Dep't of Finance v. Zindel

OATH Index Nos. 168/06 & 223/06 (Oct. 3, 2006), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD07-63-SA (June 12, 2007), **appended**

Respondent, a city tax auditor, was found to have been insubordinate toward her supervisor, to have failed to perform her duties properly with respect to certain audits, to have been discourteous to a member of the public and to have failed to follow proper time and leave procedures on two occasions. A 30-day suspension is recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF FINANCE
Petitioner
- against -
JEANETTE ZINDEL
Respondent

REPORT AND RECOMMENDATION

RAYMOND E. KRAMER, *Administrative Law Judge*

This is an employee disciplinary proceeding referred by petitioner, the Department of Finance, pursuant to section 75 of the Civil Service Law. Respondent Jeanette Zindel, a city tax auditor level II, is charged with failing to obey orders, neglectful and/or incompetent performance of her assigned duties, making false statements and filing false reports with supervisors, being discourteous and disrespectful to her supervisor and to a member of the public, and failing to accurately fill out time records and comply with time and leave procedures, in violation of various provisions of the Department's Code of Conduct. These charges cover incidents occurring between September 2003 and May 2005 (ALJ Exs. 1A, 1B, 1C, & 1D).

A hearing was conducted before me on February 13 and 23, and March 15 and 21, 2006. In support of the charges, petitioner presented seven witnesses: Answorth Robinson, Kevin Burke, Glenda Andrews, Jeremy Kersaint, Hamdi Fattah, Harry Moses and Sharon Jaffee.

Respondent presented one witness, Gennaro Irace, and testified on her own behalf, denying any misconduct.

Based upon the record before me, I find that petitioner has proved most of the charges that have been brought against her.

ANALYSIS

Mr. Fattah, the group chief for the sales tax unit, testified that the Department, on behalf of the State, audits New York City businesses and vendors to ensure that appropriate sales and use taxes are paid. The statute of limitations for auditing a return is three years from the date of filing. Mr. Fattah supervises four auditors, including respondent, to ensure that audits are correct before they are sent to the taxpayers (Tr. 98-102). When a taxpayer is audited, an auditor is assigned and a case file is set up. The Department uses a computerized case resources tracking system ("CARTS") to monitor all taxpayers' filings and audits. Each task performed by an auditor is logged into CARTS so that a supervisor or the State can monitor the case and determine at any point which actions have been taken by the auditor, and which, if any, remain to be taken. Auditors must keep track of the time they spend on each activity using various codes so that the City can properly charge the State for work performed on its behalf. An auditor can either charge her time directly into CARTS or, using a laptop computer, enter the necessary information through a field system (VISTA) and synchronize the two databases so that the information appears in CARTS (Tr. 106-13). Auditors are also required to maintain a form DO-220.5 log, which is a daily log in which an auditor must record any significant actions taken or tasks performed on the audit each day. The log, which must be kept up to date at all times, is kept on the computer and should correspond to the information logged into CARTS. Mr. Fattah has directed that his auditors keep track of and charge their time on a daily basis in order to minimize mistakes and keep their files current. He reviews their time weekly, and stressed the importance of auditors accounting for their time (Tr. 113-25). The only exception to the daily time charging requirement is if an auditor is in the field; then, he or she can charge the time in CARTS as soon as they return to the office.

Respondent has been with the Department as an auditor for 13 years. In 1998, she was promoted to auditor level II and was transferred to the sales tax unit where she is currently

employed (Tr. 377-79). Mr. Kersaint, the section head for the sales tax unit who supervised respondent between 2000 and 2002, testified that he constantly had to remind her that auditors are required to account for their time on a daily basis (Tr. 82-84). According to Mr. Kersaint, respondent complied with this requirement only "selectively," and between January 2002 and October 2002, he sent her a series of e-mails reminding her of the need to charge her time daily and to keep her DO-220.5 log up to date (Pet. Exs. 11-18). On September 17, 2002, respondent received her performance evaluation for the year, which indicated that she "chronically" failed to enter her time charges in CARTS and on her DO-220.5 log on a timely basis, that she frequently failed to follow through with supervisors' requests and that she lacked diligence in her audit work (Tr. 95-96; Pet. Exs. 19 & 20).

Respondent testified that in 2001, she became aware of a job opening for a special tax auditor position, which was not posted. She notified her branch chief that she was interested in the position, which would have been a promotion for her, but she got no response. While she was on vacation, she received an e-mail asking her to provide her resume within an extremely abbreviated time frame. Since she was not at work, she missed the deadline and someone with less experience got the job.

According to respondent, thereafter, she began having trouble at work. Her supervisor at the time, Mr. Kersaint, stopped giving her assignments and also refused to sign her time sheets. She also began receiving less than favorable performance evaluations, although previously her performance had always been rated as "superior." As a result of these changes, she filed an EEO complaint, alleging that she was being discriminated against on the basis of her gender and country of origin. Because of her pending complaint, she was re-assigned to work for an assistant commissioner between February 2003 and June 2003. In June, she was re-assigned again, this time to work for Mr. Fattah in his unit, which represented somewhat of a change in the nature of the auditing she was performing. Under Mr. Kersaint, respondent had been primarily auditing hotels. In Mr. Fattah's unit, the auditors primarily worked on auditing restaurants, delis and similar food businesses. Mr. Fattah explained that the average caseload for an auditor in his unit was only about 20 open cases, which is fewer than in other units because the businesses operate as mostly cash businesses whose audits need to be conducted quickly, within three or four months time (Tr. 124).

Mr. Fattah testified that when he began assigning respondent cases in July/August 2003, he immediately noticed problems with her work (Tr. 102). For example, respondent's DO-220.5 was often incomplete and could not be reconciled with the activities and times logged into CARTS (Tr. 133; 239-45; Pet. Ex. 38). Documents were often missing from her files. Cases would take a long time, contained errors, and would have to be done again (Tr. 126). He would have group meetings to give guidance as well as individual meetings with respondent, but to no apparent avail (Tr. 127-28). He continued to have difficulties with her performance in certain areas. Respondent, too, claimed that there were problems from the beginning regarding her work in Mr. Fattah's unit but blamed those problems on his supervision or lack thereof. She claimed that her requests for assistance and training in dealing with what were different audits for her were routinely denied or ignored, and that she was constantly threatened with being written up (Tr. 382-89). It was against this backdrop that the pending charges against respondent were filed.

I. Charges of Incompetence, Insubordination, and Negligent Performance of Duties

a. Refusal to Charge Time Daily

Petitioner has charged respondent with insubordination, neglect of her duties and improper and inefficient performance of her duties for failing to maintain her time charging logs on a daily basis as required, despite numerous verbal requests and instructions to do so, the receipt of a written memo to that effect on December 31, 2003, and a staff meeting held on January 21, 2004 to reiterate such requirements (ALJ Ex. 1A, charge I, specification 1, and charges IV and V, specification 1).

Mr. Fattah testified that throughout the period from when he took over respondent's supervision in July 2003 through January 2004, he repeatedly instructed respondent to enter her time on a daily basis because at the end of the week there were often gaps in her records (Tr. 115-17). On October 30, 2003, Mr. Fattah gave respondent a "to-do-list" for five cases. The instructions included updating the DO-220.5 log, charging time to CARTS, completing worksheets, surveying the place of business, and obtaining prior audit files (Pet. Ex. 21). Respondent continued to make mistakes and was not charging her time as instructed (Tr. 127). As a result, Mr. Fattah started writing formal memos documenting the time keeping procedures

and her errors. On December 31, 2003, Mr. Fattah gave respondent a memo concerning the time charging procedures and the discrepancies in her cases (Pet. Ex. 22; Tr. 127-36). Attached to that memo was a computer print-out of her time charges on CARTS in which she failed to charge her time at all on six days that month and which also contained discrepancies between the time charged to CARTS and the activities that her DO-220.5 log reflected.

On January 21, 2004, Mr. Fattah conducted a meeting with his auditors concerning time keeping, in which he reiterated the requirements to charge time daily in CARTS and to keep up to date and accurate DO-220.5 logs. According to Mr. Fattah, respondent indicated to him that she was not going to follow the procedures and that she would only log her time at the end of each month (Tr. 136-37). Since respondent was unresponsive, he convened a supervisory conference with respondent on January 27, 2004. At the conference, Mr. Fattah discussed respondent's failure to charge time daily and her failure to comply with his instructions concerning the cases he had assigned her in August 2003. Respondent had not sent out the initial appointment letters on cases which had a statute of limitations deadline of March 20, 2004. Respondent told Mr. Fattah to stop telling her what to do because he was not her "daddy" and that she did not care (Tr. 138-43). On February 4, 2004, Mr. Fattah gave respondent a disciplinary memorandum summarizing the conference (Pet. Ex. 23).

Respondent testified that in 2002, she received an e-mail which stated that auditors should use their discretion to enter time monthly or weekly. She was a field auditor, which meant that she was not always in the office and that as a result, it was not possible to enter time on a daily basis (Tr. 393). Respondent stated that Mr. Fattah did not want auditors spending more than 21 hours on a case and if they did, they should "hide" the time "somewhere else" (Tr. 394-95). Respondent claimed that she nevertheless regularly entered her time in CARTS as instructed, except when she did not know the appropriate codes. She complained that she was never properly trained in the process, nor would she receive assistance when she asked. Respondent further accused Mr. Fattah of logging into the CARTS system and deliberately deleting time from her records and then asking her why it was not there (Tr. 396-98). Mr. Fattah, for his part, denied deleting respondent's time from CARTS and denied telling respondent to limit her time spent on a case or to hide her time (Tr. 505).

The evidence in support of this charge was overwhelming. Overall, Mr. Fattah was a credible witness, who testified in a straightforward, detailed and convincing manner. His testimony was corroborated by supporting documentary evidence. There is no question that Mr. Fattah repeatedly instructed respondent, as well as his other auditors, on the need to charge time daily in CARTS and to keep up-to-date DO-220.5 logs. Indeed, he was clear as to why such requirements were important by allowing supervisors to be able to effectively monitor an audit at all times and ensuring accurate billing of hours to the State for the work performed by city auditors. As an accountant, respondent especially should understand the need to keep accurate and up-to-date records of her audit activities.

I credited Mr. Fattah's testimony that he repeatedly reminded respondent between the period from August 2003 through January 2004 to charge her time daily. Memos submitted to her on October 30, 2003, and February 4, 2004, further demonstrate his instructions to her in this regard. Moreover, Mr. Moses, another auditor in the unit, corroborated the daily time charging requirement and that it was communicated to staff by Mr. Fattah (Tr. 288). Indeed, as to the issue of notice of the requirement, respondent's former supervisor, Mr. Kersaint, testified that he too repeatedly warned respondent of the need to charge her time daily during the years he supervised her from 2000 to 2002. Despite such prior notice and instruction, computer printouts of respondent's CARTS time charges for December 2003 and January 2004, reflected multiple days in each month where respondent failed to charge any time at all (Pet. Exs. 22 and 23).

Respondent's divergent explanations for her failure in this regard were neither convincing nor credible. Her claims that she was never properly trained in charging time to CARTS or in the various codes that should be used, and that she was consistently denied help when she sought it, were neither believable nor supported by the evidence. There were clear negative consequences to Mr. Fattah, as a supervisor, as well as the work unit, when time was not properly charged, and Mr. Fattah, as well as his superiors, had every interest in making sure it was done timely and accurately. Even if, as respondent claimed, an e-mail had been circulated in 2002 telling auditors that they had the discretion to charge their time weekly or monthly, that had no bearing on the pending charges, since Mr. Fattah had stressed from the beginning of his supervision of respondent in August 2003 that he required her and the other auditors in his unit to charge time daily, except for the limited times when they were in the field. Moreover, even if

she was in the field regularly, as she also alleged at one point, respondent could have used the field system to log her time daily or logged in the very next day she returned to the office as required, and she had no explanation for her failure to do so.

Respondent's somewhat inconsistent alternative defense to this charge, that she did in fact charge her time daily and that Mr. Fattah was intentionally deleting time from her records and instructing auditors to hide their time, was likewise incredible and amounted to no more than unsupported accusations. Mr. Fattah's motives to ensure the efficient and proper functioning of his unit would appear to far outweigh any negative personal feelings that he may have had for respondent or a desire to "sabotage" her in the workplace. Nor was there proof that he had any personal dislike for or animosity toward respondent, beyond his apparently justified frustration with her work performance. There was certainly no evidence that respondent's prior EEO complaint was substantiated, that it was directed at or involved Mr. Fattah, that he had anything to do with her earlier failure to get a promotion, or that it provided him with any motivation to falsify his testimony.

I found respondent's failure to charge her time daily to be volitional and thus to constitute insubordination, as well as improper and neglectful performance of her duties. Charge I, specification 1 is sustained, as well as specification 1 of charges IV and V, to the extent they relied on the same misconduct.

b. Insubordination, Incompetence, Neglect of Duty and Making False Entries with respect to Audit of Case No. X-356570089

Petitioner filed a number of charges against respondent for her conduct of an audit in what was designated as case no. X-356570089. In particular, petitioner charged that respondent made false entries in her DO-220.5 log for this audit regarding alleged conversations she had with Mr. Fattah; submitted an initial audit that contained various errors and omissions and lacked any supporting paperwork or documentation; twice resubmitted the audit, on April 15, 2004, and July 13, 2004, without having made any of the necessary corrections or provided the required paperwork as directed by Mr. Fattah; and told Mr. Fattah on July 13, 2004, with regard to his directions, that "I'm not doing it and I don't care" (ALJ Ex. 1A, charge I, specifications 3, 4 and 5, and charges II through V).

Mr. Fattah testified that on March 8, 2004, respondent gave him an audit file for review which contained a number of errors and omissions. First, respondent's DO-220.5 log entries for September 25 and 30, 2003, both indicated that she had discussed case no. X-356570089 with Mr. Fattah on September 25, and that on that date he had agreed to her adjourning the initial field appointment with the taxpayer from September 30, 2003 until November 6, 2003 (Pet. Ex. 24, at 4). Mr. Fattah testified that respondent never spoke to him about this case on September 25. On September 30, he approached respondent to ask why she was in the office rather than at her scheduled September 30 initial appointment with the taxpayer, which she had arranged by letter mailed out on September 17, 2003 (Pet. Ex. 24). Respondent advised him that she had already told him that the appointment had been rescheduled for November 6 and that he had agreed. Mr. Fattah reminded her that she could not adjourn an appointment for more than 30 days and that anything longer than that required his approval, which he denied giving. He gave her the State's guidelines for appointments and stated that a request for a postponement of more than 30 days must be made in writing. Here, there was no written request by the taxpayer and no approval provided by Mr. Fattah; this was the first that he had heard of the adjournment which was in excess of 30 days (Tr. 144-48). He directed respondent to change the entries to delete what he considered to be false statements. Also, respondent's DO-220.5 log did not contain an entry noting that she had mailed the taxpayer a waiver, as she claimed or that she had obtained a Test Period Audit Method Election Agreement, significant auditor activities that should be entered contemporaneously in the log.

In addition, according to Mr. Fattah, respondent had concluded that there should be "no change" to the taxpayer's tax liability but had no documentation to support this finding. This audit involved a year of expenses for a restaurant, yet there was no evidence that respondent had done the necessary calculations. First, there were no bank statements to show that the deposits made by the taxpayer justified the amount the taxpayer claimed should be taxed. Second, there were no records to reconcile the taxpayer's tax accrual account with what was actually filed. Third, there were no expense records for purposes of calculating the use tax for the test period (Tr. 168-73).

Mr. Fattah returned the file to respondent on April 6, 2004, with instructions to correct her DO-220.5 and to provide the necessary paperwork so that he could verify respondent's "no

change" audit conclusion. He also gave her a supervisory memo, documenting her errors and his instructions (Pet. Ex. 24).

On April 15, respondent returned the file to him without making any of the requested corrections. On April 23, Mr. Fattah issued her a second supervisory memo and returned the file to her (Pet Ex. 28). On July 13, 2004, respondent gave Mr. Fattah the file once again and nothing had changed. On July 20, 2004, Mr. Fattah held a supervisory conference with respondent, wherein she indicated that she was not going to make the required corrections and that she did not care. She left the case on the floor and walked out. The case was subsequently transferred to Albany for review and processing because the taxpayer had been complaining that the audit was taking too long (Tr. 214-17). Mr. Fattah issued a third supervisory memo on July 21, 2004, concerning respondent's failure to perform her duties and her insubordination (Pet. Ex. 33).

Mr. Fattah testified that the auditors in Albany did not agree with respondent's final conclusion that there should be no change in the taxpayer's liability. On November 5, 2004, Mr. Fattah was copied on a letter from the State Department of Tax and Finance to the taxpayer representative in which the Program Chief stated: "We are in agreement that the work papers submitted to date do not justify a "no change" audit result. It is regrettable that the auditor's work papers are insufficient to support the recommendation for this result . . . ." The State offered the taxpayer three options for concluding the audit (Pet. Ex. 34). Ultimately, the State closed the file because the taxpayer would not agree to further audit. The taxpayer, who had spent a significant amount of time on the audit and had sent all of his paperwork to respondent, was unwilling to go through the process again with other auditors. If the State did not drop the audit, it faced legal action by the taxpayer. It was not determined whether the State lost any taxable income as a result of respondent's action (Tr. 358-66).

Respondent testified that on September 17, 2003, she prepared the initial appointment letter for case no. X-356570089. Mr. Fattah told her to schedule the appointment for September 30, which she claimed was contrary to the guidelines giving the taxpayer at least 15 days to prepare from the date of the letter. She did as she was told. She was subsequently contacted by the representative on September 25, 2003, who asked for an adjournment until November 6. Since he was asking for more than 30 days, respondent asked him to put the request in writing

and to provide her with a power of attorney form and a waiver of the statute of limitations deadline. She also advised him that the adjournment request would have to be approved by her supervisor. She did not receive a written adjournment request. On September 25, she advised Mr. Fattah about her conversation with the representative and he said that it would not be a problem to postpone the initial appointment so long as she got the written request. She noted in her DO-220.5 log for September 25, 2003, that she had "discussed" the adjournment request with Mr. Fattah. She did not go to the appointment on September 30 for obvious reasons, because the appointment had been adjourned and the representative was not available. When Mr. Fattah approached her on that date, he threatened to write her up for not being at the appointment and she reminded him that she had spoken to him on September 25 about the adjournment. She also noted as much in her DO-220.5 log for September 30, 2003 (Tr. 408-11). Respondent refused to subsequently change her log entries for September 25 and September 30 with respect to her purported conversations with Mr. Fattah about the adjournment, as the latter directed, because the entries were true and to delete them would be false (Tr. 431-32).

Respondent also testified that she prepared all the necessary paperwork for case no. X-356570089 and gave it to Mr. Fattah when she first submitted the audit on March 8, 2004. She prepared the gross sales reconciliation schedule, the daily sales for a select period, the fixed assets, the purchase expenses, and her audit report. Respondent examined the taxpayer's bank statements and compared them with the sales tax returns and records. Everything was balancing out and she said so in her report and made the proper entries into the computer. The State's audit guidelines do not specify which documents are necessary for an audit and the decision as to what to submit in support of an audit is within the auditor's discretion (Tr. 444-46). The reason that she did not provide the bank statements was because the taxpayer would not allow her to copy them. She had to review them in his office and she indicated in her report that she did so. She did not write down her reconciliation (Tr. 550-52).

Respondent testified that she did not write a separate finding concerning the audit report because it is something that is computer generated by clicking a box in the program (Tr. 445). With regard to the charge that she tested the taxpayer's expense purchases without providing supporting documentation, she indicated in her log for February 11, 2004, that she reviewed purchase expenses for the year 2002. Since this was a restaurant, there were very few office

expenses and she did not find any to list (Tr. 454-58). Moreover, since the sales tax was charged, there was no reason to show in the schedules all the invoices for the year 2002. She only prepared one page for the purchase expenses, as noted in respondent's Exhibit C. No other paperwork was necessary. The fixed assets did not need to be tested because they are depreciable assets and not considered taxable (Tr. 416-20; 561-63).

Respondent testified that she did not add any more paperwork after she got the April 6, 2004 memo from Mr. Fattah because she had already provided what was necessary. When she resubmitted the file on April 15, she was not advised of any further corrections to be made (Tr. 420-21). Respondent testified that she did not change the log to show the date that she had mailed the waiver to the taxpayer because she was planning to have him sign it at their scheduled appointment. Respondent testified that the requested changes as to her conversations with Mr. Fattah about the adjournment were false and that she advised Mr. Fattah that she would not make them (Tr. 432-34).

With respect to respondent's DO-220.5 log entries for September 25 and 30, 2003, I credited Mr. Fattah's testimony over respondent's contrary claims, that she never spoke to him as her log entries indicated about an adjournment of the initial appointment on this case from September 30, 2003 to November 6, 2003, and that he never gave her advance approval. Mr. Fattah made clear that the guidelines called for adjournments not to exceed thirty days without a written request and supervisory approval. I had no doubt, if it occurred, that he would have recalled having given such approval just five days earlier, as respondent tried to claim. Nor was a written request ever submitted by respondent. I was not persuaded that Mr. Fattah was so biased against respondent that he would fabricate his testimony.

On the other hand, respondent had a much more substantial motive to falsely pretend that she had notified Mr. Fattah about the length of the adjournment since it exceeded the guidelines. The fact that her entry that she had "discussed the case with the team leader" was the very last sentence of her rather lengthy DO-220.5 log entry for September 25, 2003, allowed for the probability that she added that sentence after being questioned about the adjournment on September 30, 2003, when Mr. Fattah found her in the office rather than at the scheduled appointment. I was persuaded that the entries about discussing the adjournment with Mr. Fattah were false, and therefore charge II, specifications 1 and 2 are sustained.

With respect to the allegations regarding errors and omissions in respondent's conduct of the audit of case no. X-356570089, I found those allegations also properly proved by petitioner. Mr. Fattah credibly specified in his testimony and in memos that he provided to respondent at the time, that there were certain errors and omissions in her work on this audit that had to be remedied. He further told her that he needed her to submit supporting work papers to justify her "no change" conclusion as to the taxpayer's lack of any tax liability. Respondent does not dispute that she failed to make the necessary changes or corrections or to submit any further work papers or supporting documentation. She simply claimed that what she provided should be enough. Even if State guidelines permit an auditor to use discretion as to the amount of supporting paperwork to prepare, once respondent's supervisor directed her to provide supporting paperwork she was obligated to prepare and provide it. Respondent failed to do that and I had little doubt that her failure was volitional.

In particular, respondent failed to provide work papers, including bank statements, which supported her conclusion that the taxpayer's bank deposits were in substantial agreement with the books and records. She also failed to submit work papers or documents from the businesses which demonstrated the taxpayer's sales tax payable reconciliation or her alleged test of the taxpayer's expense purchases for 2001 or 2002, the year she apparently focused on. A review of the paperwork respondent submitted (Resp. Ex. F) makes it clear just how superficial her audit was. The computer print-outs that she attached to the audit which showed various figures but without calculations reflect her conclusions but did not support them. Mr. Fattah asked her to submit work papers and supporting documentation including things such as, her calculations and reconciliations, back-up documentation, comments and summaries of audit adjustments, a log of taxpayer-auditor communications, bank statements, expense records and recommendations for follow-up procedures (*see* Resp. Ex. F, at 4 of the DO-220.5 log). She was twice told to provide such items in this audit and had over three months to do so, yet refused and twice resubmitted the audit without changes, corrections or the requested paperwork. I further credited Mr. Fattah's testimony that on July 13, 2004, when she resubmitted this audit with no changes or additional work performed that she answered Mr. Fattah's protests about her failure to act with the comment, "I'm not doing it and I don't care."

That respondent's performance on this audit was seriously inadequate despite her arguments otherwise, and that Mr. Fattah was not simply being unreasonable or unfair to her, was amply demonstrated by the fact that State auditors upon getting this file could not agree with respondent's conclusions of a "no change" in the taxpayer's liability because of the insufficient paperwork she submitted to support it. They nonetheless had to close the matter out because of the length of time she had taken to that point and the potential for legal action by the taxpayer. In the circumstances, respondent's insubordination and poor performance with respect to this audit may have even lost legitimate revenue for the State.

In sum, I found respondent to have been insubordinate for refusing to make the requested corrections and changes in this audit and failing to provide the necessary paperwork and supporting documentation as twice directed, and thus charge I, specifications 3, 4 and 5 were sustained. Such conduct also constituted negligent and improper conduct of her duties, and thus charges IV and V are sustained. Respondent's failures in this regard, however, did not constitute the making or submission of a false report or false entries by her, as it was not clear that she intended to submit false documentation and it was not proved that what she submitted was actually false. They were simply unsupported and inadequately documented audit conclusions. Thus, charge II, specifications 4 through 7 are dismissed.

I did not find the charged misconduct to constitute incompetence by respondent, in that I was persuaded that she was capable of doing the assigned work and providing the supporting paperwork, but simply refused to comply with Mr. Fattah's directions. Charge III should be dismissed.

c. Insubordination for Failing to Report to Supervisor's Office on April 6, 2004

Petitioner charges that on April 6, 2004, respondent refused to report to supervisor Jeff Talan's office in order to receive a supervisory conference memorandum as instructed by Mr. Fattah (ALJ Ex. 1A, charge I, specification 2).

Mr. Fattah testified that after he had the supervisory conference with respondent on April 6, 2004, he told her to report to Jeff Talan, the disciplinary liaison. Respondent indicated that she "did not feel like going there today" (Tr. 183). She left work at 3:20 p.m. without permission and without explanation (Tr. 184-91; Pet. Ex. 27). On cross-examination, Mr. Fattah denied that

respondent advised him that she would be leaving early for the Jewish holiday (Tr. 267-72). On April 9, 2004, Mr. Fattah gave respondent two supervisory memos, one for refusing to see Mr. Talan and one for leaving work early without permission (Pet. Exs. 25 and 26).

Respondent testified that on April 6, she told Mr. Fattah at 11:00 a.m. that she would be leaving at 3:00 p.m. for Passover. He did not respond and she assumed that it would be alright because it had never been a problem before. She testified that she did not need Mr. Fattah's approval to leave early for the religious holiday. As she was packing up her things to leave that afternoon, Mr. Fattah appeared at her desk and told her to report to Mr. Talan's office. She thought it was a joke. When he told her that she had to go, she was "amazed" and told him that she was leaving early for the religious holiday. Mr. Fattah threatened to dock her pay and did not explain to her why it was necessary to see Mr. Talan at that moment. She left and when she returned to work she was given the supervisory memos (Tr. 401-04).

Mr. Fattah was a credible witness and indeed, there was little dispute over the facts. I was persuaded that during their interaction in the afternoon, respondent made no mention of having to leave for the religious holiday and also made the comment that she did not feel like complying with the order. Whether or not Mr. Fattah ever indicated to respondent earlier that day that she could leave early for the religious holiday, he clearly ordered her that afternoon to go speak to Mr. Talan before departing and respondent just as clearly refused. Mr. Fattah's order was clearly communicated to respondent, was lawful, was understood by her, and yet was ignored without adequate reason. She presented no convincing explanation for why she could not have immediately complied, at least to the extent of checking in with Mr. Talan to explain that she needed to leave early for religious reasons. She had no idea as to how long if at all, she would be detained by Mr. Talan. She simply never bothered to check and instead refused to comply with Mr. Fattah's direction that she go see him. Nor did Mr. Fattah's direction require an explanation as a condition precedent to her compliance.

Charge I, specification 2 is sustained.

d. Insubordination Regarding Taxpayer's Closing Agreement on May 12, 2004

Petitioner charges that on May 12, 2004, respondent obtained a closing agreement from a taxpayer without submitting it to Mr. Fattah for review in contravention to his instructions that

all documents be reviewed before being sent to a taxpayer. The agreement contained a critical $50,000 error in that it stated in one of the paragraphs that the taxpayer would pay $5,571.70 instead of $55,571.70, as was due (ALJ Ex. 1A, charge I, specification 4, and charges IV and V).

Mr. Fattah testified that on May 10, 2004, respondent gave him a closing agreement that she had drafted wherein the taxpayer agreed to pay $55,571.70 and waived the right to challenge the amount. Upon his review, he asked her to delete an unnecessary space between the dollar sign and the amount in one of the paragraphs, which space he explained created an opportunity for someone to potentially tamper or make a mistake regarding the amount. Respondent did as she was instructed, but in the process, she made a new error and changed the amount owed by the taxpayer in that paragraph to $5,571.70, inadvertently deleting the first "5". Respondent did not show Mr. Fattah the revised agreement and it was sent to the taxpayer with a $50,000 error in the taxpayer's favor. Mr. Fattah testified that he has instructed his auditors repeatedly that they are required to show him all documents before sending them to taxpayers and that respondent's failure to do so in this instance led to a potentially significant error (Tr. 206-13; 333-34). As a result, Mr. Fattah gave respondent a supervisory memo on June 18, 2004 (Pet. Ex. 32).

With regard to this audit, respondent testified that Mr. Fattah tried to have another auditor illegally remove cash register receipts from the taxpayer's place of business. Mr. Fattah made up the estimated tax owed by the taxpayer without reviewing books and records. At his direction, she prepared the closing agreement rather than a statement of audit adjustments which would have given the taxpayer 30 days to respond and to file for a refund. She prepared the first closing statement and gave it to Mr. Fattah for review. When he looked at it, he asked her to delete the space between the dollar sign and the number which appeared in paragraph 4. She did so and presented it to Mr. Fattah for a second review. He asked her to deliver the agreement to the taxpayer rather than mailing it, which is the usual procedure. Neither of them caught the typographical error in paragraph 4. Another paragraph had the correct amount and the taxpayer executed the agreement and sent a check for $55,571. When she was putting the paperwork together she noticed the typo and notified Mr. Fattah who screamed and threatened her. She prepared another agreement with the correct amount, which the taxpayer signed and which was ultimately sent to Albany (Tr. 423-31). On cross-examination, respondent testified that on May 10, 2004, she noted in her log that she showed Mr. Fattah the first agreement for review (Pet. Ex.

49). Even though she stated in her memo to Mr. Talan that she showed Mr. Fattah the agreement a second time (Pet. Ex. 50), she did not put it in her log because she did not think it was necessary (Tr. 519-21). Respondent also did not think it was important to note in the DO-220.5 log that she had to reissue the agreement to the taxpayer to correct the amount owed (Tr. 523-28).

The weight of the evidence in this instance supports petitioner's charge. In terms of motivation to testify falsely, demeanor and consistency in testimony, Mr. Fattah was more credible than respondent. Thus, I did not credit her claim that she resubmitted the revised agreement to Mr. Fattah a second time for his review and that he too failed to notice the error.

The issue here is not the nature of the error itself or the lack of any consequences that may have stemmed from it. Indeed, in this case, the correct amount was noted in another paragraph of the agreement and the taxpayer ultimately paid the agreed upon amount without challenge. One typographical error in a prepared agreement, albeit a potentially significant one, made without intent or careless or reckless performance of respondent's duties, would probably not rise to the level of actionable misconduct or incompetence. The charge here, however, addressed respondent's failure to follow required procedures, which were in place to serve as a check to catch such errors. As with the daily time charging, respondent and her colleagues were repeatedly instructed to submit all documents to Mr. Fattah for final review before sending them out to a taxpayer. Mr. Fattah explained his very legitimate reasons for such instructions, and his direction in this regard was lawful and well within his authority to make, regardless. Respondent failed to comply with required procedures, namely, she failed to give Mr. Fattah the revised agreement, after eliminating the extra space as instructed, for final review before mailing it out. I was convinced that her conduct in this regard was volitional, or at a minimum amounted to careless indifference to required procedures, and thus I find this charge to be sustained.

Particularly given his experience with respondent, Mr. Fattah would likely have reviewed this agreement very closely and spotted the typo, as he did the first time that she gave him the proposed agreement and he noticed the extra space after the dollar sign. A $50,000 mistake in the taxpayer favor is just the kind of error that would leap out at Mr. Fattah and which his final review is intended to prevent. Respondent's additional allegations that Mr. Fattah was doing questionable things with the audit are incredible and appeared to be completely out of character

with his by-the-book professional demeanor. The fact that respondent failed to note in her log that she showed the agreement to Mr. Fattah a second and final time as she claimed, or had to reissue the agreement, supports Mr. Fattah's version of the incident.

In sum, petitioner properly proved charge I, specification 4. Respondent's failure to follow procedures in this instance also reflects negligent and improper performance of her duties as alleged in charges IV and V.

e. Improperly Backdated Test Period Audit Method Election Agreement

Petitioner charges that respondent made false entries in an official record and was negligent in the performance of her duties when she submitted a Test Period Audit Method Election Agreement from a taxpayer, dated December 11, 2003, which had actually been executed after February 13, 2004 (ALJ Ex. 1A, charge II, specification 3, as amended in ALJ Ex. 1D).

Mr. Fattah testified that on December 11, 2003, respondent obtained a Test Period Audit Method Election Agreement in case no. X-356570089. Instead of doing a full audit, a taxpayer, who has an adequate set of books, can consent to have a test period audited wherein a specific window of time is examined and the result is projected for the entire audit period. If the taxpayer is unsatisfied with the result, he can ask for another test period or a full audit. The agreement must be signed by a representative who has the power to do so (Tr. 151-54).

The agreement obtained by respondent in this case had a number of errors. First, respondent did not log the agreement in her DO-220.5 as required on the day that she obtained it. Second, it was executed by the accountant who was not the designated representative (Tr. 155). Mr. Fattah instructed respondent to, among other things, obtain an agreement signed by the designated representative. Respondent obtained a second agreement with the correct signature on or after February 13, 2004, but it was still dated December 11, 2003. Next to the date was respondent's signature (Pet. Ex. 24, at 7). Mr. Fattah concluded that respondent had backdated the agreement, which should not be done because it is a legal document which should accurately reflect what occurred. When he asked respondent about the date discrepancy, she had no response. Moreover, her actions in obtaining the second agreement were never logged into the DO-220.5 (Tr. 158-64).

Respondent denied backdating the agreement. On December 11, 2003, she visited the taxpayer and the accountant signed the Test Period Audit Method Election Agreement. As she was leaving, she realized that the accountant was not the designated representative so she left a blank form for the representative to sign. When she went to the taxpayer the next time, she forgot to get the agreement and she had a conversation with Mr. Fattah about it. When she got the agreement on February 13, 2004, it was already signed and dated December 11, 2003. She does not know who wrote in that date and did not question the taxpayer (Tr. 437-43). On cross-examination, respondent testified that she did not note in her DO-220.5 log that she got the agreement on December 11, 2003 because she noted it on December 24, 2003 (Tr. 539).

There is no dispute here that the Test Period Audit Method Election Agreement was backdated. Respondent's defense, and it was somewhat hard to follow, was apparently that she was not one who backdated it, but rather that it was the taxpayer's representative. I credited Mr. Fattah's testimony that he observed the first agreement obtained by respondent, saw it was signed by someone other than the taxpayer's representative and instructed her to obtain a new and correct agreement, which she did, but which was backdated. Whether she did the actual backdating or the taxpayer's representative did, and she simply condoned it by signing off on it, is of no moment. It was improperly dated and needed to be dated on the date that it was signed, which clearly was not on December 11, 2003. Indeed, respondent never logged in on December 11, 2003 that she obtained a Test Period Audit Method Election Agreement Form.

Respondent's submission in the audit folder of a backdated Test Period Audit Method Election Agreement for case no. 356570089 was improper and constituted careless, sloppy and negligent performance of her duties, and was further support for finding charges IV and V sustained. I was not persuaded, however, that in the backdating or condonation of the backdating of this agreement, respondent intended to submit a false document or to deceive, and thus charge II, specification 3 should be dismissed.

II. Charges of threatening, disruptive and discourteous behavior on April 23, 2004

Petitioner charges that on April 23, 2004, respondent was discourteous toward her supervisor and a member of the public when she accused a taxpayer representative of "playing games" after he asked for her work papers in support of her audit conclusions. When Mr. Fattah

spoke to respondent about the taxpayer's complaint, she accused him of giving special treatment to the taxpayer and complained that they were "setting" her up (ALJ Ex. 1A, charge VI, specification 1, and charges VII and VIII, specification 2).

Mr. Fattah testified that on April 23, 2004, he held a supervisory conference with respondent concerning her unprofessional conduct. Mr. Fattah had received a telephone call from a taxpayer representative complaining that respondent had insulted him. The representative had called to ask for copies of respondent's work papers showing that the taxpayer owed an estimated $150,000 in sales tax, something that he is entitled to see. The representative stated that respondent accused him of "playing games" (Tr. 200-03). Mr. Fattah asked the representative to send his complaint in writing. When Mr. Fattah spoke to respondent about the matter, she became agitated, defensive, and insulting. She claimed that Mr. Fattah was trying to "set her up" with the taxpayer and that there was a conspiracy to get her in trouble. In his memo documenting the incident, Mr. Fattah also noted that respondent accused him of being friends with the taxpayer representative and willing to give him "two-thirds of the [tax] assessment" (Pet. Ex. 30). Mr. Fattah ended the meeting and directed her to report to Supervisor John Perotti's office. On April 27, 2004, Mr. Fattah gave respondent a supervisory memo summarizing these events and attached a copy of the taxpayer's letter of complaint (Tr. 203-05; Pet. Ex. 30). Because respondent had accused Mr. Fattah of collusion with the taxpayer, Mr. Fattah turned the matter over to Mr. Parotti for final review (Tr. 342).

Respondent testified that she was concerned that the taxpayer, who had 12 employees, had failed to report their wages in 2002. After sitting in on a telephone conversation Mr. Fattah had with the taxpayer, she was given an amended tax return by the taxpayer. Respondent thought that the taxpayer had filed a fraudulent return and wanted it investigated. Mr. Perotti had sent respondent an e-mail on April 18, 2004, saying that there was no evidence that the amended tax return was ever filed (Resp. Ex. I). She claimed that Mr. Fattah was angry that she went above him for guidance on how to process the case. According to respondent, when the taxpayer representative called, the representative yelled at her because she asked whether he had spoken to the taxpayer about the amended return. When the call was concluded, she went immediately to Mr. Fattah's office where she found him already on the phone speaking with the representative. Mr. Fattah was chatting and smiling and when he saw respondent, he tried to end

the call. After hanging up, Mr. Fattah started "berating" respondent about insulting a taxpayer without giving her a chance to explain. The two of them then went to Mr. Perotti's office. Mr. Fattah asked for the case to be transferred from respondent (Tr. 460-78).

Charge VIII, specification 2 alleges that respondent's conduct and comments to Mr. Fattah and the taxpayer representative violated agency rules against being uncivil or discourteous in relation to members of the public or other employees. I found Mr. Fattah's version of this event, as supported by the letter of complaint from the taxpayer, to be the more credible version and that respondent indeed made the comments attributed to her. Respondent has an obligation to be courteous and professional in her interactions with the public and the fact that she said "Don't play games with me" and argued with the representative, rather than agree to provide him the requested copies of her work papers supporting her conclusion that his client owed a $150,000 tax liability, to which he was entitled, was improper and discourteous. Likewise, her comments to Mr. Fattah, in which she argued with him and baselessly accused him of corruption when simply asked to explain why a taxpayer representative had called in a complaint about her, crossed the line and was uncivil and discourteous. Charge VIII, specification 2 is sustained.

The nature of the comments by respondent proved here, however, did not amount to either disruptive or disorderly conduct by respondent nor threatening, intimidating or harassing behavior toward the taxpayer's representative or Mr. Fattah. As a result, charges VI, specification 1 and VII, specification 2, alleging as much, should be dismissed.

Specification 1 of charges VII and VIII, further allege that respondent engaged in conduct that was disorderly, disruptive, uncivil and discourteous, for having purportedly told Mr. Fattah on July 13, 2004, when resubmitting her audit for a second time without making the necessary changes or corrections, "I'm not doing it and I don't care."

While I credit that the comments alleged were made, they are an integral part of the act of insubordination engaged in by respondent which has already been adjudicated as misconduct in charge I, specification 5, and do not, standing alone, constitute conduct which was disorderly, disruptive, uncivil or discourteous in violation of agency rules. Therefore, specification 1 of charges VII and VIII should be dismissed.

III. Time and Leave Charges

Respondent is charged with leaving Quality of Work Life ("QWL") Committee meetings early on February 2, 2005 and March 2, 2005, and arriving late for a QWL ceremony on May 11, 2005, without permission, and making false entries as to her work hours on her time sheet for those dates (ALJ Exs. 1B, 1C, and 1D).

Answorth Robinson, the director of labor relations, testified that on February 2, 2005, the monthly QWL meeting ran from approximately 2:40 p.m. to 4:15 p.m. and that he observed respondent leaving at 3:15 p.m., only twenty-five to thirty minutes after the meeting had begun (Tr. 9-10, 26). According to Mr. Robinson, if meetings end early, employees are supposed to return to work. Respondent did not return to work, yet wrote on her time card that she worked from 9:15 a.m. to 5:15 p.m. on that date (Pet. Ex. 6).

On March 2, 2005, Mr. Robinson noted on a piece of paper that respondent left the QWL meeting early, once again at 3:15 p.m. (Tr. 13-15; Pet. Ex. 7). Kevin Burke, an associate staff analyst and co-chair of the committee, also testified that he saw respondent leave at 3:15 p.m. (Tr. 59). Mr. Fattah testified that he received a call from Mr. Robinson, whom he did not know, inquiring whether respondent had returned to work from the March meeting (Tr. 16, 253). Respondent did not return to work and again wrote on her time card that she worked from 9:15 a.m. to 5:15 p.m. (Tr. 16; Pet. Ex. 9).

Respondent testified that when she went to QWL meetings in the afternoons, she was released from work for the entire day (Tr. 479). On February 2, 2005, she arrived at work at 9:15 a.m.; she is on flextime. She used her lunch hour to travel from her office in Brooklyn to the meeting in Manhattan. She testified that she did not leave before the meeting was over that day and in fact stayed later and chatted with some committee members (Tr. 488). She left around 4:30 p.m., and did not return to work because it is not customary to do so (Tr. 480-83). Normally, she would put an end time on her time sheet that would total a seven-hour day (Tr. 485). Similarly, respondent denied that she left the QWL meeting early on March 2, 2005, claiming that she stayed until the end which was sometime after 4:00 p.m.

Gennaro Irace, an associate staff analyst and the director of petitioner's Tax Appeals Tribunal, testified for respondent that he too, was at the March 2nd QWL meeting and had to leave early on that date to return to work. He testified that when he left at 3:50 p.m., respondent was still there. He recalled that respondent was sitting next to another committee member, Karol

Lee (Tr. 303-08). Respondent testified that she saw Mr. Irace leave the meeting at 3:50 p.m. (Tr. 495-96). Petitioner's Exhibit 46 show's that Karol Lee was out sick for the entire day on March 2, 2005.

I found Mr. Robinson to be a credible witness with respect to his recollection that respondent left the QWL meetings early on both February 2, 2005 and March 2, 2005. With respect to the February 2nd meeting, I was persuaded that he reliably recalled respondent's early departure because she was the only one to leave early that day, she left only about a half hour into the meeting, and she stood up and announced to the group that she had to go (Tr. 25-26). I was further persuaded that the early departure put him on the alert for respondent's early departure at the very next committee meeting on March 2, 2005, and this time he made a contemporaneous written note of respondent's departure time. His testimony was reliably corroborated by Mr. Burke, who recalled respondent's early departure on March 2nd, particularly because Mr. Robinson spoke to him immediately afterwards to ask if respondent had told him that she would be leaving early, which she had not.

I found respondent's denials of an early departure incredible. I further found Mr. Irace's testimony insufficiently reliable to corroborate respondent's presence at the March 2nd meeting as of the time he left at 3:50 p.m. Mr. Irace had far less reason than Mr. Robinson or Mr. Burke to recall or note the time of respondent's departure on March 2, 2005, and he was not questioned about it until months later. Unlike Mr. Robinson, he made no record of his recollection as to respondent's presence at the meeting. Moreover, he incorrectly recalled that Ms. Lee was at the meeting, suggesting that his recollection of this date was unreliable and that perhaps he confused the details of this meeting with another monthly meeting.

I was persuaded, as respondent claimed, that the condoned practice for employees who attended committee meetings was that they were released for the afternoon and yet could note their time of departure for those dates as consistent with the required seven-hour day, even though the meetings might end before 5 p.m. It made sense that the committee members would not be required to travel back to their work locations simply to turn around and leave for the day.

However, I was further persuaded that such condoned practice was contingent upon employees actually attending the QWL meetings for the entire time allotted. Once respondent chose to depart the meetings on February 2, 2005 and March 2, 2005 more than an hour before

their ending time, she was obligated to return to work. Her travel time between lower Manhattan and Adams Street could not have been more than twenty minutes or so and she had plenty of time to return to her office on those dates. Her failure to return to work after her unauthorized early departures from the meetings, and still noting the end of her work day inaccurately on both occasions as 5:15 p.m., is sanctionable. I find that on both occasions, February 2, 2005 and March 2, 2005, respondent failed to accurately record her tours of duty with respect to her times of departure and that she failed to comply with petitioner's time and leave procedures. Charges I, II and III of the amended charges dated April 6, 2005 (ALJ Ex. 1B) are sustained.

Charge IV, however, is dismissed. I do not find that respondent committed the misconduct with the necessary intent to constitute a crime or specifically the crime of offering a false instrument for filing in the second degree, and therefore charge IV of the amended charges is dismissed.

Mr. Robinson testified that on May 11, 2005, an employee recognition ceremony took place at 345 Adams Street in Brooklyn for which QWL Committee members were supposed to arrive at 7:30 a.m. to help set up. Mr. Robinson testified that he arrived that morning at 7:10 a.m. Up to 20 people involved with the committee filtered in thereafter up through 8:00 a.m. No sign-in sheet or log of when folks arrived was kept. Everyone had assigned tasks and set about on their own to set up for the ceremony.

Mr. Robinson testified that to the best of his recollection, respondent arrived sometime close to 8:00 a.m. He did not actually see her arrive but recalled seeing her for the first time around 8:00 a.m. when she asked him about kosher food for the ceremony (Tr. 38-51). Glenda Andrews, a labor relations assistant, testified that she arrived for the ceremony at about 7:45 a.m. and the first time she saw respondent was around 8:30 a.m. (Tr. 79). She knew respondent by face, but had never met her before. She acknowledged she was not looking for her on that date, spent twenty-five minutes or so in an upstairs room focusing on her role in setting up the ceremony, and was only asked about her recollections of respondent's arrival time months later (Tr. 75-76). Sharon Jaffee, another committee member, testified that she got there at 7:30 a.m. and saw respondent arrive at about 7:45 a.m. or 7:50 a.m. (Tr. 291-96).

Respondent testified that she arrived at 7:29 a.m. for the ceremony that morning and that she recalled signing into the building's lobby at that time (Tr. 497). She had to be there early to

make sure that the kosher food was delivered. After the ceremony, she went to work and stayed until 5:00 p.m. Respondent noted her work hours for that date as from 7:30 a.m. to 5:00 p.m. (Pet. Ex. 10). She was paid for only seven hours, however, and did not request overtime (Tr. 498-500).

The evidence submitted by petitioner with respect to respondent's time card entries on the day of the May 11, 2005 employee recognition ceremony was simply too speculative and unreliable to satisfy petitioner's burden of proof that she committed any misconduct. None of petitioner's witnesses had any compelling reason to pay attention or note for future reference the exact time that respondent arrived at the ceremony. Nor would that event have any significance, since it was not an activity that she was required to appear at by a certain time. Mr. Robinson's testimony with regard to when he first observed respondent at the ceremony was revised over time, as he initially reported weeks after the fact that respondent arrived at 8:30 a.m., subsequently recalled that it was probably closer to 8:00 a.m. (Resp. Ex. A), and allowed at trial that it may even have been up to ten minutes before. Neither Ms. Andrews nor Ms. Jaffee had any good reason to track or remember respondent's time of arrival, and indeed, Ms. Andrews did not even really know respondent.

The ceremony was held at a location other than the work location, in a big room, with as many as twenty or more employees present, arriving at various times, moving about and engaging in their various assigned tasks and activities in preparing for the ceremony. Some of the committee member's preparatory activities also took place in a second floor room that all had access to during this period. Petitioner's witnesses had differing recollections as to when they first saw respondent, which would only be natural in the circumstances and depending on when they arrived, where they were at any given moment and what they were engaged in. None of them actually saw her arrive nor did they have any reason to notice as much. While none of petitioner's witnesses may have been testifying falsely, the fact that they first recalled seeing respondent at disparate times after 7:30 a.m. does not preclude the fact that she may nevertheless have arrived at the time that she claimed.

In sum, the quality of proof submitted by petitioner on this issue did not rise to the level necessary to satisfy petitioner's burden. Respondent testified that she arrived at 7:29 a.m. that morning and none of petitioner's witnesses reliably persuaded me otherwise. All of the charges

with respect to respondent's alleged abuse of time and leave procedures on this date, May 11, 2005, should be dismissed.

FINDINGS AND CONCLUSIONS

1. On April 6, 2004 respondent was insubordinate when she refused a lawful order from her supervisor to report to Jeff Talan's office in order to receive a supervisory conference memorandum.

2. On April 15, 2004, respondent was insubordinate when she resubmitted an audit for supervisory review without making the corrections and providing the necessary information or work papers as ordered by her supervisor when he rejected the audit on April 6, 2004. Respondent's failures in this regard also constituted neglectful and improper performance of her duties.

3. On May 12, 2004, respondent mailed out and obtained a signed closing agreement from a taxpayer without having submitted the agreement for prior supervisory review, in direct opposition to the supervisor's instructions that all documents must be reviewed before being sent to a taxpayer. This closing agreement contained a critical $50,000 error, in that it stated at one point that the payment in full to be paid by the taxpayer was $5,571.70, instead of the correct amount of $55,571.70. Respondent's conduct in bypassing supervisory review was insubordinate and constituted neglectful and inefficient performance of her duties.

4. On July 13, 2004, respondent was instructed by her supervisor once again to make certain corrections and to provide the work papers and information necessary to complete the audit in case no. 356570089. The audit file had been returned to her for the same reasons on April 6, 2004 and April 23, 2004. She failed to make corrections to the case's DO-220.5 and did not prepare the necessary work papers. When brought to her attention, she replied, "I'm not doing it and I don't care." Respondent's conduct in this regard was insubordinate and amounted to neglectful and improper performance of her duties. Her comments were not separately sanctionable.

5. Respondent's DO-220.5 log entries for September 25, 2003 and September 30, 2003, falsely indicated that she discussed a specific case on that date with her supervisor and that he was aware of and

approved an initial appointment adjournment in excess of thirty days.

6. Respondent improperly submitted a backdated Test Period Audit Method Election Agreement form from a taxpayer, which was obtained and submitted on or after February 13, 2004, but was dated December 11, 2003. Such conduct amounted to neglectful and improper performance of her duties, but did not constitute the intentional submission of a false document to petitioner.

7. On April 23, 2004, respondent was discourteous and uncivil toward a taxpayer representative and toward her supervisor, Mr. Fattah, for having first argued with and accused the representative of "playing games" when he requested that she provide him with the work papers supporting her audit conclusions, and then accused Mr. Fattah, when he tried to discuss the representative's complaint with her, of giving special treatment to the representative, offering him payoffs, and trying to "set her up." Respondent's conduct, however, did not constitute harassing, intimidating, threatening or disruptive or disorderly conduct in violation of agency rules.

8. On February 2, 2005, and again on March 2, 2005, respondent failed to accurately record the time of her departure from work and failed to comply with proper time and leave procedures, when she left QWL committee meetings on each date at least an hour before the meetings ended, failed to return to work without approval, yet still recorded her time of departure on each date as 5:15 p.m. to reflect that she worked a seven-hour day.

9. Petitioner failed to prove that on May 11, 2005, respondent violated time and leave procedures or improperly recorded her time of arrival at a QWL Employee Recognition Ceremony, when she noted on her time sheet that she arrived at 7:30 a.m.

10. Petitioner failed to prove that respondent was incompetent to perform the duties of her position based on the above proved misconduct.

THEREFORE:

I find that petitioner has properly proved charges I, II, specifications 1 and 2, IV, V, and VIII of the original charges (ALJ Ex. 1A), as well as charges I, II, and III of the first set of amended charges, dated April 6, 2005 (ALJ Ex. 1B). Charge II, specifications 3 through 7, and

charges III, VI, and VII of the original charges (ALJ Ex. 1A), charge IV of the first set of amended charges (ALJ Ex. 1B), and all charges contained in the second set of amended charges, dated July 15, 2005 (ALJ Ex. 1C), should be dismissed.

RECOMMENDATION

Upon making the above findings, I obtained and reviewed an abstract of respondent's personnel record as provided by petitioner.

Respondent was appointed to her position as a city tax auditor on June 28, 1993. Her performance evaluations rated her work from 1993 through 1997 as either "good" or "superior." In January 1998, she was promoted to the position of city tax auditor level II and her performance evaluations through 2001 were all "superior."

Beginning in 2002, however, respondent's work performance as reflected by her informal disciplinary history and evaluations began to deteriorate. Respondent received a "conditional" work performance evaluation for the year 2002, and for reasons not specified, she was deemed unable to be rated for 2003. Beginning in 2003, her personnel abstract reflects her receipt of numerous supervisory conference warning memoranda. Respondent received a supervisory conference memo for unspecified reasons in March 2003 from the assistant commissioner of enforcement. During the year 2004, she received ten supervisory conference memos from Mr. Fattah for various Code of Conduct violations, many of them at issue in the pending case. Her work evaluation from Mr. Fattah for 2004, which she signed under protest, not surprisingly, rated her performance as "unsatisfactory."

Respondent received two supervisory conference memos in 2005, one from Unit Head John Perotti for insubordination and one from Mr. Fattah for unspecified Code of Conduct violations. Her evaluation for 2005 rated her performance as "unsatisfactory," and again was signed by her "under protest." Respondent has received six supervisory conference memos so far in 2006 for various unspecified Code of Conduct violations and on one occasion, for AWOL violations.

Despite the numerous supervisory warnings in the past three years, respondent, however, has no prior formal record of discipline.

In this proceeding, respondent has been found to have been insubordinate on several occasions, repeatedly failed to follow basic agency and audit procedures despite frequent warnings and specific instructions as to what she needed to do, been discourteous, and failed to properly comply with time and leave procedures on two occasions. The evidence in this case reflected a stubborn and persistent refusal on respondent's part, over a lengthy period of time, to accept Mr. Fattah's authority or to comply with required agency procedures, for reasons that were not quite clear or evident. Indeed, at times there was a touch of paranoia regarding respondent's perception of what was occurring in the workplace and as to why she was having the difficulties that led to these charges. Respondent might want to consider the potential benefits of the employee assistance program or personal counseling.

Clearly, something has changed for the worse in respondent's attitude and/or work relationships since about 2002. I was not at all persuaded that she was being singled out unfairly by supervisors nor that she was the victim of a workplace "conspiracy" or retaliation for her complaints about the job or failure to get a promotion. Nor was I persuaded that respondent is incompetent or unable to perform her job duties properly and efficiently, when she wants to and is focused on doing so. Her superior performance evaluations for many years, even after being promoted to a higher job level, attest to her fundamental abilities.

Rather, the credible testimony here suggests something other than competency is at issue. Respondent has consistently demonstrated in the past few years an unwillingness to conform her behavior and her work performance to supervisory expectations and directions, despite repeated informal attempts by her supervisors to effect some change. Respondent has a responsible and important position, in which insubordination and careless or negligent performance of her duties can have a potentially significant negative impact on the taxpayers and citizens of the city.

Despite respondent's lack of a prior formal disciplinary record and her thirteen-year tenure with petitioner, a significant penalty is warranted for her misconduct, which continued over an almost two-year period. Moreover, her continued receipt of supervisory conferences in 2006 suggests that the problems respondent has been experiencing in the workplace may not yet be resolved. The penalty is this matter must serve as a clear reminder to respondent that she must work in accordance with established procedures, be responsive to supervisory instructions

and directions, and work well as a member of a team in performing her critical functions as a public servant, or ultimately she will risk losing her position.

Considering all of the relevant penalty factors, including the persistent nature of the misconduct committed, I recommend that respondent be suspended from work without pay for a period of thirty days.

Raymond E. Kramer
Administrative Law Judge

October 3, 2006

SUBMITTED TO:

MARTHA E. STARK
Commissioner

APPEARANCES:

ARI LIEBERMAN, ESQ.
Attorney for Petitioner

MITCHEL B. CRANER, ESQ.
Attorney for Respondent

The City Civil Service Commission's Decision, Item No. CD07-63-SA, June 12, 2007

THE CITY OF NEW YORK
CIVIL SERVICE COMMISSION

In the Matter of the Appeal of

JEANNETTE ZINDEL
Appellant

- Against -

NYC DEPARTMENT OF FINANCE
Respondent

Pursuant to Section 76 of the New York State Civil Service Law

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SIMON P. GOURDINE, *Commissioner/Chairman*

STATEMENT

On Thursday, May 31, 2007, the City Civil Service Commission heard oral argument in the appeal of **JEANNETTE ZINDEL,** City Tax Auditor – Lever II, New York City Department of Finance, from a determination by the New York City Department of Finance, finding her guilty of charges of misconduct and imposing a penalty of a **30 DAY SUSPENSION** following an administrative hearing conducted pursuant to Civil Service Law Section 75.

DECISION

COMMISSIONERS' FINDINGS:

After a careful review of the testimony adduced at the departmental hearing and based on the record in this case, the Civil Service Commission finds no reversible error and affirms the decision and penalty imposed by the New York City Department of Finance.

SIMON P. GOURDINE, *Commissioner/Chairman,* Civil Service Commission

NICHOLAS A. LAPORTE, *Commissioner/Vice Chairman,* Civil Service Commission

DAVID S. LANDE, *Commissioner,* Civil Service Commission

RUDY WASHINGTON, *Commissioner,* Civil Service Commission

NORMA LOPEZ, *Director and General Counsel,* Civil Service Commission

MICHEL CRANER, ESQ.
Representative for Appellant

AIR LIEBERNAM, ESQ.
Representative for Respondent