

# ***Admin. for Children's Services v. West***

OATH Index No. 866/13 (Apr. 10, 2013)

Dismissal of charges recommended where respondent's failure to make three tours of inspection was a regular practice known to and condoned by supervisors and petitioner failed to show respondent was on notice that the inspection policy would be enforced.

---

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

*In the Matter of*  
**ADMINISTRATION FOR CHILDREN'S SERVICES**  
*Petitioner*  
*- against -*  
**VALERIE WEST**  
*Respondent*

---

### **REPORT AND RECOMMENDATION**

**ALESSANDRA F. ZORNIOTTI**, *Administrative Law Judge*

This proceeding was referred by petitioner, the Administration for Children's Services ("ACS"), pursuant to section 75 of the Civil Service Law. Respondent Valerie West, an associate juvenile counselor I ("AJC-I"), is charged with failing to make three tours of inspection on July 4, 2012, as required by ACS rules (ALJ Ex. 1).

A hearing was conducted before me on March 1, 2013. Petitioner submitted documentary evidence and testimony from Keica Hancock. Respondent admitted that she did not make three tours of inspection and testified that the failure to do so was a regular practice caused by an excessive work load. Petitioner did not call any rebuttal witnesses but asked and was allowed to hold the record open to submit another document (Tr. 112; Pet. Ex. M). Closing statements were filed on April 5, 2013.

Under the doctrine of condonation and waiver, dismissal of the charges is recommended because respondent's failure to make three tours of inspection was a regular practice known to and condoned by supervisors and there was insufficient evidence that respondent was on notice that the inspection policy would be enforced.

## ANALYSIS

Respondent was hired as a juvenile counselor (“JC”) in 2002. In 2005 she was promoted to AJC-I. For over seven years respondent has worked at ACS’s Crossroads Juvenile Center (“Crossroads”) (Tr. 94-95). She works on the 3:00 to 11:00 p.m. tour (Tr. 98), a tour that usually has two AJC-Is and one tour commander (Tr. 20). Mr. Eromosele, a tour commander, is respondent’s supervisor (Tr. 19, 99).

Crossroads is a 24-hour secure detention facility that houses juvenile offenders who have open cases in criminal and family court. The facility has 11 halls and the housing areas have separate bedrooms for each resident. Residents are monitored by JCs and must be escorted when they move throughout the facility. The chain of command from lowest to highest is: JC, AJC-I, tour commander, operation manager, director of operations, and executive director. Ms. Hancock started at Crossroads as the executive director on May 7, 2012 (Tr. 15-18).

An AJC-I is responsible for supervising JCs and ensuring that they know their posts and daily assignments and that they are monitoring residents and handling conflicts properly. An AJC-I has other administrative duties including reviewing time sheets and preparing staff evaluations. An AJC-I must also perform three tours of inspection on a shift (Tr. 21-23, 97; Pet. Ex. A). Ms. Hancock testified that tour commanders meet with ACJ-Is at the start of their tours to discuss when administrative tasks can be fit into the required inspections (Tr. 54-56).

According to Ms. Hancock three tours of inspections for each hall are necessary to make sure that JCs are performing their duties that involve the care, custody, and control of residents. Security is of primary importance and an AJC-I must verify that all residents are accounted for and logbooks and security sheets are accurate. There is no specific agency policy that sets forth what is expected on a tour of inspection (Tr. 26-27, 59-60, 64-65) or when inspections are supposed to be done (Tr. 55). However, the policy is in Facility Level Order 14-08, Directive 06/08, and the AJC-I Tasks and Standards that respondent signed in December 2011 (Pet. Exs. A, B, L). Tours of inspection are referenced also in Operations Order 002/02, which concerns bed checks at regular intervals by JCs: an AJC-I must ensure during inspections that bed checks are conducted and accurately documented (Pet. Ex. C).

A September 13, 2011, memo addressed to Crossroad’s staff stated that a review of ACS records revealed that bed checks were not being conducted as required and that fraudulent logbook entries were being made. The memo stated that anyone who failed to adhere to the bed check policy was subject to discipline (Pet. Ex. D). The memo was posted in the tour

commander's office (Tr. 36). Ms. Hancock testified that staff is also reminded of the bed check policy through e-mails and at roll call (Tr. 32, 84).

Ms. Hancock stated that when she first arrived at Crossroads in May 2012, she held a meeting where she conducted an "overview" or a "laundry list" of items that "highlighted areas that we needed to make sure we needed to do." Ms. Hancock indicated that everyone was invited but that not everyone attended (Tr. 87-90).

Ms. Hancock also testified that when she arrived she found that the tours of inspection policy was not being followed because staff felt that there were too many tours (Tr. 33-34, 69, 71). As a result she held a meeting with the tour commanders in June. AJC-Is were invited but not all of them attended. Ms. Hancock distributed the relevant policy orders and told the attendees to follow agency policy and to convey this information to other staff. She also stated that she would be performing audits to make sure the requisite tours were being conducted and that logbooks were accurate (Tr. 58-59, 78-80). She told them that progressive discipline would start but that she wanted to give them an opportunity to correct their behavior. Some tour commanders stated that doing three tours of inspection for 11 halls for a total of 33 tours was unrealistic and Ms. Hancock responded that the policy had to be followed (Tr. 72-74). Respondent was not at this meeting (Tr. 87).

By email dated June 20, 2012, Ms. Hancock directed tour commanders to have monthly meetings with the JC and AJC-I staff. The first meetings were held on June 27, 2012. Respondent attended a meeting on this date with Mr. Eromosele during her tour (Pet. Ex. M).

Ms. Hancock conducted audits before July 4, 2012, and saw that while there was improvement, some AJC-Is were still not doing three inspections on their tours and that some tour commanders were not doing their two tours of inspections as required. (Tr. 69-70).

Respondent acknowledged that after Ms. Hancock arrived, there was a "general understanding" that inspections had to be done (Tr. 109). She also admitted that the three tours of inspection rule has existed since she started at Crossroads in 2002 but testified that it was never enforced prior to July 4, 2012. Respondent stated that prior to this date, she never made three tours of inspection; she tried to make at least two but sometimes had time for only one. She asserted that the work load is "excessive" and that it is not possible to complete all the required tasks on her shift. Respondent also stated that prior to July 4, other AJC-Is made fewer than three inspections per tour as evidenced by the logbook that she read and that she never talked to Mr. Eromosele about the requirement to do so (Tr. 101-08).

Respondent and Mr. Eromosele were on duty on the 3:00 to 11:00 p.m. tour on July 4, 2012 (Tr. 104; Pet. Exs. F, H). It was undisputed that on July 4, at 9:48 p.m. a resident on the D Hall went into the bedroom of another resident in violation of ACS policy. The two residents were discovered together on July 5, at 2:18 a.m. After they were discovered, the residents were examined and cleared by medical staff (Tr. 38).

Respondent testified that she started her July 4 shift with roll call and that she assisted with making sure there was adequate staff coverage. During her tour she prepared the "security long sheet form" and the coverage sheet for the next tour and did some counseling with residents to prevent incidents (Tr. 104-05). Three incidents occurred during respondent's tour and she responded to at least one of them (Tr. 47-51; Pet. Ex. J). Also, respondent conducted two visiting sessions with juveniles and their parents from 3:30 to 4:30 and 7:30 to 8:00 p.m. and worked on staff evaluations as directed by Mr. Eromosele (Tr. 54-56, 98).

It was undisputed that respondent performed one complete tour of inspection that included the D Hall at 5:25 p.m. and that she did a second inspection of the E hall as indicated by the logbook (Tr. 39-40, 43, 46; Pet. Ex. G2). There is no allegation that respondent's logbook entries were not accurate (Tr. 45-46).

Respondent testified that she did not know that one resident visited another resident's bedroom during her tour but found out when Mr. Eromosele spoke to her about her failure on July 4 to conduct three tours of inspection (Tr. 105-06). According to the conference memorandum from Mr. Eromosele dated July 19, 2012, respondent stated that she was unable to make the required inspections because the "tone" in the building was "very high" (meaning the juveniles were unruly), she had to conduct two sessions of visiting, and had administrative duties (Tr. 50, 52-53; Pet. Ex. I).

Ms. Hancock testified that from her post-incident review she determined that the tone in the building was not high on July 4 (Tr. 54) and that respondent's other duties did not excuse her obligation to perform three tours of inspection (Tr. 56).

Respondent acknowledged that Ms. Hancock spoke to her about the need to perform three tours of inspection but could not recall the date (Tr. 109). Ms. Hancock testified that she spoke directly to respondent about the need to follow the tour of inspection policy "right after" the July 4 incident (Tr. 33-34).

Ten staff members at the JC, AJC-I, and tour commander levels, including respondent and Mr. Eromosele, were brought up on disciplinary charges for their failure to perform the

required inspections on July 4, 2012 (Tr. 70; Pet. Ex. H). Respondent testified that prior to July 4, 2012, she was never told she would be subject to discipline if she failed to make three tours of inspection (Tr. 103). Ms. Hancock acknowledged that between May 7 and July 4, 2012, no AJC-Is were charged with failing to make three tours of inspection (Tr. 67-68).

Respondent argued that she did not engage in misconduct because the failure to perform three tours of inspection was condoned by supervisors for many years prior to 2012. Condonation and waiver is an affirmative defense that respondent bears the burden of proving. *See Dep't of Environmental Protection v. Critchlow*, OATH Index No. 709/07 at 12 (Mar. 5, 2007); *Dep't of Correction v. Calligaro*, OATH Index No. 925/95 at 8 (Apr. 25, 1995).

For condonation and waiver to apply, a respondent must show that the behavior alleged to be misconduct was a regular practice known to and accepted by a supervisor. *See Dep't of Correction v. Heredia*, OATH Index No. 1070/91 at 12 (Aug. 23, 1991). Moreover, an agency may not lead an employee into believing that her conduct will not be considered a violation of a rule and then reverse its policy and seek to discipline the employee. *See Hadden v. Consolidated Edison Co.*, 45 N.Y.2d 466, 470 (1970); *Fahey v. Kennedy*, 230 A.D. 156, 159 (3d Dep't 1930); *Law Dep't v. Coachman*, OATH Index No. 1370/00 (June 13, 2000), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 01-13-SA (Apr. 11, 2001).

Charges of misconduct have been deemed waived where supervisors have condoned the practice that gave rise to the charges and failed to notify the employees that violations would lead to discipline. *See, e.g., Dep't of Correction v. Dominguez*, OATH Index Nos. 550/10 & 551/10 at 10-11 (Jan. 8, 2010) (charges dismissed where evidence established that petitioner condoned practice of wearing gloves); *Dep't of Environmental Protection v. Hewlett*, OATH Index No. 644/07 at 6-7 (Mar. 9, 2007) (charges dismissed where evidence established that petitioner condoned practice of submitting forms in violation of agency policy); *Health & Hospitals Corp. (Bellevue Hospital) v. Olosunde*, OATH Index No. 262/05 at 4-5 (June 15, 2005) (charges dismissed where respondent had received approval to attend labor-management meetings, work the remaining portion of the current tour, and report to his regular tour and code his time sheet with overtime); *Dep't of Homeless Services v. Brown*, OATH Index No. 1653/02 at 43-44 (Nov. 7, 2003), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 05-52-SA (Aug. 26, 2005) (finding it unfair to sanction respondent for submitting improper differential wage claims, where ranking agency officials, including a deputy commissioner, consistently and openly approved them for months); *Health & Hospitals Corp. (Woodhull) Medical & Mental Health Ctr. v. Perez*,

OATH Index No. 1498/02 at 5 (Sept. 26, 2002) (charges dismissed where respondent had requested and supervisor approved the use of lunch and compensatory time to cover absence); *Dep't of Correction v. Johnson*, OATH Index No. 514/02 at 13 (May 30, 2002), *modified on penalty*, Comm'r Dec. (July 17, 2002), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 03-39-SA (Apr. 11, 2003) (charges dismissed where respondent was either explicitly told or led to believe that he was on retirement status and was authorized to remain out of work pending processing of retirement application); *Coachman*, OATH 1370/00 at 8 (past practice of forwarding leave requests to timekeeper for delivery and assuming leave would be approved unless told otherwise excused AWOL charge); *Calligaro*, OATH 925/95 at 8-9 (charges dismissed where respondent was led to believe that he could remain out of state while on sick leave).

Here, respondent testified credibly that from the time she started at Crossroads more than seven years ago until July 4, 2012, she never performed three tours of inspections, that other AJC-Is also failed to do so, and that the failure to perform the required tours was noted in the logbooks. Indeed, Ms. Hancock testified that soon after she arrived at Crossroads in May 2012 she became aware that neither AJC-Is nor their supervising tour commanders were performing the required number of inspections and that this was confirmed by conversations with staff and audits of the logbooks. Moreover, given Mr. Eromosele's duty to supervise respondent about when she would do her administrative tasks and his own failure to perform the required inspections on July 4, it is more likely than not that he knew she was not performing three tours of inspection and condoned this practice.

Since respondent established a *prima facie* defense of condonation and waiver, the burden shifted back to petitioner to rebut the defense. Although the record supports a finding that Ms. Hancock expected AJC-Is to perform the required tours of inspection and that she told tour commanders to convey this information to them, there is insufficient proof to support a finding by a preponderance of the credible evidence that respondent and the other AJC-Is were on notice of this change in policy prior to the July 4, 2012 incident.

Ms. Hancock's testimony that prior to the incident, meetings were held about the need to perform three tours of inspection was vague and insufficient to establish that respondent had notice that the policy must be followed and that she would be disciplined if she failed to do so.

According to Ms. Hancock she held a meeting when she arrived in May 2012 where she expressed her overall expectations for staff to follow the rules of the agency. However, not everyone attended and there is no proof that respondent was present. Even if respondent was at

this meeting, a general overview of policies and expectations is insufficient to defeat respondent's defense of condonation and waiver.

It was also undisputed that respondent did not attend Ms. Hancock's June meeting with tour commanders where Ms. Hancock specifically told them to adhere to the inspection policy or face discipline.

Ms. Hancock referred to a meeting held before July 4, 2012, where the need to perform tours of inspection was discussed, but she indicated that respondent did not attend due to a medical appointment (Tr. 81-84). Ms. Hancock subsequently stated that the meeting respondent missed was held after July 2012, and that respondent was present for a June meeting where the need for tour inspections was discussed (Tr. 86). It appeared that Ms. Hancock was referring to the June 27 tour commander meeting with ACJ-I and JC staff where respondent's signature appears on a sign-in sheet (Tr. 82; Pet. Ex. M). However, Ms. Hancock did not testify that she herself attended this meeting and the agenda does not specify whether the inspection policy was going to be covered.<sup>1</sup> While "Supervision (Residents)" could conceivably include tours of inspection, no one with personal knowledge testified whether this policy was in fact discussed. Ms. Hancock, who delegated notifying the AJC-Is about the inspection policy to the tour commanders, admitted that she did not know whether Mr. Eromosele spoke to respondent about it prior to July 4, 2012 (Tr. 85-87). Moreover, Ms. Hancock testified that the issue whether an AJC-I could be brought up on disciplinary charges if the policy was not followed would not have been discussed at a meeting with JCs (Tr. 88).

Ms. Hancock's general testimony that staff was also reminded of the bed check policy through memos, e-mails, and at roll call was insufficient to establish notice about the tour of inspection policy. Ms. Hancock did not provide any specifics relating to respondent being notified about either policy between May 7, and July 4, 2012, through memos or e-mails and testified that the tour of inspection policy would not have been covered at roll call (Tr. 32, 84). The 2011 memo stating that the bed check policy would be enforced is insufficient to establish notice of the separate tour of inspection policy. Moreover, there was no proof that this memo was given to respondent or that she had access to the office where it is posted. Actual or constructive notice of the rules of employment is required before an employee can be held liable

---

<sup>1</sup> The agenda for the meeting was: (1) Time and Leave; (2) Documentation; (3) Overtime; (4) City time; (5) Incidents; (6) Call control before any movement; (7) A.S.P.I.R.E; (8) Uniform; (9) Supervision (Residents); (10) Professionalism; and (11) Searches (Pet. Ex. M).

for violating an employer's regulation. *Transit Auth. v. Middleton*, OATH Index No. 258/05 at 8 (Jan. 13, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-26-SA (Feb. 17, 2006); *Dep't of Correction v. Hodges*, OATH Index No. 222/82 at 14 (June 30, 1983).

Even assuming that respondent knew about the 2011 bed check memo, the record made clear that the practice of not performing three tours of inspection continued until the July 4, 2012, incident occurred. Respondent's acknowledgement that after Ms. Hancock arrived, there was "a general understanding" that inspections had to be done was too vague to establish notice that the three-tour inspection policy would be strictly enforced prior to July 4, 2012.

Certainly the wisdom of strict inspection policies to prevent incidents like the one that occurred on July 4, 2012, is clear. However, prior to this incident management was faced with employees at multiple levels in the chain of command that had not been following these policies for years. Moreover, supervisors had declined to enforce the policies and had expressed reservations to management when the issue of enforcement was raised. Under the circumstances, the better practice would have been to require employees to sign for the applicable policy orders and acknowledge that they understood the need to follow them or face discipline. Instead, management initiated disciplinary action without adequately notifying the entire staff of the change when the policy violation resulted in an incident.

Since the failure to perform three tours of inspections was a practice that was known to and condoned by supervisors and because there was insufficient evidence to show that respondent was on notice that Ms. Hancock was going to enforce the policy and discipline staff if they failed to do so, the charges should be dismissed.

### **FINDINGS AND CONCLUSIONS**

1. On July 4, 2012, respondent failed to make three tours of inspection as required by ACS's rules.
2. The failure to make three tours of inspection was a regular practice known to and condoned by supervisors.



**RECOMMENDATION**

The petition should be dismissed.

Alessandra F. Zorghiotti  
Administrative Law Judge

April 10, 2013

SUBMITTED TO:

**RONALD E. RICHTER**  
*Commissioner*

APPEARANCES:

**KAREN A. BLACKMAN, ESQ.**  
*Attorney for petitioner*

**KRIESBERG & MAITLAND, LLP**  
*Attorneys for respondent*  
**BY: JILL MENDELBERG, ESQ.**