Dep't of Correction v. Blanc

OATH Index No. 2571/11 (Feb. 2, 2012)

Respondent, a correction officer, found to have cashed New York City Housing Authority Section 8 subsidy checks on which she was not the payee and to have forged the payee's name as endorsee on the back of the checks, as well as on a number of other documents submitted to the Housing Authority. Respondent also found to have fraudulently received the benefit of a public assistance subsidy from the Human Resources Administration. Termination of employment recommended despite respondent's lack of prior disciplinary history.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
-against-
MARGARETH BLANC
Respondent

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

This is a disciplinary proceeding referred by the petitioner, the Department of Correction, pursuant to section 75 of the Civil Service Law. Petitioner alleges that respondent, Margareth Blanc, a correction officer, engaged in misconduct as follows. Charges one and two allege that from February 1, 2003 to March 1, 2005, without permission or authority, respondent cashed New York City Housing Authority ("NYCHA") Section 8 subsidy checks for which she was not the payee, aggregating more than $24,000, by forging the payee's name on the checks. Charge three alleges that from October 1, 2002 through approximately July 19, 2004, respondent forged the payee's name on a number of documents required by NYCHA in order to receive Section 8 checks. Charge four alleges that from January 1, 2003 to about April 13, 2004, respondent received more than $19,000 from the New York City Human Resources Agency ("HRA") in public assistance monies after filing false documentation with HRA pertaining to her residence. Charge five alleges that during the same time period, respondent collected public assistance

money from HRA relating to her purported residence while simultaneously collecting Section 8 money from NYCHA relating to her actual residence at a different location. Charge six alleges that from August 1, 2005 through May 1, 2006, respondent failed, as required, to notify NYCHA that she had moved in December 2002 into a home owned by her sisters, resulting in one of respondent's sisters receiving approximately $4,976 in Section 8 monies to which she was not entitled (ALJ Ex. 1).

The charges allege specific violations of the Department's rules and regulations, and also allege that respondent engaged in various crimes, including grand larceny, forgery, welfare fraud, and making a false statement.

At a two-day trial, petitioner presented the testimony of Edith Clarke, the complainant in the criminal case; Eric Malecki and Anthony Capek, who investigated the case for DOI;[1] and Mary Caban, who investigated the case for HRA. Respondent testified on her own behalf, and also presented the testimony of her sister, Nadia Joseph, and of Annie Dacis, an employee at the check-cashing establishment in Brooklyn where respondent cashed the Section 8 checks. The record was left open until December 16, 2011, for post-trial legal submissions.

As set forth below, I find charges one through five sustained, but only as to misconduct occurring after February 12, 2004, when respondent became a correction officer. I find charge six was not sustained and recommend that it be dismissed.

ANALYSIS

Preliminary Legal Issues

This case raises multiple legal issues, including whether or not respondent can be disciplined under Section 75 of the Civil Service Law for conduct occurring before she became a correction officer, the applicability of section 160.50 of the Criminal Procedure Law to the admissibility of certain of petitioner's exhibits, the crimes exception to the statute of limitations under Section 75 of the Civil Service Law, and the admissibility of statements which respondent made to DOI which counsel claims were obtained in violation of her constitutional rights. These issues are discussed below.

[1] Mr. Malecki remains a DOI investigator while Mr. Capek is currently an inspector employed by the United States Postal Service (Maleck: Tr. 29; Capek: Tr. 197). For purposes of this decision, however, Mr. Capek will be referred to as "Investigator," rather than "Inspector."

Motion to Dismiss or Preclude on the Basis of Section 160.50 of the Criminal Procedure Law

Prior to trial, respondent moved to dismiss this case, or, alternatively, to preclude petitioner from introducing certain documents and materials because they appeared to have been presented to a grand jury, which on November 16, 2010, dismissed the criminal complaint against her. Pursuant to section 160.50(1)(c) of the Criminal Procedure Law, "all official records and papers" relating to the case were sealed.

I issued a memorandum decision denying the motion to dismiss and granting the motion to preclude as to certain items. *Dep't of Correction v. Blanc,* OATH Index No. 2571/11, mem. dec. (Sept. 12, 2011). The memorandum decision is incorporated within this report and recommendation. In sum, I held that because the criminal case against respondent was dismissed and sealed, Section 160.50(1)(c) of the Criminal Procedure Law acts to preclude petitioner from introducing into evidence "official records and papers" that were presented to the grand jury. Crim. Pro. Law § 160.50(1)(c) (Lexis 2011). However, there was no basis for dismissal of the disciplinary action.

Assuming for purposes of the decision that certain material which the Department of Investigation ("DOI") supplied as part of its investigation to the District Attorney was presented to the grand jury, I went on to find that a number of items were precluded since they were affidavits, recordings and transcripts of interviews, and statements given to DOI by respondent, and DOI records, notes, and memoranda relating to these interviews. The one exception was a statement which respondent had attached as an exhibit to an Article 78 petition, which is admissible as part of the public record. Other items, such as rent subsidy checks and NYCHA records, were not precluded, because they were records made in the ordinary course of business, prior to the commencement of the criminal court proceeding, and not generated in furtherance of the prosecution, or by the prosecutor.

Even as to the precluded items, such as taped interviews of respondent with DOI, I found that petitioner's witnesses could testify as to their independent recollection of events or statements, even if petitioner could not produce the particular document or recording as an exhibit at trial.

Whether Respondent Can be Disciplined for Conduct Occurring Prior to Her Employment as a Correction Officer

With the exception of charge six, the charges against respondent charge her with misconduct that began before she became a correction officer on February 12, 2004 (Blanc: Tr. 332).

Respondent contends that pre-employment conduct is outside the disciplinary purview of Section 75 and that any evidence pertaining to such conduct must be stricken from the record. Petitioner asserts that Section 75 does not contain any restrictive language to this effect and that the cases relied upon by respondent are inapposite.

The case law supports respondent's position to the extent that discipline may not be imposed for discrete acts of misconduct occurring prior to employment. However, evidence of conduct prior to employment may be admissible as relevant to the respondent's state of mind, relating to post-employment conduct.

The First Department held in *Umlauf v. Safir,* 286 A.D.2d 267 (lst Dep't 2001) that it was error to terminate an employee for pre-hiring misconduct, because authority over pre-hiring conduct is "statutorily vested in the head of the New York City Department of . . . Citywide Administrative Services," under Civil Service Law 50(4). Section 50(4) permits the "appropriate municipal commission" to "investigate the qualifications of an eligible after he has been appointed from the list, and upon finding facts which if known prior to appointment, would have warranted his disqualification . .. may revoke such eligible's certification and appointment and direct that his employment be terminated." Civ. Serv. Law § 50(4) (Lexis 2011). The *Umlauf* decision cited *Borges v. McGuire,* 107 A.D.2d 492 (lst Dep't 1985), which held that a police officer could not be disciplined under the Administrative Code for conduct occurring prior to her employment. Nor could the police officer be disciplined under Section 75 of the Civil Service Law for conduct occurring while she was a civilian employee, since she was no longer a civilian employee.

Petitioner's attempt to distinguish *Borges* by asserting that the Administrative Code expressly provides for discipline of "members of the force," while the Civil Service Law does not contain such "specific limiting language" (Pet. Supp. Post-Trial Mem. at 3), was unavailing. The principle is the same. Officer Borges was a member of the force when the Police Department sought to discipline her for conduct occurring before she was a member of the force.

Section 75 of the Civil Service Law provides for the initiation of due process disciplinary proceedings for five categories of employees, including "[a] person holding a position by permanent appointment in the competitive class of the classified civil service." Civ. Serv. Law § 75(a)(1) (Lexis 2011). Respondent is a permanent civil service employee. The Department has sought to discipline her for conduct occurring prior to this time. Thus, *Borges* controls. As the First Department noted in *Borges* and again in *Umlauf*, should the Department seek to discipline respondent for pre-employment conduct, the proper recourse is through Section 50(4) of the Civil Service Law, not Section 75.

That aside, it stretches the holdings in *Borges* and in *Umlauf* to hold that evidence of conduct occurring prior to respondent's appointment as a correction officer, should be excluded. Such evidence may be admissible as part of the proof of motive, intent, or other material fact, relating to respondent's conduct on and subsequent to February 12, 2004. *See Matter of Gala*, OATH Index No. 582/97 at 6 (Dec. 9, 1996), *adopted*, Loft Bd. Order No. 2054 (Jan. 9, 1997). Thus, respondent's application to strike evidence of pre-employment conduct from the record is denied.

Crimes Exception to the Statute of Limitations

The charges in this case were served on respondent on March 29, 2011, well beyond the 18-month statute of limitations set forth in the Civil Service Law. However, by alleging that respondent violated various sections of the Penal Law, petitioner seeks to invoke the crimes exception to the Statute of Limitations. Section 75(4) of the Civil Service Law provides that the statute of limitations "shall not apply where . . . the misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime." Civ. Serv. Law § 75(4) (Lexis 2011). To prove that the crimes exception applies, the agency must establish all of the elements of the alleged crimes as defined in the Penal Law by a preponderance of the evidence. *See Dep't of Correction v. Melendez*, OATH Index Nos. 237/05, 240/05 at 2 (Aug. 25, 2005); *Dep't of Correction v. Battle*, OATH Index No. 1052/02 at 7-9 (Nov. 12, 2002) (citing *Aronsky v. Bd. of Education*, 75 N.Y.2d 997, 1000 (1990)).

The fact that respondent was never indicted does not prevent reliance on the crimes exception, nor preclude a subsequent determination of guilt in a disciplinary proceeding. *Foran v. Murphy*, 73 Misc. 2d 486, 488 (Sup. Ct. N.Y. Co. 1973); *see also Dep't of Correction v.*

McFarland, OATH Index No. 650/92 at 4, n.2 (Aug. 24, 1992), *aff'd sub. nom. McFarland v. Abate*, 203 A.D.2d 190 (1st Dep't 1994) (District Attorney's decision not to prosecute does not preclude reliance upon the crimes exception).

Respondent's counsel asserts in his post-trial brief (Resp. Post-Trial Brief at 2-3) that the crimes exception does not apply because the criminal statute of limitations has run on the crimes which respondent is alleged to have violated. Thus, counsel contends that because respondent could no longer be prosecuted for these crimes, petitioner would not be able to establish that the misconduct proven would constitute a crime. This argument is misplaced. As the New York State Supreme Court held in *Dati v. Gallagher,* 68 Misc. 2d 692, 694 (Sup. Ct. Westchester Co. 1971):

> This argument does not conform to the statute. The statute last cited [§75] does not require a conviction on the acts of misconduct charged to the petitioner to make the exception [to the limitations period] operative . . . It does not purport to bar disciplinary proceedings merely because a criminal prosecution may not now be maintained on the charges preferred against petitioner.

OATH has followed this holding in several cases, including *Transit Authority v. Morgillo,* OATH Index No. 1288/90 at 5 (Mar. 20, 1991) and *Board of Education v. Arena,* OATH Index No. 437/82 at 9-10 (Dec. 2, 1982).

Thus, the crimes exception would apply here to permit discipline on charges served after the eighteen-month statute of limitation if petitioner is able, for each charge, to establish by a preponderance of the credible evidence every element of at least one crime.

Suppression of Statements Made by Respondent During and as a result of interviews with the Department of Investigation

Respondent was interviewed by DOI on three occasions. Petitioner presented the testimony of two of the DOI investigators at trial, consistent with my holding in the memorandum decision that while the interviews themselves were precluded, as were DOI memoranda, notes, or summaries of the interviews, the investigators would be permitted to testify about their independent recollection of the interviews.

In respondent's post-trial memorandum, counsel asserted that any statements respondent made to the investigators should be suppressed because those interviews violated her

constitutional rights. In brief, he asserted that the setting and circumstances of the interviews were coercive and that respondent's statements were involuntary. He argued that respondent was not given *Miranda* warnings, and that when she asked for legal representation, she was told that she did not need it. (Resp. Post-Trial Mem. at 3-5). *See Miranda v. Arizona*, 384 U.S. 436 (1966).

Respondent's motion is essentially a motion to strike from the record the DOI investigators' testimony and the written "deposition" that respondent provided to the investigators. As a legal matter, I find an insufficient basis to do so. However, in making credibility determinations and fact-findings in this case, I have relied primarily upon the witness testimony, including the testimony of respondent and Edith Clarke, about what occurred, rather than the testimony of the investigators about what respondent and Ms. Clarke told them. Both respondent's trial testimony and her written "deposition" were essentially consistent with the investigators' account of their interviews.

It is undisputed that respondent was not given *Miranda* warnings during her DOI interviews. However, *Miranda* warnings are only required during custodial interrogation. *See Miranda*, 384 U.S. at 444 ("By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."). As discussed below, the record does not support a finding that respondent was subject to custodial interrogation. As a matter of law, moreover, the lack of *Miranda* warnings does not give rise to the suppression of the interviewee's statements in an administrative disciplinary proceeding. The Court of Appeals has held that breach of a person's rights under the Fifth Amendment of the United States occurs "only when his statements, taken without the necessary observance of his protection, are used against him in a criminal case." *Terpstra v. Niagra Fire Insurance Co.*, 26 N.Y.2d 70, 75 (1970). Hence, statements taken by the police without prior warning to the individual of his *Miranda* rights need not be suppressed in a civil case, so long as they are voluntarily given. *Id.* at 73. [2] *See also Rokjer v. Prezio*, 34 A.D.2d 588, 589 (3d Dep't 1970) (admission of incriminating statement in administrative disciplinary proceeding did not violate Fifth Amendment, despite the absence of *Miranda* warnings); *Marohn v. Waterfront Comm'n of New York Harbor*, 2011 N.Y. Slip Op

[2] By contrast, the Court noted that evidence seized in violation of Fourth Amendment rights may not be admitted in administrative forfeiture hearings, because a breach of Fourth Amendment rights occurs at the time a person's belongings are illegally confiscated. *Id.* at 75.

32238U at 6 (Sup. Ct. N.Y. Co. Aug. 15, 2011) (admission of interview transcripts in registration revocation proceeding did not violate Fifth Amendment, as *Miranda* warnings apply only in the context of criminal proceedings).

There is no evidence that respondent's statements to DOI were involuntary. In considering voluntariness, the issue is whether the individual's statement is "the product of an essentially free and unconstrained choice" or whether the person's "will has been overborne and his capacity for self-determination critically impaired." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973) (internal citation omitted). Factors to be considered may include the youth of the individual, his lack of education, limited intelligence, length of detention, repeated and prolonged nature of the questioning, any advice given involving constitutional rights, and physical abuse, including deprivation of food or sleep. *Id.* at 226. *See also People v. Tankleff*, 84 N.Y.2d 992, 994 (1994) (issue is whether "defendant's . . . will had not been overborne by any actions taken by the police"). Thus, in *Terpstra*, 26 N.Y.2d at 73, the Court of Appeals found that a jury was properly instructed that it should not consider or give any weight to statements that "resulted from force, fraud, duress, fear or intimidation, so that they did not represent the plaintiff's free and voluntary acts."

Here, the evidence fell far short of establishing that respondent's will was "overborne." The parties agreed that respondent was interviewed each time in a small office or interview room. The investigators testified that the door was closed, and unlocked, and that the interview rooms have a table, several chairs, and a telephone, and are approximately fifteen feet by fifteen feet (Malecki: Tr. 60, 61; Capek: Tr. 206, 236). During interviews, recording equipment is brought in and placed on the table, in full view (Tr. 206). Respondent did not deny that the door was unlocked but she estimated the room as somewhat smaller, about ten feet wide by ten feet long (Tr. 384).

The parties also agreed that respondent came back the day after the first interview, with a written statement, although the investigators insisted that her visit was a surprise and respondent asserted that she had promised to return the next day with a written statement (Malecki: Tr. 36-37; Capek: Tr. 202; Blanc: Tr. 401). Respondent returned for a third interview, dealing with public assistance subsidies (Malecki: Tr. 38).

The parties diverged about other circumstances of the questioning.

According to Investigators Malecki and Capek, they followed DOI procedure during each interview by telling respondent that she was there voluntarily, that she could leave at any point, that she could choose to answer only certain questions, and that the door to the room was closed for "privacy"(Malecki: Tr. 33, 62; Capek: Tr. 206, 238). Under DOI procedure, the investigator asks the interviewee if she understands these statements, and if the interviewee says she does not understand, repeats the statements so that the interviewee is "fully aware of what's going on" (Tr. 206).

By contrast, respondent denied that either Investigator Capek or Malecki told her that she was there voluntarily and could leave at any time (Tr. 385). Respondent testified that she asked the investigators, "Are you sure I don't need a legal representative?" and they replied, "You don't need that," and that they had "just a couple of questions about some housing check" (Tr. 385). She also said that the investigators told her the questioning was not anything for which she needed an attorney or a delegate (Tr. 402). She did not feel she could leave the room. The door was behind her and Mr. Capek and Mr. Malecki were in front of her, on either side (Tr. 387). Moreover, Mr. Capek said that he was asking her questions and she had to tell the whole truth or otherwise her job was in jeopardy (Tr. 388).

Investigator Capek denied telling respondent that she did not need a union delegate or attorney (Tr. 205). He was not clear about whether respondent ever asked for a union delegate or attorney: first he testified that she did not (Tr. 205), and then he testified that he did not remember whether she asked for an attorney (Tr. 237). He denied that either he or Investigator Malecki told respondent that her job would be in jeopardy if she did not speak to them (Tr. 239). He did acknowledge that he never advised respondent that she had the right to an attorney (Tr. 237), and he maintained in his testimony that the questioning was non-custodial (Tr. 205, 237). Investigator Malecki did not recall whether respondent ever asked for a union delegate (Tr. 62).

This record fails to establish that respondent was in "custody," such that the right to an attorney was triggered, requiring *Miranda* warnings, or that her will was "overborne" such that her statements were involuntary. I credited the investigators' testimony that they told respondent that she was being interviewed voluntarily and that she could leave at any time. This was DOI's required procedure, and there is no plausible reason why the investigators would have departed from it. There is no evidence that the door was locked or that respondent was told that she could not leave. There was no suggestion that respondent was questioned for an inordinate

amount of time or that the questioning was abusive in nature. There is no evidence that respondent was compelled to return the next day with her written statement. Thus, there is insufficient evidence that respondent was in "custody." *See People v. Huffman,* 41 N.Y.2d 29,33 (1976) (whether custodial interrogation is present is a mixed question of law and fact, but both the element of custody and the element of interrogation must be present).

This is not to say that I fully credited the investigators' testimony about the interviews. In particular, I found it extremely likely that respondent was apprehensive throughout the interviews and asked if she needed an attorney or union representative. However, even if she was told that this was unnecessary, that would not give rise to a finding of involuntariness.

For all these reasons, respondent's motion to suppress statements made to DOI is denied.

The Evidence at Trial

The evidence at trial centered around two Brooklyn residences: one on Paerdegat 3rd Street and the other on Beverly Road. Respondent admittedly resided at both residences, at different times, and she obtained a rental subsidy for both residences: a Section 8 subsidy for the Paerdegat 3rd Street residence, and an HRA subsidy for the Beverly Road residence. As set forth below, the evidence showed that respondent's sister's friend Edith Clarke was the titled owner of the Paerdegat 3rd Street house from 2001 through 2004, but did not have actual ownership responsibities; that title passed from Edith[3] to respondent's sister Elizabeth on January 9, 2004; that respondent applied for and received a Section 8 voucher from NYCHA for a rental subsidy at the Paerdegat 3rd Street house; that, in the process, respondent signed Edith's name to the NYCHA rental documents; that because of this voucher, NYCHA issued checks to Edith Clarke as the owner of the premises for the amount of respondent's rental subsidy; and that respondent cashed the checks made out to Edith, signing Edith's name, without Edith's permission. NYCHA continued to issue checks payable to Edith even after Elizabeth became the owner of the property, and respondent continued to sign Edith's name as endorsee, until August 1, 2005, when NYCHA began to issue checks to Elizabeth. The evidence also showed that respondent received the benefit of a rental subsidy for the Beverly Road address during a time when she did not live there.

[3] For simplicity, Nadia Joseph, Elizabeth Pierre-Noel, and Edith Clarke will usually be referred to by first name, as will another witness, Annie Dacis. This choice of language reflects the way in which the individuals typically referred to each other.

The evidence is discussed in detail below.

The Purchase of the Paerdegat 3rd Street residence in 2001 and the 2004 Transfer of Ownership

There is no dispute that beginning on November 13, 2001, Edith Clarke became the titled owner of the Paerdegat 3rd Street house (Pet. Ex.7. Deed of Sale). Edith was a friend of respondent's sister, Nadia Joseph, a co-worker at a Manhattan hospital for twenty years (Clarke: Tr. 121; Joseph: Tr. 283). There is also no dispute that Edith did not live in the house or make any mortgage payments on the house, which is now in foreclosure (Joseph: Tr. 297), and that Edith became the titled owner of the house as a favor for Nadia.

Nadia testified that she wanted to buy this house. Prior to the closing, the real estate agent told her she needed a co-signer, because her credit was not good enough (Tr. 284). Nadia asked Edith to be the co-signer, and Edith agreed (Clarke: Tr. 96; Joseph: Tr. 284). Nadia and Edith both attended the closing. Nadia testified that her two sisters were also at the closing: Elizabeth Pierre-Noel, and Margareth, the respondent (Tr. 285).

Nadia testified that the real estate agent told her at the closing that due to her poor credit, it was not sufficient for Edith to be a co-signer; rather, Edith would have to sign the closing documents as the purchaser (Tr. 286). Edith recalled the conversation somewhat differently, stating that, "I don't know if the girls, Nadia, Margareth and Elizabeth, their credit was not high enough to purchase the house. So they told me since my credit was higher than the girls, I have to sign to own . . . the house, and they couldn't do it" (Tr. 96).

In any event, after Nadia told Edith that it would be a temporary arrangement and that after a year or two, the house would be transferred out of Edith's name, Edith agreed to sign as the purchaser. She did not have an attorney (Clarke: Tr. 97, 125, 126; Joseph: Tr. 286). Nadia testified that after the closing, the house was, for all practical purposes, hers. Edith gave Nadia the house keys, and went to her own home in Queens. Nadia was responsible for paying the mortgage, utility bill, and phone bill (Tr. 287). She moved into the house immediately, with her sister Elizabeth (Tr. 291).

Nadia testified that in 2003, she gave Edith a letter, written by Elizabeth on January 16, 2003, for Edith to sign. Edith declined to sign the letter, which said that she did not own the Paerdegat Street home. The letter went on to say:

> . . . This house . . . belongs to my friends Mrs. Nadia Joseph, Ms. Elizabeth Pierre-Noel and Ms. Margareth Blanc. As a personal favor to these three women, I . . . agreed to be their co-signer. But instead, I became an owner . . . Through my outstanding credit history, I helped my friends purchase this house. . . I freely agreed to let these three sisters use my name as the sole owner of their property . . . All monies invested were made only by Mrs. Joseph, Ms. Pierre-Noel, and Ms. Blanc. Everyone involved was in accordance of this deal and had come to term that in a year or so, to have one or all of my friends' names transferred from my name on the deed/mortgage. . . . I want to clearly state that my friends have full and legal ownership of the above mentioned house.

(Pet. Ex. 20). When asked why this letter said respondent was an owner, rather than a tenant, Nadia testified that Elizabeth wrote it and she thought that whatever Elizabeth wrote was "good" (Tr. 313). Nadia also testified, confusingly, that respondent always puts her name on everything because she (Nadia) is a "sick person," and that she (Nadia) always puts respondent's name "on everything I have" because, "If anything happen to me, she will be doing something for my kids" (Tr. 312). Nadia denied that respondent was ever an owner or part owner of the house (Tr. 311).

Respondent's testimony about the closing was inconsistent and confusing. She initially testified that she was at the closing and "observe[d]" Edith there, "signing a couple of papers." (Tr. 349). She said that Edith wanted to leave but the real estate agent said she needed to stay because her credit was good; otherwise the deed could not be completed (Tr. 349). She also testified that she did not know who Edith was and thought maybe she was someone from the bank, and that she did not know at the closing who the legal owner of the house was (Tr. 349, 350, 391). Later in her testimony, however, respondent testified that she had driven her sisters to the closing and remained outside in the car, waiting, so she was not present when the closing papers were signed (Tr. 392). Before she moved into Paerdegat 3rd Street, respondent learned that the house was in Edith's name (Tr. 354).

Respondent wrote in her written "deposition," which she gave to the DOI investigators when she returned the day after her first interview, that Nadia and Elizabeth had decided to buy the house because they were living together (Pet. Ex. 26). Respondent denied being an "owner" of the house (Tr. 368).

Title to the house was transferred from Edith to Elizabeth Pierre-Noel on January 9, 2004, for ten dollars (Pet. Exs. 8, 11).

In sum, while Edith was the titled owner of the Paerdegat 3rd Street residence until its transfer to Elizabeth in January 2004, it is unclear whether respondent had ownership responsibilities -- such as paying the mortgage -- along with her two sisters. The credible testimony established that respondent was at the closing. Respondent described seeing Edith signing some documents, prior to changing her testimony and saying that she remained outside the closing waiting in her car. That was not credible. And while Nadia testified that she was the actual owner (as opposed to the legal, titled owner), she presented a letter to Edith, for the latter's signature, which stated that the house "belongs" to the three sisters. This letter undercut Nadia's and respondent's assertions that it was only Nadia who was the "real" owner. The fact that title was transferred from Edith to Elizabeth in 2004 also casts doubt on Nadia's testimony that she was the sole owner of the property.

Respondent's Move to the Paerdegat 3rd Street home and her receipt of Section 8 subsidy checks payable to Edith

Respondent testified that she had initially applied for a Section 8 subsidy from NYCHA around 1990 (Tr. 334-35). She did not receive a voucher until about a year after her sister Nadia obtained the Paerdegat 3rd Street house (Tr. 354). At the time respondent was still living at the Beverly Road residence. Nadia told respondent she could move into the house but had to go through a real estate broker. Respondent acknowledged that she did not tell the broker that Nadia was her sister (Tr. 352). She submitted a form to the broker on October 19, 2002, which the broker completed, certifying the Section 8 rental to respondent (Tr. 352). The landlord listed on the form was Edith Clarke, the titled owner (Pet. Ex. 6). Respondent submitted an affidavit of income to NYCHA on August 3, 2003 (Pet. Ex. 14). According to respondent, she moved into the Paerdegat 3rd Street house in January, 2003, as a tenant (Tr. 352, 368). Respondent denied ever owning the property (Tr. 368). She paid her rent in cash. She first testified that she gave the cash to either Elizabeth or Nadia (Tr. 365), then testified that she gave the money to Nadia, who paid the mortgage (Tr. 411).

Nadia confirmed that respondent moved into the Paerdegat house in 2003 as a tenant. She testified that respondent paid her $ 1,400 a month in rent, in cash. Nadia said she also rented to her sister, Elizabeth. She used the rent money to pay the mortgage (Tr. 294, 295). Nadia

wrote a letter to Edith, dated March 24, 2005, which, among other things, noted that she knew that respondent "was receiving money from the housing department" (Pet. Ex. 18).

Edith testified, "They were paying it. Margareth and Betty and Nadia, the three of them together were paying the mortgage" (Tr. 128). However, she acknowledged never speaking with respondent about who was making the mortgage payments and admitted that she did not know whether respondent was an owner or tenant (Tr. 129). Indeed, she testified that she spoke to Nadia about the mortgage. "I called Nadia and said are y'all paying? I don't want my credit to go bad. Make sure y'all pay the mortgage. She . . . said, yes, they are taking care of it" (Tr. 130).

Respondent acknowledged signing Ms. Clarke's name to a number of documents that she filed with NYCHA, including: the housing assistance contract signed October 19, 2001 (Pet. Ex. 1), the landlord's request for lease renewal approval, signed July 19, 2004 (Pet. Ex. 2), the initial lease agreement for a two-year lease beginning January 1, 2003 (Pet. Ex. 3), and the federal W-9 form, request for taxpayer identification number and certification, signed October 19, 2002 (Pet. Ex. 13). Edith testified that these signatures were not hers (Tr. 100-04). Respondent also admitted writing a letter, addressed "To Whom It May Concern," dated October 26, 2002, which Investigator Malecki testified was found in respondent's NYCHA's file (Tr. 212-13). Respondent acknowledged signing Edith Clarke's signature to the letter, which stated that Edith wanted to rent the first floor apartment at the Paerdegat 3rd Street house to respondent and would accept the Section 8 voucher as partial payment (Pet. Ex. 19; Tr. 413).

Beyond these documents, respondent admitted writing Edith's name as the endorsee on Section 8 NYCHA subsidy checks, and cashing these checks at a check-cashing establishment in Brooklyn. These checks were mailed to mailed to the Paerdegat 3rd Street residence, apartment 3, where respondent resided, and they were made payable to the order of Edith P. Clarke (Tr. 359; Pet. Ex. 4). Each check came with a stub from NYCHA with respondent's name listed as tenant (Resp. Ex. B).

Respondent testified that she believed, having seen the checks and the stubs, that, "All I have to do is to . . . cash it, and pay my rent" (Tr. 361). She signed Edith's name as the endorsee and signed her name directly below Edith's name, on NYCHA checks that were issued from February 1, 2003 through March 1, 2005. The NYCHA checks were issued to Edith even after title to the house was transferred to Elizabeth on January 9, 2004. Respondent kept signing

Edith's name and then her own name on these checks. Thirteen such checks (ten in the amount of $964 and three in the amount of $472) were issued from March 1, 2004 on, while respondent was a correction officer (Pet. Ex. 4). She cashed the checks at a check cashing store in Brooklyn. The total cash she received as a result was $11,056.00. She paid the money as rent to Nadia and/or Elizabeth.

Respondent testified that she believed she had Edith's permission to sign her name on the checks and various documents. She told this to the two DOI investigators who interviewed her and expressed it as well in the written "deposition" that she gave to DOI (Capek: Tr. 201; Pet. Ex. 26). Respondent's sister Nadia corroborated her testimony to some degree, as did Annie Dacis, the manager of the check cashing store. Edith denied giving respondent such permission or even speaking to respondent about the Section 8 subsidy.

More specifically, respondent testified that in November or December 2002, before she moved into the Paerdegat 3rd Street house, Nadia telephoned her and said Edith was coming to the house to sign for a loan with a contractor, for remodeling work on the first floor (Tr. 353, 416). Respondent testified that she needed to ask Edith, the titled owner, to give her a copy of the deed to the house, so she could take it "downtown" because "they" needed her to bring all the paperwork (Tr. 354). According to respondent, she told Edith that she had a Section 8 voucher, which she had applied for some ten or twelve years ago, but had just received (Tr. 355). Edith asked what the voucher was and respondent explained that it was money to help pay the rent, although not the full rent, and that "the lady" she had seen needed her to "bring all the paperwork," including the deed, to her office (Tr. 355). Respondent also said that she needed Edith to do "this paperwork for me" so she could bring it "downtown" (Tr. 356). Respondent then testified, referring to Edith,

> She said . . . Just do it. You can do it. You can go ahead and do everything because the house is not my house; this is your sister's house. You can do whatever you want to do, but please don't mention, don't put me in any trouble. I said, okay.

(Tr. 356). After they ate Edith left (Tr. 356). Respondent testified that she believed that Edith "told me I can do whatever I want to do, as long as I don't put her in any trouble" (Tr. 357). As a result, she completed the Section 8 package signing Edith Clarke's name, including the "To Whom It May Concern" letter, containing Edith's signature (Tr. 357, 414).

On-cross examination, when asked if she took this exchange to mean that Edith gave her permission to sign Edith's name on the back of the Section 8 subsidy checks, as well as the other forms, respondent replied,

> Because she told me I can do it. She said, oh, you can do it. You can do it because your house is not mine; it's your sister's house. You can do whatever you want to do . . . You can sign my name. You can sign the checks. You can do whatever you want to do. She's saying it, like, okay, this is not my house. This is your sister's house so just go ahead and do it.

(Tr. 393). When asked why she had not visited Edith at her house in Queens so Edith could sign these forms in person, respondent reiterated that she had Edith's permission to fill out the forms and also said that she did not know where Edith lived and that she was in school and working a part-time job. However, she admitted that Nadia knew where Edith lived. Asked why she did not take public transportation to Edith's house, respondent testified that she could not take a train, bus, or cab to Queens from where she lived (Tr. 397), without explanation.

Respondent also testified that Edith specifically authorized the manager of the check cashing store to cash the Section 8 checks, which were payable to Edith. According to respondent, she went to a check cashing store in Brooklyn to cash the first Section 8 check. Her daughters worked at the business so she knew Annie, the supervisor. She told Annie that she needed to cash the check. Annie said she could not cash it because the payee was Edith. Respondent told Annie that Edith lived in Queens and could not come to the check cashing store. Annie replied that she needed to speak to Edith before she could permit respondent to cash the check. Respondent testified that she went home and telephoned Edith and told her that she had received the voucher and needed to cash the subsidy checks and asked whether Edith could come to Brooklyn. Edith said she would not come to Brooklyn but would speak to Annie if Annie telephoned her (Tr. 362).

Thus, according to respondent, the next day she went to the check cashing store and gave Annie the phone number for Edith ("a 347 something") (Tr. 363). Annie telephoned Edith and spoke to her. After that, Annie told respondent that respondent had to sign Edith's name on the back of the check before Annie could cash it (Tr. 363). Annie then cashed the check and gave respondent cash and the check stub (Tr. 363). Respondent signed Edith Clarke's name to the

back of all her other Section 8 checks, which she cashed at the check cashing store, either through Annie or another employee (Tr. 365).

Respondent explained that she learned from Nadia that Edith had received a notice from the Internal Revenue Service ("IRS") that she owed them tax money for 2003 (Tr. 372). Respondent realized that Edith must not have reported the income from NYCHA, despite knowing that respondent was receiving the "housing money" (Tr. 372). She told Edith to report these amounts because she was the legal owner but that Edith replied that she would not and that respondent and her family should pay the taxes. Respondent agreed to pay the tax delinquency, which was $615, and wrote a check to the IRS for that amount, dated April 5, 2005 (Pet. Ex. 9). Respondent learned that the IRS sent a similar notice to Edith for the 2004 tax year, again based upon the payments from NYCHA. Respondent, who by then worked at Riker's Island, relatively close to Ms. Clarke's residence in Queens, went to talk to Edith at her house. Edith complained that she was "tired" of this and that respondent needed to "do something" about the house (Tr. 373). Respondent said she paid the taxes due, $1,916, by check to the IRS dated January 26, 2006, because Nadia did not have any money and respondent did not want anybody to be in trouble (Tr. 374; Pet. Ex. 10).

Nadia testified that Edith met her at the Paerdegat 3rd Street house some time after the closing because Nadia wanted to renovate the first floor and wanted to finance it through the contractor, who required the titled owner to sign the loan documents. The loan amount was $40,000 (Tr. 291). Edith appeared at the house and signed for the loan, meeting with the contractor in the basement of the house (Tr. 289, 290). Respondent was in the Paerdegat 3rd Street residence at the home, and spoke to Edith. Nadia admitted that she did not hear the conversation, but said that respondent later told her that Edith had given respondent permission to sign Edith's name to the housing checks so respondent could pay rent (Tr. 298). Respondent told her Edith said, "do what you can to pay the house," so long as it did not put Edith "into trouble" (Tr. 301).

However, in her March 24, 2005 letter, written to Edith, Nadia wrote that she apologized if one of her sisters "had hurt" Edith. More specifically, she wrote:

> . . . if my sister did anything about your name, I don't know anything about it, the only thing I knew she was receiving money from the housing department, I do not know how.

(Pet. Ex. 18).

Annie Dacis testified almost entirely consistently with respondent regarding the cashing of the Section 8 subsidy checks. Annie testified that she is the manager of the check cashing store who respondent approached about cashing her Section 8 check. Annie said that she told respondent that she would cash the check if Edith gave her permission to do so, because the check was for respondent's rent. When respondent returned with Edith's telephone number, Annie called Edith, who said that she lives in Queens and could not make it to Brooklyn and that it was "okay" for Annie to cash the Section 8 checks (Tr. 259). Annie testified that she did not remember the telephone number, since it was nine years ago, although she speculated that she thought it began with a "718" because Edith lived in Queens (Tr. 263-64). Annie acknowledged that she did not ask the woman who said she was Edith for any identifying information, such as a social security number (Tr. 260). She testified that after the telephone conversation, she cashed respondent's check because Edith made her "feel secure enough . . . to do it" (Tr. 261). Also, she knew that a lot of other customers had cashed similar checks for their rent (Tr. 261). She continued for almost two years to cash checks for respondent, and gave other cashiers approval to do so. Annie never met Edith. Annie testified that she did this for respondent because she was a long-term customer; while respondent's daughters also worked in the check-cashing establishment, Annie denied that this played a role in her decisions (Tr. 265).

Edith denied ever authorizing respondent to sign her name to documents, including checks, and said she had never applied to NYCHA to "become a Section 8 landlord" (Tr. 104, 105, 119). Indeed, Edith said that she spoke to respondent only sporadically, including conversations when she learned the taxes were due, as well as a couple of occasions when respondent and her sister brought her hanging plants (Tr. 136-38). On cross-examination, Edith denied that respondent ever discussed Section 8 with her or asked her for permission to complete paperwork related to Section 8 (Tr. 138).

Similarly, Edith denied knowing anyone named "Annie" and testified that no one from a check cashing store ever asked her if she would give permission for respondent to sign her name to the Section 8 checks (Tr. 145). She said she only found out about what respondent had done when she got a notice from the IRS for a tax delinquency for the year 2003. This notice required her to pay the balance due by March 24, 2005, or face increased interest and penalties (Pet. Ex. 9). Edith testified that her accountant discovered the taxes were for income from the NYCHA

subsidy checks (Tr. 97). As Edith had never gotten any checks, she telephoned NYCHA at the suggestion of her accountant and spoke to Investigator Malecki, who called her in and began an investigation. He showed her checks and paperwork with respondent's name and Edith said she did not know anything about this. Asked if she was surprised, Edith testified,

> Yeah, I was surprised. I didn't know what went on. I didn't know who was doing it. That's why I went to the Government to get it straight . . . I wanted to know where it came from, or who did it. I didn't know.

(Tr. 99). Edith testified that she did not know until she saw the documents and checks that respondent had been signing checks with Edith's name (Tr. 98). She testified that she was "very angry" when she found out so she called Nadia and demanded to meet with her at their workplace (Tr. 112). They met in the lobby. Edith recounted the conversation this way:

> . . . I told her, I said, did you know what your sister did? I said, you know, she's messing around with my name. Something like that. I don't know if that's my exact words, but I told Nadia I'm very upset, Did you know what Margareth did? And she [Nadia] turned and said to me, no, she did not know

(Tr. 113). About two weeks later, Edith testified, Nadia mailed her the March 24, 2005, letter which apologized if respondent had "done anything" with Edith's name (Tr. 113). Edith also testified that respondent paid the tax delinquency after she showed Nadia the notice from the IRS (Tr. 106, 108; Pet. Ex. 9). As respondent's check for the tax delinquency is dated April 5, 2005 (Pet. Ex. 9), it appears that Edith first met with Investigator Malecki, then with Nadia, then got respondent to agree to pay the tax delinquency.

Edith acknowledged that Nadia asked her about taking out a loan to repair the basement at Paerdegat 3rd Street. Edith told Nadia, "okay," meaning that "she could take out the loan" (Tr. 132). Edith testified that said she did not remember whether Nadia signed Edith's name on the loan documents (Tr. 133). Later in her testimony, however, she testified that she "figured" that Nadia would take out a loan in Nadia's own name (Tr. 154). Edith admitted that she could not explain why Nadia would ask for permission to take out a loan in her own name (Tr. 155). She testified that she did not recall being present in the basement looking at damage to the house and thought that the general contractor had come to her house in Queens to talk to her (Tr. 135). She had no recollection of ever talking with respondent when the contractor was at her home (Tr. 135).

Investigator Malecki testified that Edith was "surprised" when he showed her the NYCHA contract and lease agreements which appeared to bear her signature (Tr. 33). He testified that "she had no idea what any of this was" and did not know why her name was on the documents (Tr. 33). Although he was not absolutely positive, he believed that Edith brought to the interview a copy of respondent's check for $615 to the IRS, representing payment of the 2003 tax delinquency.[4] He recalled Edith saying that after she made an initial telephone complaint, she approached Nadia about the overdue money, resulting in respondent paying Edith the money for the overdue taxes (Tr. 47).

In general, I found petitioner's witnesses more credible than respondent's. Factors to be considered in making a credibility determination include "witness demeanor, consistency of a witness' testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness' testimony comports with common sense and human experience." *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 4, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998). As discussed below, while I did not credit Edith's testimony that she never spoke to respondent about Section 8, I concluded that Edith was largely in the dark about what respondent was doing. I credited Edith's testimony that she never gave respondent permission to sign Edith's name on the Section 8 checks. At the most, respondent may have had a basis for believing she could list Edith as the owner on the initial NYCHA paperwork. However, there is no credible evidence to support an inference that respondent had a reasonable basis for believing that she could sign Edith's name on the Section 8 checks. This is particularly the case as to checks issued after January 9, 2004, when title to the property was transferred from Edith to Elizabeth.[5] Annie Dacis's testimony that Edith gave her permission to cash the checks was not reliable.

I found it more likely than not that respondent and Edith had some discussion about respondent's application for a Section 8 subsidy. Respondent's testimony that she spoke to Edith to ask for a deed to the Paerdegat 3rd Street house, so she could bring it to personnel at the

[4] Investigator Malecki's testimony that Edith brought a copy of respondent's check to the interview is contrary to Edith's testimony, in which she relayed first meeting with Malecki, then confronting Nadia, then receiving Nadia's letter of apology, dated March 24, 2005, and finally getting a check from respondent for the taxes, dated April 5, 2005. I credited Edith's testimony, which was far more detailed than Malecki's, who testified without benefit of his notes and acknowledged that his recollection was not "100 %" (Tr. 47).

[5] As indicated above, respondent may only be found guilty of misconduct for acts occurring after she became a correction officer, on February 12, 2004.

NYCHA office was credible, as respondent was applying for Section 8 housing and needed to submit paperwork in order to be approved. It is plausible that Edith would have retained the deed to the property, as the titled owner. Moreover, respondent's testimony was corroborated by the "interview record" maintained by NYCHA regarding respondent. A note in the "interview record," dated October 30, 2002, states that respondent had produced an almost completed package, but that the deed is unrecorded and the "landlord promised to provide recorded copy and water bill" (Pet. Ex. 16). The next note, dated November 1, 2002, indicates, that "All papers were brought to the office" (Pet. Ex. 16). Thus, I found respondent's testimony that she asked Edith for a deed to the Paerdegat 3rd Street house because she needed to bring it "downtown" and that she needed Edith "to do this paperwork for me" to be credible.

However, I was not persuaded that respondent told Edith explicitly that she wanted to sign Edith's name on the NYCHA paperwork. Nor did I credit respondent's testimony that she told Edith during this conversation that she wanted to endorse Edith's name on the Section 8 checks, and that Edith agreed. Respondent's initial testimony about this conversation was telling. Respondent said that she told Edith that she needed the deed and that she needed Edith "to do this paperwork for me." At no point did respondent mention saying that NYCHA would be sending checks payable to Edith for the rent and asking Edith if it would be okay if she signed Edith's name to the checks. Moreover, when describing Edith's response to her inquiry, she also spoke in generalities, indicating that Edith said, "you can do it. You can do whatever you want to do, but please don't mention, please don't put me in any trouble" (Tr. 356).

While respondent amplified her testimony about this exchange on cross-examination to add that Edith told her, "You can sign my name. You can sign the checks," I found this to be an embellishment rather than an accurate recollection. This was the first time that respondent had mentioned checks despite having given a long narrative describing her conversation with Edith. Moreover, respondent made this reference to checks after a series of questions in which she was reminded that Edith had denied giving her permission to sign the checks.

My conclusion that respondent's initial narrative testimony was more accurate than her follow-up answer was also buttressed by the similarities between respondent's initial testimony and the written account that respondent provided in the "deposition" that she gave to DOI. In that "deposition," respondent wrote that she met Edith for the first time when she went to look at the house with the real estate agent. According to respondent, Nadia introduced Edith to her and

respondent told Edith that she was getting the apartment with Section 8 and that she would have to "use" Edith's name as landlord because that was what the deed said. Respondent wrote, further, "She [Edith] replied As long as you don't put me in any trouble." (Pet. Ex. 26 at Ex. A). Although respondent framed this conversation as occurring when she went to look at the house with the real estate agent, as opposed to when the contractor was in the house, the most telling thing about her account was that she used virtually the same language she used in her trial testimony: that she talked to Edith about the paperwork and Edith said, very generally, that it was okay so long as she did not get into any trouble.

Thus, at the very most it could be concluded from respondent's testimony that respondent asked Edith to fill out Section 8 paperwork for her and that Edith told respondent to fill it out herself, so long as respondent did not get Edith in any trouble. In light of this discussion, respondent may have thought that it was acceptable to list Edith as owner on the initial Section 8 paperwork. However, there is no basis for determining that respondent asked Edith about the housing checks and that Edith told respondent that respondent could endorse the Section 8 checks in Edith's name. There is therefore no basis for concluding that respondent had a reasonable basis, because of this conversation, for believing she could sign Edith's name on the Section 8 checks.

Nadia's testimony that respondent told her later that evening that Edith said that respondent could sign her name on the checks was not credible in light of Nadia's statement in her March 24, 2005 letter to Edith, that ". . . if my sister did anything about your name, I don't know anything about it." Nadia's statement in her letter is inconsistent with her trial testimony. Moreover, according to Edith's credible testimony, when Edith confronted Nadia after meeting with Malecki and asked if Nadia knew what respondent had done, Nadia denied any knowledge of her sister's actions. As with her written letter, Nadia neglected to say that Edith had given respondent permission to sign her name. Nadia did not explain at trial why, in her March 24, 2005 letter, she disavowed any knowledge of respondent using Edith's name.

I also did not credit respondent's testimony that she spoke to Edith after trying to cash a Section 8 check at the check cashing store and that Edith gave her permission to do so and also told Annie Dacis, the manager of the check cashing store, that it was okay. Although Annie testified consistent with respondent's testimony, Annie's testimony was not reliable. Annie gave telephonic rather than in-person testimony, in light of respondent counsel's representation that

she would be unable to take off time from work to testify in person. Telephone testimony has been permitted by this tribunal where the witness was unavailable or where testifying in person would constitute a substantial hardship. S*ee, e.g., Office of the City Clerk v. Blackson,* OATH Index No. 1899/07 at 2 (Aug. 10, 2007) (telephone testimony taken upon consent where respondent's witnesses had difficulty leaving their jobs to testify); *Matter of Live Centre Tenants Ass'n*, OATH Index No. 834/05, mem. dec. at 2 (Mar. 2, 2006) (telephone testimony allowed of elderly, infirm out of state resident and of witness from Suffolk County, Long Island who had knee ailment and was also caretaker for two family members, making her in-court appearance possible, but difficult and inconvenient). However, telephone testimony is inherently more unreliable than in-court testimony, as both counsel and the tribunal are deprived of the opportunity to observe the witness.

Moreover, even if Annie Dacis's testimony were fully credited, she acknowledged that she never met Edith Clarke, nor asked Edith for any identifying information. At best, Annie's testimony demonstrates that she spoke to someone who said she was Edith and who told Annie that she could let respondent sign the checks. Annie's testimony does not establish that she actually spoke to Edith Clarke, and that Edith gave her permission to cash the Section 8 checks. Thus, Edith's testimony that she never spoke to Annie about the checks was more reliable than Annie's testimony to the contrary.

Beyond the lack of corroboration, respondent's testimony that Edith gave her permission to cash the checks is inconsistent with Edith's contacting NYCHA to begin an investigation. If Edith knew that NYCHA had issued checks to her, and that respondent had signed Edith's name to the checks and cashed them, there would be no reason for Edith to have lodged a complaint with NYCHA. This is particularly the case if Edith wanted to keep a low profile and avoid doing anything that could get herself "in trouble."

No theory of the case was offered to provide a motive for Edith to go to NYCHA if she knew that respondent was signing the Section 8 checks. There was no evidence that Edith was angry at respondent or Nadia, or had any motive to hurt them, prior to learning that respondent had signed the checks in Edith's name. Moreover, Edith's testimony that she was shocked and angry when she saw the checks was corroborated by Investigator Malecki, who agreed that Edith was surprised and did not know why her name was being used this way (Tr. 33).

Moreover, Edith transferred title to the house to respondent's sister Elizabeth on January 9, 2004. At that time Edith had every reason to believe her involvement with the house was over. There is no basis for respondent to have believed she had Edith's permission to sign Edith's name on checks issued by NYCHA to Edith, when Edith no longer owned the house.

Respondent's suggestion (Resp. Post-Trial Br. at 7) that Edith was so nominally involved in the running of the house that she may have forgotten that she gave respondent authority to sign Edith's name to the checks was not persuasive. According to respondent, Edith gave her permission to do this in two separate conversations: once during their meeting in the basement of the house, and once when she telephoned Edith after trying unsuccessfully to cash the first check at the check cashing store. Respondent has also testified that Annie Dacis, the manager of the check cashing store, telephoned Edith and obtained her permission to cash the checks. It is unlikely that Edith would not remember at least one of these three conversations. It is particularly unlikely that Edith would completely forget the telephone call from Annie. This is not the type of phone call that Edith likely received on a regular basis and thus it is probable that it would have stood out in Edith's mind, rather than have been forgotten.

Respondent also posits (Resp. Post-Trial Memo at 7) that Edith may have testified that she did not give respondent permission to sign the NYCHA paperwork or endorse the checks because she had told this to DOI and felt unable to recant. According to Nadia, Edith said that she had already told the investigators who interviewed her that she had not given respondent such authorization and was not going to go back on her word (Tr. 299). However, Nadia also testified that Edith reiterated that she did not give respondent permission to sign the checks in Edith's name (Tr. 299). Thus, Nadia's testimony does not support a finding that Edith testified as she did purely because she feared reprisal from DOI if she changed her story. This is the case even given respondent's testimony that Edith said she was scared of reprisals from the investigators if she changed her story (Tr. 376).

Respondent's testimony that Edith said she had been "tricked" about not having to testify at OATH, and had been forced to do so also does not support a finding that Edith's testimony was coerced or was unreliable (Tr. 379). Edith may well have been unhappy about having to testify, against a woman whose sister she had been a friend of for two decades, and may have thought this matter was put to rest after the grand jury declined to indict respondent. However,

not being pleased about testifying is entirely different from testifying untruthfully under threat or fear of reprisal.

Finally, the fact that the criminal case was ultimately dismissed and sealed does not preclude a finding that Edith did not authorize respondent to sign the Section 8 checks in Edith's name. As the New York State Supreme Court noted in *Foran v. Murphy*, finding that the crimes exception to the statute of limitations could apply even where a grand jury had declined to indict, the failure to indict "is not equivalent to a finding of innocence." 73 Misc. 2d 486, 488 (Sup. Ct. N.Y. Co. 1973). Rather, the failure to indict means only that the grand jury found the evidence insufficient to warrant a finding of guilt beyond a reasonable doubt. By contrast, in a disciplinary proceeding, it is sufficient if the specifications are established by a a fair preponderance of the evidence. The Court noted, further:

> This court will not speculate as to what evidence was adduced before the Grand Jury, nor as to what considerations other than the evidence presented -- such as mercy, or the belief that departmental discipline rather than criminal prosecution would be more appropriate -- may have caused the Grand Jury not to return an indictment.

73 Misc. 2d at 488.

In sum, the evidence establishes that from February 1, 2003 through March 1, 2005, while respondent was living in the Paerdegat 3rd Street house, she signed Edith Clarke's name as endorsee on checks that were issued to Edith by NYCHA and signed her own name under Edith's name. Respondent signed Edith's name to 13 checks, issued from March 1, 2004 through March 1, 2005, while she was a correction officer (Pet. Ex. 4). She then cashed the checks. During this time, Edith no longer owned the house. The total amount of cash respondent received from these thirteen checks was $11,056. Respondent also signed Edith's name to NYCHA paperwork. Edith did not give respondent permission to sign her name on the checks. Nor did Edith give respondent explicit permission to sign her name on the paperwork. However, respondent had asked Edith for the deed for the house, and had discussed needing paperwork to give to NYCHA, so it is plausible that respondent thought she had Edith's permission to list Edith as the owner on the paperwork. By contrast, it is not plausible that respondent thought she had permission to sign Edith's name to the NYCHA checks, particularly with regard to checks issued after January 9, 2004, when Elizabeth, not Edith, was the titled owner of the Paerdegat 3rd Street house.

Respondent's Receipt of Section 8 subsidies via checks payable to her sister, Elizabeth Pierre-Noel

It is undisputed that beginning on August 1, 2005, some seven months after title of the Paerdegat 3rd Street property was transferred from Edith Clarke to Elizabeth Pierre-Noel, ten NYCHA subsidy checks were issued to Elizabeth as a rental subsidy for respondent's unit. Elizabeth endorsed these checks (Pet. Ex. 5). The checks were issued monthly from August 11, 2005, through May 1, 2006, and totaled $4,976.00 (Pet. Ex. 5). Respondent testified that she closed her Section 8 account in June 2006, after she finished her probationary term with the Department (Tr. 440). She also testified that NYCHA reduced the amount of her subsidy checks in 2005 because she reported her increased income as a correction officer (Tr. 440).

Meanwhile, respondent continued to live at Paerdegat 3rd Street. Section 8(g) of the NYCHA housing contract provides that during the term of the contract, "the owner certifies that . . . [t]he owner is not the parent, child . . . or sister . . . of any member of the family, [who is renting] unless the PHA [public housing agency] has determined . . . that approving rental of such unit, notwithstanding such relationship, would provide reasonable accommodation for a family member who is a person with disabilities" (Pet. Ex. 1). Respondent testified that when she got the voucher, her daughter had just lost her left eye to cancer (Tr. 355). However, there is no evidence that Elizabeth ever requested permission to rent to her sister on a reasonable accommodation exception.

Respondent did testify, however, that she went to the NYCHA office after Elizabeth had assumed ownership because she took the "last check" from NYCHA made out to Edith to NYCHA and told the staff member at NYCHA, Ms. Washington, that her sister, Elizabeth, owned the house. According to respondent, Ms. Washington told her that Elizabeth should bring her the new deed. Elizabeth did so (Tr. 370).

I found respondent's testimony questionable for several reasons. First, Elizabeth took ownership of the Paerdegat 3rd Street property in January 2004. Yet during all of 2004 and continuing into February 2005 NYCHA issued checks payable to Edith, which respondent kept signing in Edith's name and cashing. Respondent's testimony that she took the "last check" issued to Edith to NYCHA, to report to NYCHA that Elizabeth now owned the premises, made no sense. Respondent testified that she knew ownership of the house had been transferred to

Elizabeth. If her concern was that checks should be issued to Elizabeth, not to Edith, respondent would have gone to the NYCHA office long before the "last check" was issued.

Second, I found respondent's testimony that she told Ms. Washington that Elizabeth Pierre-Noel, the new owner of the property, was her sister, to be incredible. The NYCHA contract explicitly provides that the owner may not be a relative of the Section 8 tenant. I find it more plausible that respondent told Ms. Washington that Elizabeth had purchased the house, without mentioning that Elizabeth was her sister.

Respondent's Receipt of HRA subsidy for Beverly Road, Brooklyn

Respondent received housing assistance benefits from HRA for a residence on Beverly Road, Brooklyn, from January 2003 through March 1, 2004. These checks were third-party checks, meaning they were made out to the landlord of the Beverly Road property. Two of these checks, dated February 17, 2004 and March 1, 2004, were issued during respondent's employment as a correction officer. Together, these two checks aggregated $700 (Pet. Exs. 22, 27).

As noted above, respondent testified that she moved from Beverly Road into the Paerdegat 3rd Street house in January, 2003. On October 19, 2002, she signed a form entitled "real estate broker certification of Section 8 rental and tenant acknowledgment of broker services rendered" (Pet. Ex. 6). This form was for rental of an apartment at Paerdegat 3rd Street; on the form she signed her name under the line, "I hereby certify that the real estate broker identified above provided professional services resulting in rental by me of the apartment described above" (Pet. Ex. 6).

Notwithstanding the real estate broker certification of the Section 8 rental at Paerdegat 3rd Street, respondent signed a lease renewal form six days later, on October 25, 2002, for the Beverly Road apartment. The form renewed the Beverly Road lease from January 1, 2003 through December 31, 2004 (Pet. Ex. 12).

Then, on November 19, 2002, respondent signed an HRA form titled "recertification for public assistance," relating to rental assistance for Beverly Road. On this form, she wrote, in the space provided for "residence address," the Beverly Road street address. On the same form, she wrote, in the space provided for "mailing address," the address for the Paerdegat 3rd Street house

(Pet. Ex. 24). Respondent testified that she used Paerdegat 3rd Street as her mailing address because there had been break-ins to her mailbox at Beverly Road (Tr. 337-38, 341).

When asked why she signed the renewal lease for Beverly Road if she was planning to move to Paerdegat 3rd Street, respondent testified that she had submitted her Section 8 application to NYCHA and was waiting for approval (Tr. 399). She did not want to lose her Beverly Road apartment until she knew NYCHA would approve her subsidy (Tr. 401).

According to respondent, when she knew she was moving to Paerdegat 3rd Street, she informed an HRA employee, who she believed was Ms. Hughes, and told her to stop her public assistance subsidy for Beverly Road because of the move. Ms. Hughes told her to bring a lease so they could "transfer everything" to Paerdegat (Tr. 344). Respondent believed that Ms. Hughes was going to cut off the subsidy for Beverly Road (Tr. 344). She testified that she "gave" the Beverly Road apartment to a man (Jean Joseph Julien) after she moved to Paerdegat 3rd Street (Tr. 344). Mr. Julien did not pay the landlord rent. When HRA stopped issuing checks to the landlord, the landlord sued respondent under her lease for the back rent. The upshot was that HRA was ordered to pay the landlord back rent for 2002 and several months in 2003 (Tr. 344-347). The retroactive rent amounted to $4,516.09, and was issued in the form of multiple checks dated September 17, 2003 (Pet. Exs. 22, 27).

Respondent testified that she did not know anything about rent subsidies after HRA paid the back rent. All rent checks went directly to the landlord at Beverly Road (Tr. 347, 348). However, respondent acknowledged that, as soon as she began working for the Department, she contacted Ms. Hughes at HRA and told her that she no longer needed public assistance. Ms. Hughes told respondent that her public assistance money would be discontinued once respondent received her second paycheck from the Department. She said respondent would receive a letter in the mail discontinuing her benefits (Tr. 347).

On January 16, 2004, respondent went to HRA to sign a "recertification for public assistance" form for HRA benefits, including cash assistance (Pet. Ex. 25; Tr. 433). The form is a multipage document which respondent signed on the first and last page. Her signature on the first page is directly below pre-printed information including her name, street address, and mailing address. Her address was listed as Paerdegat 3rd Street and her mailing address as Beverly Road. In contrast to the earlier recertification form (Pet. Ex. 24), respondent did not hand-write her address and mailing address on the form. It appears to have been pre-printed on

the form. Respondent also signed the last page of the form, directly below a certification that she was affirming the information she was giving was correct (Pet. Ex. 24). Respondent testified that she was given the recertification form by a HRA worker to sign. The form was generated from a computer database and already showed her residence and mailing address. According to respondent, by this time HRA staff knew she was living at Paerdegat 3rd Street (Tr. 406). Respondent maintained that she did not have time to read the entire document, because HRA staff does not "have time" for public assistance recipients "to sit down and read all the papers; instead, "All they want you to do is sign" (Tr. 432).

I credited respondent's assertion that when she signed a renewal lease for the Beverly Road apartment in 2002, she had not yet received final approval from NYCHA for the Section 8 rental at Paerdegat 3rd Street. The NYCHA interview record shows that as of October 25, 2002, when respondent signed the renewal lease, her Section 8 application was still under review. On October 15, 2002, respondent attended a briefing and "reviewed the basis of Section 8." At that point, the Paerdegat 3rd Street building was not in the Section 8 program. On October 30, 2002, respondent brought an "almost completed package" to NYCHA, with the exception of the deed and several other documents; on November 1, 2002, NYCHA received a complete application package. The apartment passed NYCHA inspection on December 1, 2002, and the keys were given to respondent on December 6, 2002 (Pet. Ex. 16).

Along the same lines, respondent's submission of the HRA recertification form for Beverly Road on November 19, 2002 predated NYCHA approval of her Section 8 rental at Paerdegat 3rd Street.

More troubling is that respondent continued to receive the benefit of third-party checks issued to the Beverly Road landlord after she moved to Paerdegat 3rd Street in January 2003. Respondent acknowledged knowing that HRA had paid the retroactive rent owing to the landlord, which was paid in September 2003, and covered the period from January 1, 2003 through August 31, 2003, after respondent's move to Paerdegat 3rd Street. While respondent testified that she had "given" the apartment to someone else, she maintained the lease, and would have been liable under the lease to pay the full amount of the rent to the landlord but for the HRA third-party public assistance subsidy checks. Respondent's submission of the 2004 recertification form which listed her street address as Beverly Road was also problematic since by then she had lived at Paerdegat 3rd Street for approximately one year. Despite respondent's

testimony that it was busy at HRA, I found her submission of this form more likely indicative of intent to deceive HRA about her place of residence.

One related matter merits brief mention. HRA Investigator Caban testified that HRA's investigation was prompted because there were two different addresses listed on the recertification forms, and that she discovered "by speaking to" other agencies, including NYCHA, that respondent did not live at Beverly Road (Tr. 183, 184, 185). She concluded that respondent was not entitled to any of the housing subsidies for Beverly Road and prepared a worksheet to that effect (Pet. Ex. 27). DOI Investigator Capek testified that his entire file, including information relating to the HRA subsidy, was turned over to the District Attorney's Office (Tr. 223). Highlighting that testimony, respondent's counsel asserted at trial that Investigator Caban's worksheet (Pet. Ex. 27) should be precluded as part of the "official records and papers" that were presented to the grand jury. Crim. Pro. Law § 160.50(1)(c) (Lexis 2011). However, the worksheet was prepared June 20, 2011, after the criminal case was dismissed and sealed. The worksheet was also predicated on documents that were not "official records and papers," such as the HRA recertification applications and third-party checks. Thus, the worksheet should not have been precluded at trial.

The Charges

As noted above, Section 75 of the Civil Service Law does not give petitioner authority to discipline respondent for pre-employment misconduct. Thus, allegations of misconduct prior to February 12, 2004, when respondent became a correction officer, must be dismissed as legally insufficient. Further, as the charges are time-barred unless the crimes exception to the statute of limitations applies, petitioner must establish by a preponderance of the credible evidence that the misconduct committed constituted a crime.

Charges one and two

Charges one alleges that from approximately February 1, 2003 through March 1, 2005, respondent engaged in "conduct unbecoming" and "of a nature to bring discredit to the Department," and committed the crime of grand larceny, Penal Law section 155.35, by cashing Section 8 subsidy checks in excess of $24,000, for which she was not the recognized payee. Charge one further alleges that respondent was arrested and charged with grand larceny in the

third degree on December 4, 2009. Charge two is very similar to charge one except that it alleges that respondent "forged" checks totaling more than $24,000 during this period, thereby committing forgery in the first degree, Penal Law section 170.15, and "related crimes."

Neither charge one nor charge two are sustained as to conduct occurring prior to February 12, 2004. Additionally, to the extent that charge one alleges that respondent committed misconduct solely by virtue of her arrest, it is not sustained. An arrest, standing alone, "amounts to an accusation only." *Dep't of Sanitation v. Lowe*, OATH Index No. 1499/06 at 5 (Sept. 22, 2006 (citing *Dep't of Transportation v. Jagdharry*, OATH Index No. 1702/04 at 14 (Nov. 24, 2004); *Dep't of Correction v. Holston*, OATH Index No. 592/04 at 11 (Sept. 29, 2004); *Admin. for Children's Service v. Bass*, OATH Index No. 902/03 at 2 (Apr. 10, 2003); *Fire Dep't v. Mangravito*, OATH Index No. 499/92 at 8 (May 6, 1992)); *see also Dep't of Transportation v. Pierre*, OATH Index No. 2112/11 at 3 (Oct. 3, 2011) (charges "solely predicated upon [respondent's] arrest, are insufficient as a legal matter to allege misconduct and should be dismissed").

As discussed above, from February 12, 2004 through March 1, 2005, respondent cashed thirteen Section 8 checks, aggregating $11,056, which NYCHA issued to Edith Clarke. NYCHA had approved respondent's Section 8 tenancy at Paerdegat 3rd Street residence and issued subsidy checks to Edith Clarke because Edith was the titled owner of the house. Respondent signed Edith's name as endorsee and signed her own name directly below Edith's. There was unrebutted evidence that respondent gave the cash to one or more of her sisters (either Nadia and/or Elizabeth) to pay for her housing at Paerdegat 3rd Street. Respondent's testimony that she had permission from Edith to cash the checks was not credible. Indeed, Edith was not even the titled owner of the property at this time; rather, title had transferred to respondent's sister Elizabeth.

Petitioner alleges that by so doing, respondent committed two crimes: grand larceny and forgery (as well as crimes related to forgery). In order to meet the crimes exception, petitioner must establish each element of a crime by a preponderance of the credible evidence. Penal Law section 155.35, which petitioner alleges respondent violated, states that "[a] person is guilty of grand larceny in the third degree when he or she steals property and when the value of the property exceeds three thousand dollars." Penal Law § 155.35 (Lexis 2011). Penal Law section 155.05 ("Larceny: defined) provides that a person "steals property" and "commits larceny"

when, with "intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner thereof." Here, respondent, without permission of Edith Clarke, cashed checks which NYCHA issued to her, therefore committing a "wrongful taking." The elements of Penal Law section 155.35 are established, as are the elements of the lesser included larceny offenses: Penal Law section 155.25, petit larceny (prohibiting the stealing of property), and Penal Law section 155.30, grand larceny in the fourth degree (prohibiting the stealing of property with a value over $1000).

Penal Law section 170.15, which petitioner also alleges that respondent violated, by "forging" the Section 8 checks, provides that a person is guilty of forgery in the fourth degree when, "with intent to defraud, deceive or injure another," the person "falsely makes, completes or alters a written instrument which is . . . part of an issue of money . . . issued by a government or governmental instrumentality." The Court of Appeals has noted that, "[i]n essence, the crime of forgery involves the making, altering, or completing of an instrument by someone other than the ostensible make or drawer or an agent of the ostensible maker or drawer." *People v. Levitan,* 49 N.Y.2d 87, 90 (1980). Moreover, the actual maker or drawer must "not have the authority to act for the ostensible maker or drawer." *Id.* at 91. A check is an "instrument." *People v. Edmonds,* 251 A.D.2d 197, 199 (lst Dep't 1998); *see also* Penal Law § 170.00 (Lexis 2011). Here, because respondent signed Edith Clarke's name as endorsee on the Section 8 checks issued by NYCHA, a governmental instrumentality, without the authorization or permission of Edith Clarke, the elements of the crime of forgery in the fourth degree have been met. The elements of the lesser included offenses of forgery have also been met: Penal Law section 170.05, forgery in the third degree (prohibiting the false making, completion or alteration of a written instrument) and Penal Law section 170.10, forgery in the second degree (prohibiting the false making, completion or alteration of a commercial instrument).

The only remaining question is whether respondent may be subject to discipline for such off-duty misconduct. It is well-settled that an agency may properly discipline an employee for certain off duty misconduct. *Cromwell v. Bates,* 105 A.D.2d 699, 699 (2d Dep't 1984); *Zazycki v. City of Albany*, 94 A.D.2d 925, 926 (3d Dep't 1983); *Dep't of Environmental Protection v. Tosado,* OATH Index No. 311/83 at 13-16 (Sept. 2, 1983). As a prerequisite, the agency must establish some relationship between the conduct sought to be sanctioned, the agency's mission and the employee's position. *Furst v. New York City Transit Auth.*, 631 F. Supp. 1331, 1338

(E.D.N.Y. 1986); *Arancio v. Dep't of Sanitation*, N.Y.C. Civ. Serv. Comm'n Item No. CD 87-33 at 4 (Mar. 4, 1987). Here, as respondent is a peace officer, there is a "sufficient nexus" between her fraudulent off-duty actions and her employment to justify misconduct charges. *Dep't of Correction v. Bivens*, OATH Index No. 2088/10 at 4 (Aug. 20, 2010) (correction officer's conviction for petit larceny involving fraud had the requisite nexus with her position "because of the inherent conflict between the commission of such crimes and a correction officer's law enforcement responsibilities"); *Dep't of Correction v. Dash*, OATH Index No. 336/06 at 9 (Mar. 28, 2006), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 07-66-SA (June 13, 2007) (correction officer who assaulted his wife and then resisted arrest liable for off-duty misconduct, as "his criminal convictions are inimical to his own law enforcement duties").

For all these reasons, charges one and two are sustained, except with regard to conduct occurring prior to February 12, 2004 as well as the allegation involving the arrest.

Charge three

Charge three alleges that, from October 19, 2002 to about July 19, 2004, respondent engaged in conduct unbecoming and of a nature to bring discredit to the Department by forging Edith Clarke's signature on documents required by NYCHA in order for respondent to receive Section 8 housing checks. The charge further alleges that by so doing, respondent committed crimes of offering a false instrument for filing in the first degree, Penal Law section 175.35, and making a punishable false written statement, Penal Law section 210.45, and related crimes.

Charge three is not sustained as to conduct occurring prior to February 12, 2004, respondent's start date with the Department. Thus, although petitioner has alleged that respondent forged Edith Clarke's name on at least four Section 8 related documents (Pet. Post Trial Br. at 12), the only one in issue is the "landlord request for lease renewal approval" (Pet. Ex. 2). Respondent admitted signing Edith's name on this document, dated July 19, 2004, although she said she had Edith's permission to do so.

Petitioner has failed to show that respondent's signing of the July 19, 2004 document violated Penal Law section 210.45, since, in order to commit this crime, a person must make a false statement in a "written instrument bearing a legally authorized form notice to the effect that false statements made therein are punishable." The July 19, 2004 form does not contain such a notice.

However, petitioner has demonstrated the elements of Penal Law section 170.15, forgery. By July 19, 2004, Edith was no longer the titled owner of the premises. Respondent could not have had any reasonable basis to believe that she had Edith's permission to sign her name on this paperwork, generated after Edith was no longer the titled owner of the premises.

Petitioner has also alleged that respondent violated Penal Law section 175.35, which requires that a person, "knowing that a written instrument contains a false statement or false information, and with intent to defraud the state or any political subdivision . . .offers or presents it to a public office . . . ." However, I need not make a finding as to whether petitioner established the requisite intent to defraud, because the evidence establishes that respondent violated the lesser included offense, Penal Law section 175.30, offering a false instrument for filing in the second degree. This crime does not require intent to defraud. The crime is established when a person knows that a written instrument contains a false statement or false information and offers or presents it to a public office knowing or believing that it will be filed with or become part of the records of such public office.

In this case, by signing Edith Clarke's name to the July 19, 2004 "landlord request for lease renewal application," respondent represented to NYCHA that Edith Clarke and she had a landlord-tenant relationship. This was not true. At that time Edith Clarke was not even the titled owner of the premises. Respondent's sister, Elizabeth Pierre-Noel, had assumed ownership.

The submission of such a forged and materially false document constitutes off-duty misconduct. Thus, charge three is sustained, except with regard to conduct occurring prior to February 12, 2004.

Charges four and five

Charge four alleges that from January 1, 2003 to April 13, 2004, respondent engaged in conduct unbecoming and of a nature to bring discredit to the Department by receiving over $19,000 from HRA after filing false written documentation. Charge five, similarly, alleges that during the same period, respondent collected money from HRA while "allegedly living at one address in Kings County that she had supplied in writing to HRA," while simultaneously collecting Section 8 money from NYCHA while living at a different address in Brooklyn (ALJ Ex. 1). The charges alleges that by so doing, respondent violated Penal Law section 155.35, grand larceny, and Penal Law section 158.15, welfare fraud, and related charges.

Charge four is not sustained as to conduct occurring prior to February 12, 2004. From that date forward, two checks, totaling $700, were issued to the landlord at Beverly Road, as a subsidy for respondent's rent. The elements of section 155.35, grand larceny in the fourth degree, are not met, as the statute prohibits theft of over $3000. Similarly, Penal Law section 158.15, welfare fraud in the third degree, is inapplicable, as it prohibits welfare fraud of over $3000. Moreover, the allegation that respondent filed false written documentation with HRA is not sustained, as respondent filed documentation with HRA on January 16, 2004, prior to her start date with the Department.

The remaining question is whether, by her conduct in receiving the benefit of an HRA subsidy to the Beverly Road landlord, respondent violated Penal Law section 155.25, petit larceny, which prohibits the stealing of property, as well as Penal Law section 158.05, which applies when a person "commits a fraudulent welfare act and thereby takes or obtains public assistance benefits." I credited respondent's testimony that she told a staff member at HRA when she began working at the Department that she no longer needed the public assistance money and that the staff member said her benefits would continue until she received her second paycheck. This testimony was corroborated by the fact that HRA issued its last third-party check on March 1, 2004. Based on this testimony, I found that respondent took steps to end her public assistance benefits.

This does not change the fact that respondent knew, when she began working for the Department on February 12, 2004, that she was not entitled to public assistance subsidy checks for her rent at Beverly Road, because she no longer lived at Beverly Road. Respondent testified that she moved to Paerdegat 3rd Street in January, 2003. Yet she continued to be the beneficiary of a third-party subsidy to the landlord at the Beverly Road residence. She had installed another person in her apartment, she testified, but he was not paying rent, and respondent remained liable under the lease. Respondent's testimony that she did not know anything about rent subsidies after September 2003, when HRA paid the back rent to the landlord, was not credible, in light of respondent's acknowledgment that she took steps to end the public assistance checks when she began with the Department. Indeed, respondent signed a recertification for public assistance for HRA benefits on January 16, 2004, certifying that she lived at Beverly Road, when this had not been the case for a year. Respondent's testimony that this was simply a mistake was not credible. Thus, the evidence establishes that respondent received the benefit of public assistance

subsidies after February 12, 2004, to which she was not entitled, knowing she was not entitled to it. This is a fraudulent act. *See People v Swain*, 309 A.D.2d 1173, 1174 (4th Dep't 2003) (defendant's intent to commit welfare fraud can be "readily inferred 'from defendant's conduct and the surrounding circumstances'") (internal citation omitted)).

Accordingly, charges four and five are sustained, except with regard to conduct occurring prior to February 12, 2004.

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Charge six

Charge six alleges that respondent, from August 1, 2005 to about May 1, 2006, "engaged in conduct unbecoming and of a nature to bring discredit to the Department" by failing to notify NYCHA that, in December 2002, she moved into a Kings County home owned by her sisters (ALJ Ex. 1). As a result, one of respondent's sisters received approximately $4,976 from NYCHA in housing subsidy checks that she was not entitled to. The charge alleges that by failing to notify the Department of her move to Paerdegat 3rd Street, respondent committed the crimes of grand larceny in the third degree, Penal Law section 155.35, making a written false statement, Penal Law section 210.45, and related charges.

It is not clear what false written statement petitioner is alleging respondent made. In its written summation, petitioner argued that respondent did not disclose her relationship with her sister Elizabeth, who became the titled owner of the premises on January 9, 2004, and began getting Section 8 subsidy checks on August 1, 2005. However, petitioner has not established that respondent made a false written statement and thus has not established the elements of Penal Laws section 210.45.

Regarding grand larceny, petitioner alleged that by not telling NYCHA that Elizabeth was her sister, respondent committed the crime of grand larceny because she received the benefit of Section 8 subsidy money which she was not legally entitled to. Petitioner alleges that respondent was required to disclose her familial relationship with NYCHA, relying on the language in the NYCHA contract which provides that the owner certifies during the term of the contract that the owner is not a family member of the Section 8 renter, unless NYCHA has determined that approving rental of the unit would provide reasonable accommodation for a family member who is a person with disabilities. However, this language would appear to place

the obligation to report the familial association on the owner (Elizabeth), not the renter (respondent).

Moreover, the Court of Appeals has held that while a conviction for grand larceny for wrongfully obtaining public assistance benefits can be predicated upon a failure to fully report material information, the prosecution must prove that the applicant "was not entitled to benefits received." *People v. Hunter*, 34 N.Y.2d 432, 438 (1974). Here, petitioner notes that respondent testified that her daughter had lost an eye to cancer (Tr. 355) and that respondent "might have fallen under the exception regarding accommodation for a person with disabilities." (Pet. Post-Trial Mem. at 7). While there is no evidence that respondent or Elizabeth ever made such a request, it is unclear whether respondent would have lost her Section 8 subsidy had she fully reported her familial relationship with Elizabeth. The burden of proving the crimes exception is on petitioner; petitioner must prove every element of the crime in order for the exception to occur. Here, petitioner has not done so. Since the crimes exception is not proven, this charge is untimely and not sustained.

FINDINGS AND CONCLUSIONS

1. Petitioner established by a preponderance of the credible evidence that respondent, from February 12, 2004 through March 1, 2005, cashed Section 8 subsidy checks aggregating $11,056, for which she was not the recognized payee, and that she signed Edith Clarke's name as endorsee without the latter's permission or authority. Petitioner established by a preponderance of the credible evidence that respondent's conduct constituted one or more crimes. Hence, charges one and two are sustained, except as to other alleged conduct occurring prior to February 12, 2004, when respondent was not yet employed by the Department.

2. Petitioner established by a preponderance of the credible evidence that on July 19, 2004, without permission or authority, respondent signed Edith Clarke's name on a document which was submitted to NYCHA. Petitioner established by a preponderance of the credible evidence that respondent's conduct constituted one or more crimes. Hence, charge three is sustained, except as to other alleged conduct occurring prior to February 12, 2004, when respondent was not yet employed by the Department.

3. Petitioner established by a preponderance of the credible evidence that from February 12, 2004 through April 13, 2004, respondent received the benefit of $700 from HRA in a public assistance subsidy to which she was not entitled. Petitioner established by a preponderance of the credible evidence that respondent's conduct constituted one or more crimes. Hence, charges four and five are sustained, except as to other alleged conduct occurring prior to February 12, 2004, when respondent was not yet employed by the Department.

4. Petitioner did not establish by a preponderance of the credible evidence that respondent committed a crime by failing to notify NYCHA from August 1, 2005 to May 1, 2006, that her sister owned the house for which she was receiving a Section 8 housing subsidy. Therefore, charge six is not sustained.

RECOMMENDATION

Upon making these findings, I requested and received respondent's disciplinary record. It indicates that respondent began her employment with the Department on February 12, 2004. Respondent has no prior disciplinary record.

Petitioner has requested that I recommend termination of respondent's employment. Petitioner asserts that termination is appropriate because of the fraudulent nature of respondent's conduct. Respondent contends otherwise, primarily citing respondent's lack of a prior disciplinary record.

Although the lack of a prior disciplinary record would normally militate against termination, correction officers found to have engaged in act of larceny and fraud have typically been terminated from their positions because "this type of dishonesty is inimical to service in law enforcement." *See Dep't of Correction v. Bivens*, OATH Index No. 2088/10 at 9 (Aug. 20, 2010) (termination of employment recommended for correction officer who submitted fraudulent financial affidavits over six years to a housing program so she would qualify for a housing subsidy); *Dep't of Correction v. Fuller*, OATH Index No. 2144/05 (Nov. 28, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-120-SA (Nov. 14, 2006) (correction officer terminated from employment for defrauding HUD by signing statements that falsely claimed she was unemployed).

This is an unfortunate situation. Respondent may indeed be a hardworking and dedicated correction officer, as her attorney contends in his post-trial memorandum. Nonetheless, I agree with petitioner that for the type of misconduct proven, termination of respondent's employment is appropriate. I so recommend.

Faye Lewis
Administrative Law Judge

February 2, 2012

SUBMITTED TO:

DORA B. SCHRIRO
Commissioner

APPEARANCES:

ALBERT CEVA, ESQ.
ADRIAN LAURIELLO, ESQ.
Attorneys for Petitioner

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