanations given as to why the process for providing birth certificate and social security application assistance to inmates was changed: respondent claimed that Mr. Mitchell stated they were not getting enough numbers in their statistics (Tr. 372), suggesting that the process was changed to enhance the productivity, or the appearance of productivity, of the unit. Other witnesses testified that the system in place when Mr. Mitchell arrived was time-consuming and, because the average length of incarceration was 48 days, the

unit needed to get the documents to the inmates as soon as possible (Mitchell: Tr. 14-16, 98; Harris: Tr. 294).

Mr. Mitchell testified that when he first changed the procedures for providing services to inmates, he communicated those changes to respondent and the other counselor in the unit (Tr. 97). Mr. Mitchell expected respondent to participate in a rotation that would have distributed the responsibility for processing the social security and birth certificate applications, as well as discharge letters, among the three counselors in the unit. When respondent failed to participate in the rotation, Mr. Mitchell and Mr. Moore alternated responsibilities for the Tuesday workshops and the Wednesday discharge letters (Tr. 18, 146).

It is clear from the evidence that the rotation of responsibilities for the workshops among the three counselors did not occur. The critical issue for determination is whether, as respondent claims, he and Mr. Mitchell agreed that in lieu of the workshop groups respondent could conduct individual meetings with inmates who had difficulty completing the applications during the workshops, leaving the other two counselors in the unit to rotate responsibility for conducting the workshops. The credible evidence supports petitioner's allegation that respondent was required, but failed, to complete the applications according to the established procedures.

Petitioner's evidence establishes that respondent was notified on several occasions that he was required to complete the social security applications according to the new guidelines established for the counseling unit. In addition to Mr. Mitchell's verbal directives (Tr. 241-42), there was a March 11, 2011 e-mail from Mr. Harris to respondent and the other counselors that summarized "operational specifications that **all** counseling services unit personnel will follow relevant to the processing of Inmate Verifications, Social Security and Birth Certificate application processing" (emphasis in the original) (Pet. Ex. 18). That e-mail outlined the new procedure and rotation schedule. Moreover, on May 10, 2011, Mr. Mitchell issued a memorandum, which specified that Tuesdays were to be dedicated to processing social security and birth certificate applications (Pet. Ex. 16). Mr. Mitchell later reported to Mr. Harris that after the May 10th memorandum had been distributed to staff in the counseling unit, respondent indicated that he did not intend to follow the new process and would not complete social security or birth certificate applications (Pet. Ex. 16). Mr. Mitchell testified that respondent "never participated in the group instruction [social security and birth certificate workshops] and based on the needs of the jail, he didn't meet the necessities for that unit" (Tr. 20). Likewise, Mr.

Taylor testified that they constantly reminded respondent to complete birth certificates and social security applications, and he invariably came up with an excuse not to do so, including that the documents were improperly worded or it was "against the Federal government" to do so (Tr. 259, 264).

While respondent acknowledges that he did not conduct the workshops (Tr. 443-44), he testified that he believed he was not required to do so. Respondent contends that he notified Mr. Mitchell that he had problems with his feet and legs, and was unable to stand to conduct the workshops. He further asserted that Mr. Mitchell wanted the counselors to walk around and review the inmates' work during the workshops, which he said he was unable to do (Tr. 373-74). Respondent recalled that Mr. Mitchell suggested he could sit at a table and conduct the workshops, but respondent told Mr. Mitchell he could not do so and still review the inmates' progress as they completed the forms. Respondent maintained that he and Mr. Mitchell had a one-to-one supervision meeting in which they agreed respondent would conduct individual meetings with inmates who were illiterate, did not understand the forms, or had some other difficulty completing the forms. Respondent testified that Mr. Mitchell memorialized their agreement in a supervision form prepared by Mr. Mitchell (Tr. 374).

Respondent's witness corroborated his testimony that at some point respondent was given the impression that he did not have to conduct the social security and birth certificate workshops. Mr. Moore testified that during a unit meeting held when he first joined the unit in May 2011, Mr. Mitchell said that respondent was to process five inmates, then retreated from the number five after Mr. Moore told him there were no quotas in their contract, and stated, "okay…he'll do as many as he can, but then we will process them the way that I said. We will send them to Mr. Massie when there was difficulty" (Tr. 332-33). Mr. Moore further testified that it was his understanding that respondent was assigned individual cases because standing in the morning and afternoon workshops was very difficult for him (Tr. 333).

Petitioner's documentary evidence creates some ambiguity as to whether there was an agreement for respondent to process only individual social security applications. Indeed, in an individual conference summary dated June 14, 2011, shortly after Mr. Moore's arrival in the unit, under the heading "Issues Resolved," Mr. Mitchell wrote:

> Mr. Massie affirms that on Tuesdays he is able to complete approximately 6 birth certificate and social security applications

> (weekly) on an individual basis. On June 7th Mr. Massie completed 5.

(Pet. Ex. 15). Mr. Mitchell and respondent signed the individual conference summary. The language quoted above suggests that Mr. Mitchell and respondent had resolved issues regarding his participation in the workshops by agreeing that respondent would be responsible for completing six applications per week.

Mr. Mitchell contended, however, that he viewed this document as a reflection of respondent's continued refusal to participate in processing social security and birth certificate applications or discharge letters in the manner in which he was directed (Tr. 117). Mr. Mitchell denied having reached an agreement with respondent by which respondent would not conduct workshops, but would instead hold individual meetings with inmates who could not be helped during the workshops. He testified that respondent was asked to conduct workshops, but refused to do so, and Mr. Mitchell felt rather than have respondent read the newspaper, he settled for whatever work he could get out of respondent (Tr. 149).

In making a credibility determination, this tribunal may consider such factors as witness demeanor; consistency of 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. *Dep't of Sanitation v. Menzies,* OATH Index No. 678/98 at 2 (Feb. 4, 1998), *aff'd,* NYC Civ. Serv. Comm'n, Item No. CD 98-101-A (Sept. 9, 1998).

Here, respondent's version of these events is supported by the testimony of his witness, Mr. Moore, who appeared to be a credible witness. While respondent and Mr. Moore had worked in the same program several years before they again became colleagues in the counseling unit (Tr. 367), petitioner established no basis for concluding that Mr. Moore was biased in favor of respondent. In fact, Mr. Moore was one of the two employees on whom the primary burden of the workshops and discharge letters fell after respondent did not participate in the rotation, suggesting Mr. Moore's workload increased because of respondent's failure to participate in the rotation, which logically should have the opposite effect.

However, even crediting Mr. Moore's testimony that an agreement was in place when he arrived at the unit so that respondent was not required to conduct workshops, the agreement could have been rescinded without his knowledge. Indeed, Mr. Moore conceded that he was not present at individual conferences between respondent and his supervisor (Tr. 364).

In addition, there is credible evidence that respondent's supervisors consistently sought to make respondent fully participate in the social security and birth certificate applications workshop rotation. In a memorandum Mr. Mitchell issued on May 27, 2011, about the time Mr. Moore started working at the counseling unit, Mr. Mitchell advised Mr. Harris that respondent "still refuses to provide inmates with discharge letters utilizing the discharge list," and "will deal with [inmates] on a 1-1 basis" regarding social security and birth certificate applications. The memorandum further states that respondent "refuses to sign any documentation that even refers to social security, birth certificates or discharge letters claiming that neither of these can be found in his tasks and standards" (Pet. Ex. 14).[2]

Moreover, in his September 21, 2011 memorandum, Mr. Mitchell wrote that following his distribution of the May 10, 2011 memo describing the new process for birth certificate and social security applications, respondent "made it clear verbally and with his actions that he did not intend to adhere to this new process and would not complete any Social Security or Birth Certificate applications" (Pet. Ex. 16). He further noted that respondent had stated he would be able to complete six applications per week, but had failed to complete even that amount.

Mr. Mitchell testified that he continued to discuss with respondent the needs of the counseling unit and issues regarding respondent's productivity. He said he told respondent that he expected him to share the workload and continued to document respondent's reason for not participating, which was that he was not well enough to do so (Tr. 89). In addition, Mr. Mitchell testified that he communicated with Mr. Harris about respondent's refusal to adhere to the new procedures "despite many conversations" with respondent (Tr. 119-20; Pet. Ex. 16). With evident exasperation, Mr. Mitchell stated that he did not reach an agreement with respondent that allowed him to serve inmates only in individual meetings. To the contrary, he asked respondent to conduct the social security and birth certificate workshops, but "[w]hen you are getting nothing, you'll settle for something" (Tr. 149).

Mr. Mitchell credibly testified about the impact of respondent's refusal to participate in the unit's work. He stated that the changes he implemented in the counseling unit resulted in

[2] Mr. Mitchell also testified that respondent indicated that he did not want to process social security and birth certificate applications because he viewed them as the responsibility of other governmental agencies, and because nothing in his tasks and standards indicated that he had to process them (Tr. 114). Similarly, Mr. Taylor testified that when he told respondent to complete discharge letters, social security applications, and birth certificate applications, respondent told him it was against the federal government to do so (Tr. 259, 264, 266). There was, however, no evidence or other basis offered to support such a claim.

increased work for the staff. As a result, respondent's refusal to comply with the new procedures made the burden on the other two counselors, including Mr. Mitchell, even heavier. Mr. Mitchell also believed it was unfair for two of the counselors in a three-counselor unit to be responsible for most of the unit's work (Tr. 120). In a memorandum to the executive director of the program, he described the difficulties created by respondent's refusal to comply with the procedures he had implemented, including the "unfair burden on the remaining staff," and requested that respondent be moved from the unit (Pet. Ex. 16).

Respondent, on the other hand, claimed he was unable to participate in the workshop and discharge letter rotation because medication he took caused blurred vision, which prevented him from reading the list of inmates to be discharged, and feet and leg problems interfered with his ability to stand during the workshops and walk around the facility to deliver the discharge letters (Tr. 373-74, 378-80). Respondent testified that he notified the Department of his limitations and gave Mr. Harris a letter from his doctor regarding the problems caused by his medication (Tr. 378).

There is some support for respondent's claim that he notified petitioner of his claimed medical disability. By e-mail dated March 14, 2011, respondent advised Mr. Harris that side effects of medication he was taking and limitations to his physical mobility prevented him from performing the tasks in the new operational procedure relating to the discharge letters (Pet. Ex. 18). Mr. Harris answered respondent's e-mail with a request for medical documentation "for an alternative work assignment to be given very serious consideration" (Pet. Ex. 18). Mr. Harris testified that although he never received the requested documentation, it was his understanding that respondent submitted medical documentation to Mr. Mitchell (Tr. 305-06). Mr. Mitchell, however, testified that while respondent claimed to have submitted documentation, he never received medical documentation, nor did the administrative office (Tr. 118-19).

Mr. Mitchell testified that respondent did not bring to his attention any specific issues he had with leading the social security workshops. According to Mr. Mitchell, while he understood that respondent had medical issues, they were never specifically articulated to him as a reason respondent could not conduct workshops, given that there was the option of respondent conducting the workshops while seated (Tr. 20). Furthermore, while respondent gave health-related issues as his reason for not participating in the workshops, he submitted no evidence to this tribunal that he provided documentation to petitioner regarding his asserted disability.

In the context of disciplinary proceedings, this tribunal has considered affirmative defenses founded upon the failure of an agency to make a reasonable accommodation pursuant to the Americans with Disabilities Act, New York State Human Rights Law, and New York City Human Rights Law. *See, e.g.*, *Human Resources Admin. v. Griffin*, OATH Index No. 941/12 at 11 (May 10, 2012), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 12-52-SA (Oct. 26, 2012); *Fire Dep't v. Rivera*, OATH Index No. 3416/09 at 4 (July 30, 2010), *superseding* (July 28, 2010), *adopted*, Comm'r Dec. (Sept. 24, 2010); *Human Resources Admin. v. Hampton*, OATH Index No. 517/08 at 10 (Dec. 12, 2007); *Human Resources Admin v. Varone*, OATH Index No. 457/97 at 9 (Mar. 17, 1995). To prevail on this defense, respondent bears the burden of showing that he suffers from a disability, that he is otherwise qualified to perform the essential functions of his job with or without reasonable accommodation, that he requested an accommodation prior to the date of the misconduct alleged, and that petitioner failed to reasonably accommodate him. *Fire Dep't v. A. G.*, OATH Index No. 771/12 at 14-15 (July 5, 2012), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 13-02-SA (Feb. 6, 2013); *Rivera*, OATH 3416/09 at 4-6; *Hampton*, OATH 517/08 at 10.

While respondent testified that he had difficulty standing and experienced side effects from taking medication, which prevented him from conducting the workshops and processing discharge letters, respondent offered no evidence to this tribunal in support of these claims. Moreover, the evidence is equivocal as to whether he provided such proof to the petitioner, as he claims to have done. Therefore, respondent failed to establish that he suffers from a disability that entitled him to reasonable accommodation.

Petitioner did not explicitly show that on the dates specified in its charges respondent was assigned to do the rotation; however, it proved that respondent failed to conduct the workshops after his supervisor directed him to do so. The evidence suggests that respondent thought he was better suited for handling social security applications and birth certificate applications in individual conferences rather than the rotation of workshops designed to accommodate ten inmates, and he decided he would not conduct workshops. In light of the evidence adduced, it is reasonable to infer that respondent failed to conduct workshops every third Tuesday, as he was required to do.

Petitioner met its burden of proof in that respondent refused to complete social security applications in workshops as required under the established procedures. However, petitioner did

not prove that respondent failed to do so on August 8, 2011, as is specified in the charges. That date fell on a Monday, and the evidence established that the workshops took place on Tuesdays (Tr. 145; Pet. Exs. 16, 18); therefore, there is no basis for concluding that respondent was scheduled and failed to complete a workshop on a Monday.

Completion of less than ten discharge letters, while two other counselors completed about 5,295; Refusal to complete discharge letters in the manner required

Petitioner alleges that from May 2011 to the present date, respondent failed to efficiently perform his duties and engaged in conduct unbecoming a Department employee and of a nature to bring discredit to the Department in that he has completed less than ten discharge letters, while the two other members of his unit jointly completed approximately 5,295[3] (ALJ Ex. 2, Specification 2). Petitioner also alleges that during the same period respondent refused to complete discharge letters using an "alpha sheet" as is required (ALJ Ex. 2, Specification 3).

As with the social security and birth certificate applications, counselors are responsible for processing and distributing discharge letters in a weekly rotation. Mr. Mitchell testified that respondent was required to participate in a rotation, which would have distributed the responsibility for processing the discharge letters among the three counselors in the unit (Tr. 78-79). Program Director Harris e-mail of March 11, 2011, on which respondent was copied, made clear that the new procedures were required of "**all** counseling services unit personnel" (Pet. Ex. 18) (emphasis in original). According to Mr. Harris, these guidelines were communicated verbally to all staff in meetings as well as in writing (Tr. 285).

The evidence, monthly reports of respondent's work and that of the entire unit, establishes that respondent processed significantly fewer discharge letters than the two other counselors in the unit (Pet. Exs. 7, 8). The monthly reports show that in May 2011, respondent processed none of the 985 letters produced by the unit; in June 2011, he processed none of the 976 letters; in July 2011, he processed none of the 942 letters;[4] in September 2011, respondent processed none of the 890 letters; in October 2011, he processed four of the 881 letters; and in

[3] Petitioner did not indicate how it arrived at these specific numbers, nor did petitioner provide a timeframe within which it alleges these letters were produced. The charges are dated November 17, 2011; it is reasonable to infer that the numbers referenced in the charges reflect discharge letters completed after May 2011, but before the charges were filed. Petitioner's evidence shows that respondent completed more than ten discharge letters during the period May 2011 through November 2011, although only a few more than ten. The evidence also establishes that the other two counselors completed more than 5,295 during the same period.

[4] Petitioner did not submit evidence for August 2011 upon which a comparison could be based.

November 2011, he processed eight of the 1071 letters produced by the unit (Tr. 60-62, 78-79). The evidence establishes that during the six months summarized above, respondent completed twelve discharge letters, while the entire unit processed 5,745: respondent therefore completed less than one percent of the total number of discharge letters processed during that period.[5]

Consistent with his reaction to the new procedures for the social security and birth certificate applications workshops, respondent expressed his inability to comply with the new procedures established for the discharge letters and failed to follow those procedures. When asked on direct examination about his response to the change of process for discharge letters, respondent stated, "[i]t's what I did not do, really. I didn't do it. I told him I could not do it. He asked me why not. I said because I have a medical disability" (Tr. 378-79).

Respondent testified that he was unable to process discharge letters because he could not read the list of inmates to be discharge due to blurred vision and he was physically unable to walk around the housing areas to deliver the completed letters (Tr. 379-80). In response to respondent's claim that he was unable to comply with the new procedures for discharge letters, his supervisors suggested alternatives to surmount respondent's alleged difficulties. For example, in response to respondent's claim that he could not read the "alpha sheets," his supervisors suggested that he use the copy machine to enlarge the print (Mitchell: Tr. 19; Massie: Tr. 382). Respondent, however, did not attempt to do so. Instead, he maintained it would not work since his vision problems could not be addressed by enlarging the print (Tr. 382). Similarly, in response to respondent's claim that he was unable to deliver discharge letters to the various housing areas, his supervisor proposed that he deliver the letters to the officers assigned to the various housing units after their roll call so the officers could arrange for distribution in the housing areas. This would eliminate the need for respondent to walk to those areas (Tr. 21). Again, respondent did not attempt to do so. Instead, respondent concluded that Mr. Mitchell did not have the authority to offer such an accommodation and that "he knew better" than to adopt Mr. Mitchell's alternative approach (Tr. 467-68).

Respondent admitted that he did not use the "alpha sheet" to process the discharge letters and showed a marked unwillingness to take any measures to perform his duties relative to the

[5] Petitioner submitted master reports for respondent and the entire unit that encompass December 2011 through August 2012. Those reports reveal that respondent continued to produce significantly fewer discharge letters than the rest of the unit (Pet. Exs. 7, 8).

discharge letters (Tr. 443). His principal reason as to why he would not produce discharge letters in the manner directed involved his claim of disability, including medication-induced dizziness and blurred vision. At the same time, respondent testified that he sometimes read the *New York Times* in the morning at work (Tr. 456). Given respondent's testimony that he is unable to read the discharge list because his medication causes blurred vision and dizziness, it is unclear how he is able to read the newspaper. Moreover, respondent was evasive when asked on cross-examination about the duration of his blurred vision and dizziness, why he took his medication at work, and whether he could take it at other times of the day to minimize the disruption to his workday (Tr. 437-40). He produced no evidence to this tribunal regarding his claim of medical problems. As with respondent's assertion that he was unable to conduct the workshops, his claim of disability is unavailing as a defense to the charges relating to the discharge letters.

Petitioner has established that respondent refused to complete the discharge letters in the manner required and completed less than one percent of the total number of discharge letters produced by the unit.

Continuing pattern of unproductive and unprofessional conduct and refusal to obey orders from supervisor

Petitioner alleges that from May 2011 to the present, respondent has engaged in a pattern of conduct unbecoming a Department employee and of the nature to bring discredit to the Department in that he has demonstrated that he believes he can determine the job functions he will perform for the Department. It is further alleged that respondent has shown a pattern of unproductive and unprofessional behavior and refusal to obey direct lawful orders from his supervisors (ALJ Ex. 2, Specification 4).

Petitioner has established that respondent disregarded his supervisors' directives to utilize specified procedures for processing inmate social security and birth certificate applications, as well as discharge letters. Instead, respondent chose to perform his job in the manner he thought most suitable for him: meeting with inmates on an individual basis to assist them with the applications and discharge letters. He refused to participate in the weekly workshop rotation and he refused to complete and deliver discharge letters in the manner dictated by the procedures his supervisors implemented.

The evidence establishes respondent has been profoundly unproductive in carrying out the responsibilities of his position. Mr. Mitchell testified that respondent typically works for about three of the seven hours he is required to perform his job. Respondent is scheduled to work from 8:00 a.m. to 4:00 p.m., less an hour for lunch (Tr. 435-36, 441). Mr. Mitchell maintained, however, that since respondent only sees inmates in individual sessions, he actually works for a total of about three hours, between 9:00 to 10:30 a.m. and 1:00 to 2:30 p.m. (Tr. 82).

Respondent himself described a workday that falls short of seven hours of actual work. He admitted that he typically arrives at work at 8:00 a.m., and awaits the arrival of Officer Steed, who is assigned to the counseling unit to control inmate access to the unit and who calls the inmates to come to the unit for assistance (Tr. 436, 465). Officer Steed usually begins calling inmates down to the counseling unit at about 9:00 a.m. (Tr. 488). Respondent testified that between 8:00 and 9:00 a.m., he usually waits to see what is going to happen and sometimes reads the *New York Times* (Tr. 436). Respondent also testified that on arriving at work, after he settles in at his desk, he takes medication that makes him dizzy and causes blurred vision (Tr. 437-38). Respondent claims he meets with inmates who have submitted request slips between 9:00 a.m. and 11:20 a.m.; however, Mr. Mitchell credibly testified that in the wake of the new procedures for discharge letters and workshops, there is typically little need for inmates to seek those services in individual sessions, so the demand on respondent's time is low (Tr. 23). Mr. Mitchell's assessment is supported by evidence that respondent processed very few applications and discharge letters (Pet. Exs. 7, 8). Respondent testified that at 11:20 a.m., after the individual meetings, the counselors take a break until 1:00 p.m. and he sometimes takes a nap (Tr. 441-43). Officer Steed calls inmates for afternoon meetings at about 1:00 p.m., and they are seen until about 2:20 p.m. According to respondent, he begins to wrap up his day at about 2:20 p.m. and signs out at 4:00 p.m. (Tr. 443).

Respondent described a typical day in which he spends much of his time waiting to see what happens, reading the newspaper, napping, and getting ready to leave.

Respondent's own description of his workday, coupled with evidence of his failure to carry out the work of the unit and of his refusal to complete the work in the manner directed by his supervisors, establishes that respondent engaged in a pattern of unprofessional and unproductive behavior and refused to follow the orders of his supervisors.

False and/or misleading reports of having helped inmates complete social security and/or birth certificate applications

Petitioner alleges that respondent failed to efficiently perform his duties and engaged in conduct unbecoming a Department employee and of a nature to bring discredit on a Department employee in that he falsely and/or misleadingly stated he helped inmates complete birth certificate and/or social security applications on eight dates: May 16, July 7, November 9, November 17, November 18, November 20, November 21, and November 22, 2011. Petitioner further alleges that respondent made false entries into the Department's records and/or prevented the making of a true entry in the records with the intent to defraud and receive compensation for work he did not do (ALJ Ex. 3, Specification 1).[6]

An inmate who obtains services from the counseling unit may be entered in four logbooks. These are the general logbook used in the counseling unit (also known as the social services logbook), the social security applications logbook, the birth certificate applications logbook, and a counselor's personal logbook.

The general logbook, which is a record of inmates who come for counseling services, is usually under the control of Officer Steed or an inmate worker assigned to the unit (Tr. 465-66). Officer Steed testified that she requires that inmates' names and identifying information be entered into the general logbook and that she is unaware of inmates coming to the counseling unit and getting services from a counselor without having been logged into the general logbook (Tr. 488-89). On cross-examination, Officer Steed conceded that she takes breaks away from the area, of about 15 minutes in duration, and that she is not certain that every inmate who comes into the area is entered into the general logbook (Tr. 489, 501).

Counselors are required to maintain personal logbooks of the services they provide to inmates (Mitchell: Tr. 38; Moore: Tr. 342). Mr. Mitchell testified that counselors' entries in their logs must be contemporaneous with delivery of service and that they were told to keep their logs complete and accurate at all times because they could be subpoenaed (Tr. 39). However, there were no written guidelines instructing counselors how to keep their personal logs (Mitchell: Tr. 213-14; Moore: Tr. 342-43; Massie: Tr. 390).

[6] Petitioner stipulated that the copy of the general logbook it submitted into evidence did not encompass May 16, 2011 and July 7, 2011 (Tr. 208; Pet. Ex. 3); therefore, since petitioner did not put forth evidence regarding its claim with respect to those dates, they will not be addressed.

The counseling unit also maintained logs reflecting social security and birth certificate applications (Tr. 17). Those logbooks are used to record when an inmate submitted applications for a social security card and/or a birth certificate (Tr. 17, 148, 164).

Mr. Mitchell testified that when he reviewed respondent's personal logbook and compared it to the social security and birth certificate logbooks, he discovered inmates listed in respondent's logbook who had not been entered into either of those logbooks. Mr. Mitchell then went to the general logbook and discovered that some of the inmates identified in respondent's logbook as having received services were not entered in the general logbook on the dates respondent claimed to have met with them. Mr. Mitchell created a chart based on his review of the logbooks (Tr. 110-11; Pet. Exs. 2, 13). According to Mr. Mitchell, two inmates had already been released from the facility on the dates respondent claims to have seen them in his logbook.

In his defense, respondent asserted that petitioner failed to meet its burden because it did not produce the underlying social security and birth certificate application logbooks that Mr. Mitchell reviewed. Respondent requested that a negative inference be drawn from petitioner's failure to produce the birth certificate and social security logbooks, which Mr. Mitchell testified he relied upon to prepare his chart summarizing instances in which respondent claimed to have helped inmates when he had not done so (Tr. 509; Pet. Ex. 13).

A negative inference may be drawn if a party fails to produce requested evidence and there is a showing of bad faith in withholding that evidence. Petitioner's counsel represented that the Department had made diligent efforts to locate the logbooks, without success and respondent did not allege bad faith or deliberate destruction of the logbooks (Tr. 525). A negative inference is unwarranted under the circumstances here, given the lack of an allegation, let alone evidence, of bad faith withholding of the logbooks by petitioner. *See Dep't of Correction v. Strother*, OATH Index No. 2160/00 at 19 (July 27, 2001) (no adverse inference drawn from petitioner's failure to produce logbooks in the absence of any evidence of bad faith withholding or deliberate destruction of evidence by petitioner).

Respondent also argued that petitioner did not meet its burden because the chart created by Mr. Mitchell upon which petitioner relies is replete with errors. Mr. Mitchell, who created the chart, acknowledged that he erroneously indicated that respondent claimed he helped an inmate on a date that is a Sunday, when the unit is closed (the inmate was entered in respondent's logbook and in the social service logbook on the following Monday) (Tr. 220, 223). He also

incorrectly entered the date on which respondent claimed to have seen another inmate (Tr. 224-27).

Petitioner's charges identify nine inmates whom respondent claims to have assisted on the dates specified by respondent.[7] It is petitioner's contention that on those dates respondent did not provide services he claims to have rendered in his personal logbook to those inmates because there was no evidence of applications for the inmates in the social services logbook and/or the social security or birth certificate logbooks. Of the nine inmates identified by petitioner as appearing on respondent's personal logbook, most appear in the general logbook, indicating that those inmates were in the counseling area on or around the dates that respondent claims to have provided service to the inmates. The relevant dates and the status of the inmates vis-à-vis respondent's logbook and the general logbook are discussed below:

November 9, 2011

Respondent's logbook indicates he provided social security and birth certificate application services to two inmates on November 9, 2011. Those inmates are entered into the general logbook on that date, which is compelling evidence that these inmates were seen in the counseling unit on that date (Pet. Exs. 3, 4; Tr. 214-16).

November 17, 2011

Petitioner alleges that three of the inmates respondent identified in his personal logbook for this date as having received assistance with birth certificate and/or social security applications were not entered in the social security and birth certificate logbooks or the general logbook. All three of these inmates, however, appear in the general logbook. Two were entered on the same date as they appear in respondent's logbook. The third inmate was entered in the general logbook on November 16, 2011, one day prior to the date entered in respondent's logbook (Pet. Exs. 3, 4; Tr. 216-18).

November 18, 2011

Petitioner identified an inmate listed in respondent's personal logbook entry for November 18, 2011, as having received assistance with birth certificate and/or social security

[7] Petitioner introduced evidence regarding other inmates it contends respondent falsely or misleadingly claimed to have assisted. These dates of service and/or the alleged services provided do not correspond to those set forth in petitioner's charges. While petitioner suggested, in its closing, that this tribunal could conform the charges to the evidence, this is not appropriate in this case. *See Murray v. Murphy*, 24 N.Y.2d 150, 157 (1969) ("[N]o person may lose substantial rights because of wrongdoing shown by the evidence, but not charged."); *Dep't of Correction v. Stroud*, OATH Index No. 2188/04 at 9 (Dec. 16, 2004) (declining to amend the charge where it would be unfair to respondent and petitioner did not seek to amend the charge at the appropriate time prior to the hearing).

applications when that inmate had in fact been discharged four days earlier (Pet. Exs. 3, 4, 5; Tr. 219-20).

November 20, 2011

Petitioner alleges that an inmate respondent identified in his personal logbook entry for this date as having received assistance with birth certificate and/or social security applications was not entered in the social security and birth certificate logbooks or the general logbook. On cross-examination, Mr. Mitchell conceded he made an error in preparing the chart and that date was a Sunday, a day when the unit does not provide services. The inmate was entered in respondent's log as having been seen on November 21, 2011, the same date the inmate is entered into the general logbook (Pet. Exs. 3, 4; Tr. 220).

November 21 and 22, 2011

Petitioner alleges that two of the inmates respondent identified in his personal logbook entry for November 22, 2011, as having received assistance with birth certificate and/or social security applications were not entered in the social security or birth certificate logbooks or the general logbook. Moreover, petitioner alleges that one of these two inmates had been discharged several days before respondent claims to have met with him. The other inmate was entered into the general logbook on November 22, 2011, the same date as entered in respondent's personal log (Pet. Exs. 3, 4; Tr. 224). With respect to the inmate petitioner alleges was discharged several days before the date reflected in respondent's logbook, Mr. Mitchell conceded that he made an error in preparing his chart and the inmate was actually logged into respondent's logbook on November 21, 2011, not on November 22, 2011 (Tr. 227). Although this same inmate is listed in the general logbook as having been in the counseling unit before his discharge, the date entered in respondent's logbook is still three days after the inmate's release (Pet. Exs. 3, 4, 6; Tr. 220).

Respondent contends that the discrepancies between his personal logbook and the other logbooks can be accounted for by errors he made while entering data into his personal logbook, rather than intent to mislead or defraud. Respondent acknowledged that he probably made errors in entering information in his personal logbook because his recording practices were "sloppy" and he entered information for several dates at one time. When respondent met with inmates, he made notations on the service request slips they submitted, but typically did not enter the information into his logbook until several days later (Tr. 386, 388). Respondent testified that he recorded the services the inmate requested in his logbook, not necessarily that he had actually

provided the service to the inmate (Tr. 388, 409).

Petitioner maintains that even if respondent met with the inmates as indicated, he misrepresented the services he provided by claiming to have assisted inmates with applications when, in fact, there were no entries in the social security or birth certificate logs. Those logs are not available for this tribunal to review and petitioner asks that we rely on Mr. Mitchell's representations in a derivative chart concerning the contents of those logbooks. Given the errors that Mr. Mitchell conceded he made in creating the chart that is the basis of these allegations, this is not a compelling option, and we are left with a review of respondent's logbook, the general logbook, and the other available evidence.

It is of significance that on the monthly report of activities that respondent completed for November 2011, which encompasses the dates specified in the charges, respondent did not claim to have completed any social security or birth certificate applications (Pet. Ex. 7). Respondent's monthly report indicates "0" in the column asking for the number of inmates served in the areas of birth certificates and social security cards, which is evidence that, contrary to petitioner's assertion, respondent did not claim to have helped any inmates complete and submit those applications in November 2011. Given testimony that only completed applications were entered into the social security and birth certificate application logbooks, it is to be expected that if respondent did not help inmates complete any applications in November 2011, none would be entered in those logbooks.

Petitioner alleges that respondent falsely and/or misleadingly stated he helped inmates and made false entries in his logbook with the intent to defraud. This tribunal has held that a false statement charge requires some proof of intentional or knowing falsehood. *See, e.g., Dep't of Correction v. Callabrass,* OATH Index No. 1981/10 at 8-9 (July 23, 2010), *adopted in part, rejected in part,* Comm'r Dec. (Dec. 1, 2010), *modified on penalty,* NYC Civ. Serv. Comm'n Item No. CD 11-81-M (Oct. 31, 2011) (correction officer who admitted she was away from her post when she made a logbook entry indicating she was at her post found to have made a false entry in her logbook); *see also Dep't of Correction v. Cancel,* OATH Index Nos. 1085/05 & 1087/07 at 9 (Aug. 11, 2005); *Dep't of Correction v. Biland,* OATH Index Nos. 569/89 & 570/89 at 6-7 (Mar. 6, 1990).

The evidence does not establish that respondent possessed the requisite intent with respect to the charged logbook entries. The evidence indicates that respondent was careless in

transferring information into his logbook and that his logbook entries describe topics discussed with inmates relating to the services provided by the counseling unit, rather than a representation that he helped inmates complete applications. Moreover, there is little evidence his logbook entries were intended to mislead, when they are considered with the monthly report respondent submitted for the period in issue. Rather, the evidence suggests that respondent was not sufficiently concerned about his lack of productivity to falsely or misleadingly claim to have done more work than he in fact accomplished.

Respondent's assertion of sloppy practices regarding his personal logbook does not absolve him of responsibility for his errors, as misconduct may be premised on carelessness or negligence, as well as willful or intentional conduct. *See, e.g., McGinigle v. Town of Greenburgh*, 48 N.Y.2d 949, 951 (1979); *Reisig v. Kirby*, 62 Misc. 2d 632, 635 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008, (2d Dep't 1969). A finding of misconduct cannot be predicated on mere errors in judgment that lack willful intent and are not so unreasonable as to be considered negligence. *Dep't of Environmental Protection v. Segarra*, OATH Index No. 2730/10 at 7 (Oct. 20, 2010), *aff'd*, Civ. Serv. Comm'n Item No. CD 11-94-R (Dec. 20, 2011); *see also Dep't of Sanitation v. Pabon*, OATH Index No. 110/12 at 2 (Nov. 23, 2011), *modified on penalty*, Comm'r Dec. (Jan. 19, 2012); *Dep't of Sanitation v. Rizzo*, OATH Index No. 1423/06 at 2 (Sept. 26, 2006).

This tribunal has held that "the degree of carelessness must be more than *de minimis*, since minor and inconsequential errors do not rise to the level of misconduct." *Dep't of Sanitation v. Nieves*, OATH Index No. 1683/07 at 2 (Sept. 19, 2007); *see also Dep't of Sanitation v. Richards*, OATH Index No. 529/06 at 3 (Feb. 3, 2006); *Dep't of Sanitation v. Frank*, OATH Index No. 465/03 at 8 (Feb. 28, 2003). Negligence may be shown by repetitive errors by an employee that indicate the employee is not being careful with his or her work. *See Law Dep't v. Lawrence*, OATH Index No. 1312/10 at 14 (Mar. 30, 2010), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-36-A (May 11, 2011) (errors in processing eight payments constituted carelessness or negligence); s*ee also, Dep't of Transportation v. Goldstein*, OATH Index No. 1561/12 at 5 (Aug. 16, 2012) (employee's repeated data entry mistakes and carelessness in performing her duties constitutes misconduct); *Dep't of Consumer Affairs v. Laguda*, OATH Index No. 658/10 at 10 (Feb. 10, 2010) (neglect of duty found where respondent, despite reminders, failed to make required entries on three occasions and refused assistance and

counseling). Moreover, a single error may constitute negligence where the agency has a particular interest in accuracy or there is a potential for adverse consequences. *See, e.g.*, *Dep't of Environmental Protection v. Majors*, OATH Index No. 1024/10 at 4 (Mar. 10, 2010), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-35-A (May 11, 2011) (respondent guilty of negligence for his failure to include his truck's break down on his daily log sheet since the Department had an interest in accounting for its heavy equipment for liability and repair purposes); *Richards*, OATH 529/06 at 7 (finding respondent's failure to fuel a truck was negligent as it was an important task and the failure to perform it had adverse consequences).

Petitioner alleges that respondent failed to efficiently perform his duties and engaged in conduct unbecoming a Department employee. Respondent was, by his own admission, careless in recording data in his personal logbook. Moreover, petitioner was able to show that respondent twice claimed to have provided social security and/or birth certificate application assistance to inmates after they had been discharged. Although one of those inmates does appear in the general logbook days before his name appears in respondent's personal logbook, it does not excuse respondent's careless approach to recording those visits. In addition, respondent claimed to have met with an inmate on a date after that inmate appears in the general logbook; at best, this is another mistaken entry by respondent. These are not minor or inconsequential errors, but mistakes in a record concerning the Department's custody of its inmate population that the respondent is required to maintain (Mitchell: Tr. 38, 47; Moore: Tr. 342-43). Indeed, respondent's tasks and standards specify that he is responsible for maintaining records of services provided to inmates and that such records are to indicate which services are provided, when, and to whom (Pet. Ex. 2). Respondent's careless logbook entries are consistent with the overall lack of diligence with which he appears to have approached his responsibilities.

Accordingly, petitioner has established that respondent was careless in entering information in his personal logbook and that his lack of care resulted in errors in his personal logbook; thus, he failed to efficiently perform his duties. Petitioner, however, failed to meet its burden of proof regarding its allegation that respondent made false entries into the Department's record with the intent to defraud the Department and collect payment for work he did not do.

False and/or misleading entries in monthly reports

Respondent is charged with failing to perform his duties efficiently and engaging in conduct unbecoming and of a nature to bring discredit on a Department employee in that he falsely and/or misleadingly stated the total number of social security and/or birth certificate applications he processed in his monthly reports for July and November 2011. Petitioner further alleges that respondent made false entries into the Department's records and/or failed to make a true entry in the records with the intent to defraud and receive compensation for work he did not do (ALJ Ex. 3, Specification 2).

Respondent's July 2011 monthly report reflects respondent completed two social security card applications and zero birth certificate card applications (Pet. Ex. 7). Petitioner provided no evidence in support of its contention that this entry was false or misleading.

Petitioner also failed to meet its burden of proving that respondent falsely and/or misleadingly stated the total number of applications he processed in his monthly report for November 2011. In his monthly report for November 2011, respondent represented that he had completed no birth certificate or social security applications. While respondent's logbook indicates that he met with inmates regarding social security and birth certificate applications, respondent credibly testified that his logbook entries do not were not intended to show that he submitted such applications, only that they were the subject of discussion at the individual meetings. In light of that testimony, coupled with respondent's November 2011 monthly report in which he stated he completed no applications, and the lack of guidelines regarding how counselors were to complete their personal logs, petitioner has failed to meet its burden of establishing that respondent made false or misleading entries in his log with the intent to defraud, as is charged.

Accordingly, this charge should be dismissed.

FINDINGS AND CONCLUSIONS

1. Specification 1 of C0112/11 should be sustained in that on October 4, 2011, respondent was disrespectful in his tone and demeanor towards his supervisors when he called them "Nazis" and "Fascists" and used the word "fuck" or variations on that word. Petitioner did not establish that respondent failed to obey an order to submit a report about his behavior.

2. Specification 1 of C0118/2011 should be sustained in that respondent refused to complete social security applications in the manner in which he was directed to do so on the dates charged, except August 8, 2011.

3. Specification 2 of C0118/2011 should be sustained in that petitioner has established that respondent completed less than one percent of the discharge letters completed by the unit between May 2011 and November 2011.

4. Specification 3 of C0118/2011 should be sustained in that petitioner has established that respondent refused to obey directives to complete discharge letters in the manner specified by his supervisors.

5. Specification 4 of C0118/2011 should be sustained in that respondent engaged in a pattern of unprofessional and unproductive behavior and refusal to obey orders from his supervisor when he refused to perform work as directed and was significantly less productive than were other members of his unit.

6. Specification 1 of C0132/2011 should be sustained in that respondent was careless in entering information in his personal logbook regarding meetings with inmates on November 17, 18, and 21, 2011, and thus failed to efficiently perform his duties. Petitioner failed to meet its burden with respect to allegations concerning May 16, July 7, and November 9, 20, and 22, 2011. Petitioner has failed to prove that respondent made false and/or misleading entries with the intent to defraud the Department and collect payment for work he did not do.

7. Specification 2 of C0132/2011 should be dismissed as petitioner failed to meet its burden of proving that respondent falsely and/or misleadingly stated the total number of applications he processed in his monthly report for July 2011 and November 2011.

RECOMMENDATION

Upon making the above findings and conclusions, I obtained and reviewed an abstract of respondent's employee performance service report (Form 22R)[8] for purposes of recommending an appropriate penalty. Respondent has been employed by the Department since 1990. In 2008, he served a ten-day suspension for conduct unbecoming and failure to obey. In 2010, respondent served a three-day suspension for conduct unbecoming and, in 2011, he was suspended for fifteen days for inefficiency and incompetence.

[8] The Department submitted a document to supplement respondent's 22R form, to which respondent objected as beyond the scope of this tribunal's request. That supplemental submission was not considered in making this recommendation.

Petitioner requests that respondent be terminated if all charges have been sustained, but they have not all been sustained. Petitioner established that respondent was disrespectful towards his supervisors, failed to conduct social security applications in workshops as required, completed significantly fewer discharge letters than counselors in his unit, refused to complete discharge letters as directed, and displayed a pattern of unprofessional and unproductive conduct and refusal to follow his supervisor's orders. In addition, respondent's carelessness in entering information into his personal logbook constitutes misconduct. Petitioner did not meet its burden regarding charges that respondent failed to obey an order to submit a report regarding his behavior. Petitioner also failed to prove that respondent, with the intent to defraud and collect compensation for work he did not do, falsely and/or misleadingly stated he had helped inmates with social security and birth certificate applications and the total number of applications he processed.

While respondent's twenty-three year tenure is a lengthy one, his prior disciplinary history is recent and concerns charges similar to those for which respondent has been found guilty here. The prior penalties imposed on respondent were relatively small, but they should have put respondent on notice that his conduct was inappropriate and would subject him to sanctions. Under the principles of progressive discipline, which this tribunal has consistently applied, an employee who is disciplined for particular behavior should subsequently correct that behavior, or face increasing penalties for repeated or similar conduct. *See Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Ford*, OATH Index No. 2383/09 at 11 (July 10, 2009); *Health & Hospitals Corp. (Kings Co. Hospital Ctr.) v. Meyers*, OATH Index No. 1487/09 at 8 (Jan. 26, 2009), *aff'd*, NYC HHC Pers. Rev. Bd. Dec. No. 1349 (July 31, 2009); *Human Resources Admin. v. Beauford*, OATH Index No. 1517/03 at 18 (Dec. 5, 2003), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-15-SA (Jan. 9, 2006). Yet, despite prior discipline, respondent's behavior did not improve. Accordingly, a serious penalty short of termination is necessary to impress upon respondent that his conduct is unacceptable.

Respondent was found guilty for calling his supervisors Nazis and Fascists. In cases where employees were found to have been disrespectful by calling a supervisor a Nazi or a Fascist, this tribunal has imposed penalties ranging from five to twenty days suspension without pay. *See Human Resources Admin. v. Seemer*, OATH Index No. 1651/10 (Feb. 26, 2010) (20-

day suspension recommended for a construction manager who gave a Nazi salute to his supervisor); *Dep't of Environmental Protection v. Berlyavsky*, OATH Index No. 1011/06 (Apr. 19, 2006) (five-day suspension recommended for employee who loudly accused his supervisor of being undemocratic and a Fascist); *Dep't of Parks & Recreation v. Wallace*, OATH Index No. 864/93 (Aug. 3, 1993) (ten-day suspension recommended for a recreation director who was accused his supervisor of being "a Nazi who used Gestapo tactics," neglected his assigned duties, and was absent without authorization).

Respondent was also found to have engaged in a protracted pattern unproductive behavior, refusal to perform his job duties as directed, and carelessness in performing aspects of his job. In prior cases involving repeated refusal to perform the duties of one's job and/or improperly performing those duties, this tribunal has imposed significant penalties. *See, e.g.*, *Dep't of Transportation v. Goldstein*, OATH Index No. 1561/12 (Aug. 16, 2012) (20-day suspension recommended for employee who continuously failed to follow supervisory directives, inefficiently performed her duties, and extended a break without authorization); *Health & Hospitals Corp. (Coler-Goldwater Specialty Hospital & Nursing Facility) v. Reynolds*, OATH Index No. 2713/10 (Jan. 20, 2011) (60-day suspension for ten-year employee, with two prior disciplines, who repeatedly refused to perform assigned tasks and engaged in unprofessional conduct); *Health & Hospitals Corp. (North Bronx Healthcare Network) v. Wolfe*, OATH Index No. 2844/08 (Sept. 8, 2008) (25-day suspension for service aide with prior disciplinary record who used disrespectful language towards his supervisor and refused an assigned task); *Dep't of Finance v. Zindel*, OATH Index Nos. 168/06 & 223/06 (Oct. 3, 2006), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 07-63-SA (June 12, 2007) (30-day suspension for refusing to correct and complete work as directed on multiple occasions, failing to perform her work properly, being discourteous to a member of the public, and failing to follow proper time and leave procedures on two occasions); *Admin. for Children's Services v. Simon*, OATH Index No. 2009/05 (Sept. 20, 2005) (30-day suspension for various acts of insubordination, including repeatedly refusing to complete work on case files and refusing to perform other assignments); *Transit Auth. v. Wagh*, Comm'r Dec. (Aug. 8, 2002), *modifying on penalty*, OATH Index No. 517/02 (July 11, 2002) (30-day suspension for repeatedly refusing an assignment over five to six weeks despite several attempts by management to reason with employee).

Respondent's misconduct is persistent and, in view of the fact that he was recently disciplined for similar misconduct, a significant penalty is necessary to convey to respondent that he must change his behavior and his approach to his responsibilities.

I therefore recommend that respondent be suspended without pay for 45 days.

Astrid B. Gloade
Administrative Law Judge

March 29, 2013

SUBMITTED TO:

DORA B. SCHRIRO
Commissioner

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