

## ***Dep't of Correction v. Vives***

OATH Index Nos. 1162/14, 1163/14 & 1164/14 (Apr. 17, 2014)

Petitioner proved that correction officer was insubordinate, inefficiently performed her duties, engaged in conduct unbecoming, filed a false report, and was excessively absent. ALJ recommended that respondent be terminated from her employment.

---

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

*In the Matter of*  
**DEPARTMENT OF CORRECTION**  
*Petitioner*  
*- against -*  
**CARMEN VIVES**  
*Respondent*

---

### **REPORT AND RECOMMENDATION**

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

This employee disciplinary proceeding was referred by the Department of Correction (“DOC”) pursuant to section 75 of the Civil Service Law. Petitioner alleges that respondent Carmen Vives, a correction officer, was insubordinate, inefficiently performed her duties, engaged in conduct unbecoming, filed a false report, and was excessively absent (ALJ Ex. 1).

A hearing was held on March 24, 2014. Petitioner presented documentary evidence and the testimony of four DOC witnesses. Respondent presented documentary evidence and testified on her own behalf. Respondent admitted one insubordination charge, denied the other charges involving insubordination, conduct unbecoming, and false reporting, and defended against the excessive absence charge on the grounds that it was a continuous absence due to a documented injury.

For the reasons below, petitioner proved all of the charges. Respondent should be terminated from her employment.

### ANALYSIS

Respondent has been a correction officer since 1987. She is assigned to the Support Service Division (“SSD”) and her steady post is working in the laundry. The charges arise out of three separate instances of alleged misconduct.

Petitioner “has the burden of proving its case by a fair preponderance of the credible evidence.” *Dep’t of Correction v. Hall*, OATH Index No. 400/08 at 2 (Oct. 18, 2007), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 08-33-SA (May 30, 2008). Preponderance has been defined as “the burden of persuading the trier of fact that the existence of a fact is more probable than its non-existence.” Prince, *Richardson on Evidence* § 3-206 (Lexis 2008). Petitioner sustained its burden on all the charges.

#### *Excessive absence - May 29, 2012 to March 6, 2013*

Respondent was on sick leave from May 29, 2012, through March 6, 2013, for a total of 202 work days (Pet. Exs. 7, 8). An officer is expected to work 249 days per year (Tr. 110). Respondent alleged that she was absent due to an off-duty injury that required surgery and physical therapy.<sup>1</sup> She provided medical documentation from her doctor and DOC doctors at the Health Management Division (“HMD”) agreed that she was unfit for duty (Pet. Ex. 9).

On February 26, 2013, respondent was cleared by her doctor, using the form provided by HMD, to return to full-duty on March 1. On February 28, HMD requested that the doctor provide a signed letter on letterhead which he prepared on March 1, 2013. HMD saw respondent on March 6 and cleared her for duty for the next day (Pet. Ex. 9). Since respondent was ready, willing, and able to return to work on March 1, and did not do so because HMD requested additional information, the four days of sick leave in March 2013 should not be charged against respondent. *Dep’t of Correction v. Ferrer*, OATH Index No. 1100/98 (June 10, 1998) (charges dismissed where officer was on sick leave for a seizure disorder and who wanted to resume full duty but did not because of a DOC policy that he be seizure free for one year).

Directive 2258R-A sets forth DOC’s rule on absence that is excessive enough to constitute sanctionable misconduct. Under this directive an employee who is out sick more than

---

<sup>1</sup> Respondent’s request to remain anonymous is denied as there is no private medical information disclosed herein.

40 days within a twelve-month period may be subject to termination of employment due to excessive absenteeism. Dep't of Correction Directive No. 2258R-A § (III)(E)(1).

Respondent is charged with being “unable to perform the full range of duties of her position as a correction officer” because of excessive absenteeism. In addition to willful misconduct, “nonwillful absenteeism may be adjudicated” in a section 75 proceeding. *Garayua v. Bd. of Education*, 248 A.D.2d 714 (2d Dep't 1998); *see also Dep't of Correction v. J. C.*, OATH Index No. 208/04 at 11 (Apr. 26, 2004), *modified on penalty*, Comm'r Dec. (June 24, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 05-23-SA (Apr. 6, 2005).

Although respondent provided valid documentation for her continued absence, the presence of medical documentation does not mitigate the charge, since the absence itself is the offense. *See Gradel v. Lilholt*, 257 A.D.2d 972 (3d Dep't 1999) (employer had right to terminate for excessive absence even where employee was authorized to take the days off); *Dep't of Correction v. Waddy*, OATH Index No. 730/96 at 22-23 (June 12, 1996) (fault is not a necessary element of medical incompetence). “The fact that [the employee] may have had a ‘valid’ reason for each . . . absence[ ] is irrelevant to the ultimate issue of whether his unreliability and its disruptive and burdensome effect on the employer rendered him incompetent to continue his employment.” *Romano v. Town Bd. of the Town of Colonie*, 200 A.D.2d 934 (3d Dep't 1994); *see also Gradel*, 257 A.D.2d at 972 (employee’s “pattern of absences was disruptive and burdensome to his employer and co-workers”). This tribunal has found that an “exceedingly high rate of absence compels the conclusion” that an employee could not perform the essential duties of his position. *Dep't of Correction v. Astacio*, OATH Index No. 1715/99 at 4 (July 14, 1999), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 01-36-SA (Apr. 17, 2001) (sick days attributable to asthma).

Where petitioner has shown that the number of absences has exceeded the criteria set forth in Directive 2258R-A, this tribunal has found such absences constituted misconduct. *See, e.g., Dep't of Correction v. Jackson-Crawford*, OATH Index No. 2710/11 (Nov. 19, 2011), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 12-23-SA (May 3, 2012) (officer absent 79 days from September 2009 to September 2010 and 171 days from September 2010 to October 2011); *Dep't of Correction v. Shepherd*, OATH 965/03 (Nov. 6, 2003) (captain absent 178 days over 15-month period found “excessive and burdensome to the agency”); *Dep't of Correction v. Duncan*,

OATH Index No. 873/02 (Oct. 21, 2002), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 03-88-SA (Sept. 29, 2003) (officer sick 142 days over 16-month period); *Dep't of Correction v. Frascati*, OATH Index No. 948/96 (May 14, 1996), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 97-89-SA (Oct. 8, 1997) (officer sick 129 days over 14-month period).

Having shown that respondent exceeded the criteria of Directive 2258R-A (40 days in a 12-month period) by being absent for 198 days in a nine-month period, petitioner sustained the charge that respondent failed to perform the duties of her position as a correction officer because of excessive absence from work.

*Insubordination - February 17, 2012*

It was undisputed that on February 17, 2012, Captain Idlett granted respondent's request for personal emergency leave to take her mother to the hospital and directed respondent to provide supporting documentation on her next tour of duty. Respondent, who was on vacation, returned to work on March 7 but did not provide documentation until March 12 (Pet. Ex. 6). Captain Idlett testified that respondent never notified him about her inability to timely provide the documentation (Tr. 93-94).

Respondent testified that when she returned to work on March 7 she was tending to her ill mother and her significant other who was undergoing medical treatment. The paperwork was at her mother's house and she was unable to get it (Tr. 176-77).

To prevail on a charge of insubordination, petitioner must show that: (1) a supervisor gave an unambiguous order; and (2) the order was refused. *Dep't of Sanitation v. Smyth*, OATH Index No. 2178/05 at 7 (Feb. 14, 2006), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-122-SA (Nov. 14, 2006). The refusal need not be announced; it may consist of a deliberate, passive failure to comply. *See Health & Hospitals Corp. (Correctional Health Services) v. LaSane*, OATH Index No. 1165/02 at 7 (Aug. 8, 2002).

This charge should be sustained. There is no dispute that respondent was given an unambiguous order to submit documentation upon her return to work and that she failed to do so until five days later. Respondent had approximately 18 days to get the documentation and never advised Captain Idlett about her inability to provide it. Respondent's excuse about family medical issues was unpersuasive.

*Insubordination, conduct unbecoming, and false reporting - June 9, 2011*

Petitioner alleges that on June 9, 2011, respondent failed to comply with two supervisors' orders, inefficiently performed her duties, engaged in conduct unbecoming an officer, and filed a false report. Respondent denies the charges. These charges should be sustained.

On Thursday, June 9, during the 6:00 a.m. roll call, respondent was assigned to the horticulture unit. This is where inmates engage in gardening classes and activities under the supervision of an outside agency. Ms. Torres is the horticulture program director (Tr. 20). The unit is located near the Rose M. Singer Center ("RMSC") (Tr. 158).

Captain Idlett testified that respondent came to him at 6:10 a.m. and asked who was driving the shuttle and what to do. Captain Idlett instructed respondent to get keys and a vehicle from the SSD arsenal and to report to Ms. Torres at 400 Mandanici Road. Captain Idlett told respondent that Ms. Torres would provide her with a list of female inmates to pick up from RMSC who would be working there (Tr. 20, 77-80; Pet. Exs. 1, 2, 5). Captain Idlett testified that respondent never relayed that she had an issue getting to her assignment (Tr. 90).

Captain Crooms testified that around 9:00 a.m. she received a call from Ms. Torres who stated that respondent had not picked up the female inmates. Captain Crooms called the greenhouse and spoke to respondent at approximately 9:15 a.m. When the captain asked respondent why she had not picked up the inmates, respondent stated that she did not know where to go. Captain Crooms told respondent to pick them up in RMSC buildings 13 and 19 and respondent stated that she had her meal at 10:30 a.m. Captain Crooms told respondent to get the inmates and that she would take her meal when a meal relief was available (Tr. 20-21, 39, 45).

According to Captain Crooms, respondent failed to follow her orders. The captain received a call from respondent at 11:00 a.m. who stated that she was at RMSC but was unable to pick up the inmates because they had gone to their meal. When Captain Crooms asked why respondent had not reported to RMSC at 9:15 a.m. as directed by her over the phone, respondent claimed that they never spoke that morning. Captain Crooms repeated what she had told respondent earlier and directed respondent to return to SSD. Respondent did not arrive at SSD until 12:05 p.m. Captain Crooms testified that since respondent did not have any inmates it should not have taken her more than ten or fifteen minutes to go from RMSC to SSD (Tr. 22, 36). Captain Crooms testified that if officers have questions about an assignment they should

call a supervisor for clarification and that respondent never relayed any questions or concerns about the horticulture post (Tr. 38).

Respondent denied speaking to Captain Idlett after roll call or receiving instructions from anyone about what to do, including getting keys to a vehicle. Respondent testified that on Monday, June 6, she was advised by Captain Jones, the laundry supervisor, that she would be working on Thursday at the horticulture post. She had no objection to the assignment but had never worked there and had no idea what to do. After Thursday's 6:00 a.m. roll call, respondent followed her last order from Captain Jones and reported to the horticulture unit. She spoke to the shuttle driver who drove her to RMSC and told her to get the E key to open the outside fence (Tr. 159-61, 174, 190-191).

Respondent testified that she got to the horticulture unit at about 6:20 a.m. No one was present and there were no post orders or log books to explain the post. She waited for civilian or uniformed staff to arrive and tell her what to do. She did not think it necessary to call a supervisor and in the meantime called her union. At 7:00 a.m. Officer Whittman arrived with male inmates, and she assisted watching them until 10:00 a.m. (Tr. 160-61, 191-92).

In her initial testimony respondent made no mention of her first call with Captain Crooms (Tr. 161-62) but later testified that just after 9:00 a.m. she received a call from the captain who rudely notified her that she was not taking her meal at 10:30 a.m. and ordered her to pick up inmates "around after 10:00" (Tr. 167-68). However, on cross-examination respondent testified that the sole purpose of the captain's call was to notify respondent not to take her meal; Captain Crooms never discussed anything about picking up inmates (Tr. 197-98). Respondent explained that Ms. Torres probably told Captain Crooms that respondent mentioned she normally takes her meal at 10:30 a.m. and that she had no problem taking her meal later (Tr. 197-98).

Respondent also testified that sometime before 10:00 a.m. Ms. Torres called and told her to pick up the female inmates after the male inmates left the area at 10:00 a.m. After the male inmates had been secured, respondent walked to RMSC and spoke to a captain who told her that the inmates are usually in dorm 19. It was very hot and it took a while to walk there. When respondent got to dorm 19, an officer stated that the inmates were getting ready for their meal. Respondent signed the log book and spoke to the inmates who indicated that they wanted to eat.

Respondent told the officer that she would pick up the other inmates in dorm 13. She walked to dorm 13, signed the log book and was told the inmates were eating (Tr. 161-64).<sup>2</sup>

Respondent testified she called Captain Crooms around 11:00 a.m. to inform her that she was unable to pick up the female inmates because they were eating (Tr. 164). According to respondent, Captain Crooms was rude and upset. She ordered respondent back to SSD and slammed down the phone (Tr. 168-69). Respondent followed the captain's order. She walked to the horticulture unit because she had left the civilians there. She told them what was going on and secured the area by letting the civilians out and locking the gate with the E key. She went inside with the civilians and they went to another area in the building. Respondent walked to the other side of RMSC and called twice for the shuttle but no one responded. She waited for the route bus to bring her back to SSD and got there around 11:45 a.m. (Tr. 169-72).

When respondent returned to SSD, Captain Crooms told respondent to take her meal and ordered her to write a report by the end of her tour. She gave respondent the following a list of questions to answer (Pet. Ex. 3): (1) why she failed to report to Ms. Torres as instructed by Captain Idlett; (2) what she did from 6:00 to 11:00 a.m.; (3) why she failed to pick up the inmates at 9:15 a.m. as instructed; (4) why it took her an hour to return from RMSC to SSD; and (5) to provide a detailed account of what she did on her entire tour.

In her report (Pet. Ex. 4), respondent stated that she was never instructed to report to anyone by Captain Idlett or any other supervisor. She went to RSMC, walked through the "HOT LONG CORRIDOR" (emphasis and quotes in original) to get to the horticulture trailer, waited for staff, and when Officer Whittman arrived with male inmates they "performed our duties Care Custody and Control Supervising Inmates working." Captain Crooms called her and in "a rude loud unprofessional manner" informed her that she was not allowed to go to meal at 10:30 a.m. and that female inmates were to be picked up after the males left at 10:00 a.m. Captain Crooms "slammed down the ringer" and never instructed her to pick up the inmates at 9:15 a.m. At no time did respondent tell Captain Crooms the inmates could not be picked up. She had to find out where they were from RMSC staff who suggested she try dorm 19 at which time she walked down the "HOT LONG CORRIDOR." The officer in dorm 19 advised that the inmates were getting ready for their meal and that there may be inmates in dorm 13 who work in the

---

<sup>2</sup> Respondent did not note the time of her entries but it appears from the timed entries before and after them that she signed the first log between 10:30 and 11:00 and the second log between 11:00 and 11:10 a.m. (Resp. Exs. A, B).

horticulture unit. When she called dorm 13 she was told that the inmates were getting ready for their meal. Respondent notified Captain Crooms who “in a rudely loud unprofessional manner” ordered her back to SSD and “slammed down the ringer.” Respondent walked back to the “HOT LONG CORRIDOR” to advise the civilian staff and escort them to RSMC. She called for the shuttle and when no one answered she waited for the route bus.

Captain Crooms testified that she found respondent’s report vague in that respondent did not specifically answer questions about what she did that morning and why she failed to pick up the inmates. Moreover, the report was false because Captain Crooms never raised her voice and did not hang up the phone on respondent. Instead, the captain provided clear instructions to respondent. Moreover, respondent falsely denied receiving instructions from Captain Idlett and being told to pick up the inmates at 9:15 a.m. (Tr. 23, 36-38).

To the extent resolution of these charges relies on a determination of witness credibility, this tribunal has looked to witness demeanor, the consistency of a witness’s testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness’s testimony comports with common sense and human experience in determining credibility. *Dep’t of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 98-101-A (Sept. 9, 1998). For the reasons below, I found petitioner’s witnesses to be more credible than respondent.

There was no apparent reason for Captains Crooms and Idlett to lie about respondent. While they have known each other since they started at DOC and are friendly, there was no evidence to support that the captains colluded, as alleged by respondent (Tr. 174). Moreover, their testimony was concise, consistent, and supported by documentary evidence.

On the other hand, respondent had a motive to lie to avoid a finding of misconduct. While respondent had log book entries to support her testimony that she was at RSMC at the time claimed, they are insufficient to rebut petitioner’s credible proof on the salient facts. Moreover, respondent’s testimony was inconsistent, confusing, and it did not comport with common sense. For example, respondent’s testimony about the 9:00 a.m. call with Captain Crooms changed several times and she gave conflicting testimony about whether the captain or Ms. Torres gave her instructions to pick up the inmates. Respondent’s explanation that she was following Captain Jones’s order from three days before, went to a new post without knowing

what to do, waited for 45 minutes for someone to show up to get directions rather than call a supervisor, and that she called her union to talk about nothing in particular also undermined her credibility. Moreover, respondent's acknowledgment that Ms. Torres was the supervisor of the horticulture unit but that she never asked her what to do or sought information about where to pick up inmates from officers at RSMC (Tr. 194-96) made no sense.

The record supports a finding that, after roll call at 6:10 a.m., Captain Idlett directed respondent to report to Ms. Torres at the horticulture unit to get a list of inmates that needed to be picked up from RSMC. Captain Idlett's testimony that respondent asked him who was driving the shuttle was corroborated in part by respondent's testimony that she spoke to the shuttle driver about the horticulture unit. After respondent got to the horticulture unit and found no one there, she failed to call a supervisor for instructions but instead called her union to talk about unrelated matters.

The record also supports a finding that respondent neglected to contact Ms. Torres for her assignment which necessitated a call from Ms. Torres to Captain Crooms. I credit Captain Crooms that at 9:15 a.m. she ordered respondent to immediately go to RSMC to pick up inmates from dorms 13 and 19. Respondent delayed more than an hour so that by the time she got to RSMC the inmates were eating their meal and could not go to the horticulture unit. When Captain Crooms ordered her to return immediately to SSD, respondent delayed by taking an unnecessary detour to the horticulture unit. The charges that respondent failed to follow orders, inefficiently performed her duties, and engaged in conduct unbecoming should be sustained.

In reviewing a false report claim, the first consideration is whether the underlying incident in question did in fact occur. The second is whether respondent made material deviations from the actual incident or intentionally misrepresented the actual events in question. *Dep't of Correction v. Rodriguez*, OATH Index No. 277/06 (Mar. 29, 2006).

Since respondent was given orders to pick up inmates from RSMC by Captains Idlett and Crooms at 6:10 a.m. and 9:15 a.m., respectively, respondent's report that she was never given orders by either captain was false. Similarly, respondent failed to adequately explain why she failed to pick up the inmates as directed and the description of her activities between 6:00 and 11:00 a.m. is vague and filled with irrelevant facts. Moreover, respondent's report that she never told Captain Crooms she could not pick up the inmates was contrary to respondent's testimony

that she called the captain and advised that the inmates could not be picked up because they were at their meal. Finally, Captain Crooms's testimony that she gave respondent clear instructions was credible and respondent's report that the captain was rude and slammed down the phone was false.

### **FINDINGS AND CONCLUSIONS**

1. Petitioner demonstrated that respondent was excessively absent from her position as correction officer from May 29, 2012, until February 28, 2013, for a total of 198 days.
2. Petitioner demonstrated that respondent failed to follow an order given on February 17, 2012, as charged.
3. Petitioner demonstrated that on June 9, 2011, respondent was insubordinate, inefficiently performed her duties, and engaged in conduct unbecoming as charged.
4. Petitioner demonstrated that on June 9, 2011, respondent filed a false report as charged.

### **RECOMMENDATION**

Upon making these findings, I obtained and reviewed an abstract of respondent's disciplinary history for purposes of recommending an appropriate penalty. Respondent was appointed as a correction officer in 1987 and has a minor disciplinary history. In 2005 she received a 10-day suspension for failing to obey orders on three occasions and making an improper entry on a Department form. *See Dep't of Correction v. Vives*, OATH Index No. 817/05 (June 9, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-40-SA (Aug. 1, 2006).

Respondent has been found guilty of insubordination, inefficiently performing her duties, engaging in conduct unbecoming, filing a false report, and excessive absenteeism. Petitioner seeks termination of respondent's employment. This request is appropriate under the circumstances.

The penalties for insubordination vary depending upon a range of factors including the nature of the conduct, the context in which the conduct occurred, the employee's length of tenure, and the employee's prior record of discipline. The range of penalties may be broad, from

five days' suspension to termination. *See, e.g., Dep't of Correction v. Joseph*, OATH Index No. 196/12 (Apr. 5, 2012), *modified on penalty*, Comm'r Dec. (Aug. 7, 2013), *aff'd*, NYC Civ. Serv. Comm'n Case No. 35608 (Mar. 12, 2014) (20-day suspension for officer with no record who refused to relinquish overtime post and refused in a profane manner to open and close security doors); *Dep't of Correction v. Fernandez*, OATH Index No. 1219/11 (Apr. 15, 2011) (20-day suspension for captain with one prior incident of discipline, for two incidents of insubordination); *Dep't of Correction v. Bee*, OATH Index No. 291/06 (May 19, 2006) (five-day suspension for officer with no record who failed to provide timely oral report regarding incident where fellow officer was injured); *Dep't of Correction v. Bowens*, OATH Index No. 172/91 (Dec. 10, 1990), *aff'd, sub nom. Bowen v. Sielaff*, 186 A.D.2d 494 (1st Dep't 1992) (termination from employment for officer with prior discipline who was disrespectful toward supervisors on three occasions, failed to obey an order on three occasions, submitted a false report, and failed to supervise an inmate).

Similarly, penalties for officers who have made false reports range from 10 days' suspension to termination depending on the circumstances. *See, e.g., Dep't of Correction v. Andino*, OATH Index Nos. 731/13 & 1000/13 (May 14, 2013) (termination for officer with no disciplinary record who engaged in excessive force and made false statements); *Dep't of Correction v. Fernandez*, OATH Index No. 1219/11 (Apr. 15, 2011) (20-day suspension for officer with one prior disciplinary matter who made false statements in a written report and interview); *Dep't of Correction v. Aquino*, OATH Index No. 188/07 (Dec. 15, 2006), *modifying on penalty*, Comm'r Dec. at 9 (Feb. 22, 2007), *modifying on penalty*, NYC Civ. Serv. Comm'n Item No. CD 07-93-M (Sept. 25, 2007) (officer with no prior discipline suspended for 10 days for profanity, disobeying an order, and filing a misleading report about the event).

While respondent's insubordination and false reporting merit a penalty less than termination, respondent's medical incompetence must be given considerable weight in this analysis. When an officer is sick, another officer may need to work mandatory overtime, resulting in additional expense for DOC, scheduling changes, additional paperwork, and poor morale among the officers who have to cover for the absent officers (Tr. 108-10, 124-25).

However, the absence control directive provides that certain "mitigating factors" be considered before a decision is made to commence a disciplinary or termination action. These

include: (1) the employee's use of sick leave since joining the DOC; (2) whether the sick leave is the result of a line of duty injury which resulted from an unusual incident or a use of force incident, as defined in Directives 5000R and 5005R/5006; (3) whether the use of sick leave precedes or follows pass days and holidays; (4) whether the use of sick leave is ordered overtime; and (5) the nature of the illness (Directive, at § (III) (F)).

Here, mitigating factors include respondent's tenure with DOC and her minor disciplinary record, respondent's absence was continuous due to an off-duty injury, and respondent has not been sick since she returned to duty. On the other hand, respondent has used sick leave liberally during her tenure. Most notable are: in 1989 she used 124 sick leave days; in 1988 she used 58 days; in 2005 she used 52 days; in 2006 she used 39 days; and in 2010 she used 29 days. For the relevant period, respondent was absent for 198 days in 2012 and 2013.

Past cases show that correction officers with this number of absences have all been terminated even when mitigating circumstances exist. *See e.g., Dep't of Correction v. Rios*, OATH Index No. 2315/11 (Oct. 18, 2011) (officer absent 21 days in 2009, 205 days in 2010, and 154 days in 2011 terminated); *Dep't of Correction v. Jackson-Crawford*, OATH Index No. 2710/11 (Nov. 19, 2011) (officer absent 250 days terminated); *Dep't of Correction v. Duclet*, OATH Index No. 972/09 (May 19, 2009) (despite mitigating circumstances respondent terminated due to excessive absenteeism); *Dep't of Correction v. Rodriguez*, OATH Index No. 1999/08 (Aug. 22, 2008) (officer absent primarily for work-related injuries for 140 days in one year terminated); *Dep't of Correction v. J. C.*, OATH Index No. 208/04 (Apr. 26, 2004) (officer who had HIV and was absent for 164 days in one year terminated); *Dep't of Correction v. Peters*, OATH Index No. 1118/03 (Sept. 24, 2003) (officer with 69 absences in one year terminated); *Dep't of Correction v. Duncan*, OATH Index Nos. 873/02 and 1428/02 (Oct. 21, 2002), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 03-88-SA (Sept. 29, 2003) (officer with 142 absences in 16 months terminated); *Dep't of Correction v. Purcell*, OATH Index No. 1336/96 at 18 (July 8, 1996), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 97-106-SA (Nov. 21, 1997) (officer with 90 absences in one year terminated).

The record supports a reasonable conclusion that respondent is unreliable and that her misconduct is disruptive and burdensome to the agency. Given the totality of the circumstances presented, termination from employment would not be disproportionate to the sustained

misconduct as to be shocking to one's sense of fairness. *See Pell v. Bd. of Education*, 34 N.Y.2d 222 (1974).

Accordingly, respondent should be terminated from her employment.

Alessandra F. Zorziotti  
Administrative Law Judge

April 17, 2014

SUBMITTED TO:

**JOSPEH PONTE**  
*Commissioner*

APPEARANCES:

**MARTHA IBIS-BLAKE, ESQ.**  
**KASSANDRA KING, ESQ.**  
*Attorneys for Petitioner*

**KOEHLER & ISAACS, LLP**  
*Attorneys for Respondent*  
**BY: PETER TROXLER, ESQ.**