Dep't of Transportation v. Aleksandrova

OATH Index No. 2553/14 (Sept. 17, 2014)

Revenue coordinator charged with deleting e-mails sent by her supervisor without having read them and with telling another supervisor that she had called a DOT staff member when she had not done so. Evidence failed to establish that respondent committed misconduct. Dismissal of the charges recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF TRANSPORTATION
Petitioner
- against -
MAYA ALEKSANDROVA
Respondent

REPORT AND RECOMMENDATION

ASTRID B. GLOADE, *Administrative Law Judge*

Petitioner, the Department of Transportation ("Department" or "DOT"), brought this disciplinary proceeding pursuant to section 75 of the Civil Service Law. Petitioner alleged that respondent, Maya Aleksandrova, a revenue coordinator in its Franchise, Concession, and Consents Unit, performed her duties improperly, inefficiently, or negligently, engaged in conduct prejudicial to good order and discipline, engaged in conduct tending to bring the City of New York or its agencies in disrepute, and was insubordinate (ALJ Ex. 1).

At the hearing in this matter, petitioner relied on documentary evidence and testimony from three witnesses. Respondent, who was represented by counsel, testified on her own behalf and offered documentary evidence. For the reasons below, I find that petitioner failed to establish by a preponderance of the evidence that respondent committed misconduct and recommend that the charges be dismissed.

ANALYSIS

Respondent has been a revenue coordinator in the revenue unit of the Department's Office of Franchise, Concession, and Consents since March 2010. The unit is responsible for monitoring the collection of revenue relating to the Department's grant of franchise, concession, and consent contracts to various entities, referred to as grantees. The unit oversees approximately 900 invoices annually and the collection of millions of dollars in revenue relating to the contracts (Tr. 10-11, 29-30, 105).

Deletion of E-mails from Supervisor

Petitioner alleged that on August 4, 14, and 29, 2013, respondent, who is responsible for keeping track of and following up on invoices that are e-mailed by her supervisor to grantees, deleted e-mails relating to invoices without having read them. Petitioner charged respondent with insubordination, engaging in conduct prejudicial to good order and discipline and tending to bring DOT and the City of New York into disrepute, and performing her duties improperly or inefficiently (ALJ Ex. 1).

Sayed Rahman, supervisor of the revenue unit, has supervised respondent for four years. He testified that respondent's duties are to monitor revenue, register agreements, and oversee security deposits. As part of the revenue collection process, Mr. Rahman sends revocable consent invoices to the grantees by e-mail, on which he copies respondent. He copies respondent on the e-mails because only he and respondent oversee revenue collection and he wants her to be aware of what is occurring with the invoices in the event she has to resolve issues that might arise (Tr. 10-12, 16-17, 29-30, 136). Mr. Rahman verbally instructed respondent that if the invoice remains unpaid, she is to fax or call the grantee, and if there is new information about the grantee, that she is to update the Department's database (Tr. 15, 27, 41).

In August 2013, Mr. Rahman received via e-mail notices that respondent had deleted without reading revocable consent invoice e-mails on which he had copied her. Specifically, on Monday, August 5, 2013, Mr. Rahman received e-mail notifications that respondent had deleted a number of his e-mails without reading them. Mr. Rahman stated that he did not discuss the matter with respondent nor did he take any action. According to Mr. Rahman, it was only after he received several more notifications that respondent had deleted his revocable consent invoice e-mails without having read them that he contacted her and made a written record of the incident

and of his discussions with respondent (Tr. 17, 22-24; Pet. Exs. 3, 4). The date and time that each revocable consent invoice e-mail was sent and deleted is reflected in the following chart:

Date/Time E-Mail Sent	Date/Time E-Mail Deleted	Exhibit No.
1) 8/29/13, 9:17 a.m.	8/29/13, 9:20 a.m.	Ex. 3-2/2A
2) 8/14/13, 8:58 a.m.	8/14/13, 9:09 a.m.	Ex. 3-3/3A
3) 7/16/10, 11:03 a.m.	8/4/13, 9:27 p.m.	Ex. 3-4/4A
4) 7/16/10, 12:08 p.m.	8/4/13, 9:27 p.m.	Ex. 3-5/5A
5) 7/16/10, 12:46 p.m.	8/4/13, 9:27 p.m.	Ex. 3-6/6A
6) 7/16/10, 12:54 p.m.	8/4/13, 9:27 p.m.	Ex. 3-7/7A
7) 7/16/10, 3:23 p.m.	8/4/13, 9:27 p.m.	Ex. 3-8/8A
8) 7/20/10, 8:30 a.m.	8/4/13, 9:27 p.m.	Ex. 3-9/9A
9) 7/20/10, 10:58 a.m.	8/4/13, 9:27 p.m.	Ex. 3-10/10A
10) 7/20/10, 11:05 a.m.	8/4/13, 9:27 p.m.	Ex. 3-11/11A
11) 7/20/10, 11:57 a.m.	8/4/13, 9:27 p.m.	Ex. 3-12/12A
12) 7/22/10, 8:52 a.m.	8/4/13, 9:27 p.m.	Ex. 3-13/13A
13) 7/22/10, 9:01 a.m.	8//4/13, 9:27 p.m.	Ex. 3-14/14A
14) 7/22/10, 8:57 a.m.	8/4/13, 9:27 p.m.	Ex. 3-15/15A
15) 7/22/10, 9:14 a.m.	8/4/13, 9:27 p.m.	Ex. 3-16/16A
16) 7/22/10, 9:09 a.m.	8/4/13, 9:27 p.m.	Ex. 3-17/17A
17) 7/22/10, 9:23 a.m.	8/4/13, 9:27 p.m.	Ex. 3-18/18A
18) 7/22/10, 9:29 a.m.	8/4/13, 9:27 p.m.	Ex. 3-19/19A
19) 7/22/10, 9:56 a.m.	8/4/13, 9:27 p.m.	Ex. 3-20/20A
20) 7/22/10, 11:09 a.m.	8/4/13, 9:27 p.m.	Ex. 3-21/21A
21) 7/22/10, 11:11 a.m.	8/4/13, 9:27 p.m.	Ex. 3-22/22A
22) 7/22/10, 11:30 a.m.	8/4/13, 9:27 p.m.	Ex. 3-23/23A
23) 7/22/10, 11:52 a.m.	8/4/13, 9:27 p.m.	Ex. 3-24/24A
24) 7/23/10, 10:01 a.m.	8/4/13, 9:27 p.m.	Ex. 3-25/25A
25) 7/23/10, 10:47 a.m.	8/4/13, 9:27 p.m.	Ex. 3-26/26A
26) 7/23/10, 10:53 a.m.	8/4/13, 9:27 p.m.	Ex. 3-27/27A
27) 7/23/10, 10:56 a.m.	8/4/13, 9:27 p.m.	Ex. 3-28/28A
28) 7/23/10, 12:23 a.m.	8/4/13, 9:27 p.m.	Ex. 3-29/29A
29) 7/23/10, 3:02 p.m.	8/4/13, 9:27 p.m.	Ex. 3-30/30A

The notices Mr. Rahman received indicate that 27 of the 29 revocable consent invoice e-mails were deleted without being read on Sunday, August 4, 2013, at 9:27 p.m. The notices state that they were sent "From: Aleksandrova, Maya" and that they were "deleted without being read on 8/4/2013 9:27 p.m." (Pet. Exs. 3-4/4A to 3-30/30A). Similarly, a notice dated August 14, 2013, indicates that it was sent from respondent. The August 14th notice states that Mr. Rahman's e-mail was deleted without being read 11 minutes after it was sent to respondent (Pet. Ex. 3-3/3A). The notice dated August 29, 2013, indicates that it was sent from respondent and that it was deleted without being read three minutes after it was sent (Pet. Ex. 3-2/2A).

Respondent testified that Mr. Rahman copies her when he e-mails revocable consent invoices to grantees and directs her to follow up on specific invoices if they are not paid (Tr. 107-08). The invoices concern a specific fiscal year and new invoices are generated each fiscal year because the fees may change (Tr. 109-10, 116). After an invoice is paid, there is no need to refer back to the e-mail (Tr. 116-17). According to respondent, when she receives a revocable consent invoice e-mail from Mr. Rahman, she reviews it in the preview pane of her e-mail program to see if he has directed her to follow up on the e-mail. If it is merely a reminder to the grantee to pay the invoice, she keeps it as "new" and reviews the next e-mail. The "new" e-mail is indicated in "bold" on her computer. Respondent testified that she keeps the e-mails in bold because it is easier to find the e-mail later if she needs to review it (Tr. 108).

Respondent denied having deleted the revocable consent invoice e-mails (Tr. 117), but offered no explanation for their apparent deletion from her e-mail account. It is, however, petitioner's burden to prove the charged misconduct by a preponderance of the credible evidence. *See Dep't of Sanitation v. Figueroa*, OATH Index No. 940/10 at 11 (Apr. 26, 2010), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-47-A (July 12, 2011) (in a disciplinary proceeding, petitioner bears the burden of proving misconduct by a fair preponderance of the credible evidence); *Dep't of Correction v. Hall*, OATH Index No. 400/08 at 2 (Oct. 18, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 08-33-SA (May 30, 2008) (same). A preponderance has been defined as "the burden of persuading the triers of fact that the existence of [a] fact is more probable than its non-existence." Prince, Richardson on Evidence § 3-206 (Lexis 2008) (citations omitted); *see also Bazemore v. Friday*, 478 U.S. 385, 400-01 (1986).

Here, petitioner offered little evidence that would support a finding that respondent deleted the e-mails in question or that such conduct, if proved, constitutes misconduct. Twenty-seven of the 29 e-mails were deleted on August 4, 2013, which was a Sunday. Petitioner presented no evidence that respondent was at work at 9:27 p.m. that Sunday, or that she remotely accessed her e-mail account on that date and at that time. The remaining two e-mails were deleted without being read on the morning of Wednesday, August 14, 2013, and Thursday, August 29, 2013, a few minutes after they were sent. Deletion of these two e-mails occurred at the beginning of regular work days, but petitioner offered no evidence that respondent was at work on those dates or that she remotely accessed her e-mail account around the time the e-mails were deleted. Moreover, petitioner offered no evidence as to the e-mail security protocols to

show that it was more probable than not that respondent, and no other user, accessed her e-mail account to delete the messages. Thus, petitioner failed to establish by a preponderance of the credible evidence that respondent deleted the e-mails from her account.

Respondent is charged with insubordination. This tribunal has held that to establish insubordination, petitioner must prove by a preponderance of the credible evidence that: (1) an order was communicated to the employee; (2) the contents of the order were clear and unambiguous; and (3) the employee willfully refused to obey. *See Human Resources Admin. v. Traylor*, OATH Index No. 2162/11 at 6 (July 1, 2011); *Health & Hospitals Corp. (Queens Hospital Ctr.) v. Toval*, OATH Index No. 500/11 at 11 (Dec. 23, 2010), *rejected*, Hospital's Dec. (Apr. 28, 2011), *aff'd*, HHC Personnel Review Bd. Dec. No. 1434 (Dec. 16, 2011). An order need not be made in definitive language containing the word "order," but the language used must make it clear and unambiguous that the employee is being directed to perform a task. *See Health & Hospitals Corp. (Kings Co. Hospital Ctr.) v. Hutchison*, OATH Index No. 1937/12 at 7 (Sept. 28, 2012); *Dep't of Environmental Protection v. Salinas*, OATH Index No. 1020/04 at 5 (Nov. 15, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-16-SA (Jan. 9, 2006) (citing *Human Resources Admin. v. Aguirre*, OATH Index No. 1734/00 (Sept. 14, 2000)).

Respondent maintained that Mr. Rahman never directed her to refrain from deleting the revocable consent e-mails (Tr. 130-31). Petitioner offered no evidence of an e-mail retention policy or protocol in the revenue unit that required respondent to keep the e-mails in issue. Mr. Rahman was equivocal regarding whether he instructed respondent that she was required to retain the e-mails. He acknowledged that he never gave respondent explicit directives on how to save her e-mails, but maintained that "she's supposed to know" (Tr. 28-29). Mr. Rahman later testified that he "always" gave respondent specific instructions to retain e-mails for particular accounts, but when pressed to summarize those instructions, he spoke of instructions to follow up with the account, rather than directions to retain e-mails for any specific period or purpose (Tr. 42-43).

Given that the revenue unit oversees 900 revocable consent invoices annually, it is paradoxical that the Department would expect employees to know they are required to retain e-mails relating to those invoices, yet provide no evidence of clear written or oral guidelines for employees to follow when managing the volume of e-mails generated in the course of their work. The marked paucity of evidence about the guidelines for retention of the revocable consent

invoice e-mails suggests that no clear directives were established or articulated to respondent. Therefore, even if she deleted the e-mails, it does not constitute insubordination.

Respondent is further charged with improperly, inefficiently, or negligently performing her duties. Petitioner, however, failed to prove that even if respondent had deleted the e-mails it would have constituted misconduct. Misconduct may be premised on carelessness or negligence, as well as willful or intentional conduct. *See, e.g., McGinigle v. Town of Greenburgh*, 48 N.Y.2d 949, 951 (1979); *Reisig v. Kirby*, 62 Misc. 2d 632, 635 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008 (2d Dep't 1969). A finding of misconduct cannot be predicated on mere errors in judgment that lack willful intent and are not so unreasonable as to be considered negligence. *Dep't of Environmental Protection v. Segarra*, OATH Index No. 2730/10 at 7 (Oct. 20, 2010), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-94-R (Dec. 20, 2011); *see also Dep't of Sanitation v. Pabon*, OATH Index No. 110/12 at 2 (Nov. 23, 2011), *modified on penalty*, Comm'r Dec. (Jan. 19, 2012); *Dep't of Sanitation v. Rizzo*, OATH Index No. 1423/06 at 2 (Sept. 26, 2006). Here, there is no evidence of willful conduct or carelessness that rises to the level of misconduct.

It is significant that 27 of the deleted e-mails were sent to respondent in July 2010, over three years before they were deleted. Mr. Rahman testified that because revocable consent invoices concern contracts that often extend for ten years and can entail collection efforts that continue for several years, deletion of the revocable consent invoice e-mails three years after they were sent could harm the Department if there were ongoing collection efforts (Tr. 37-39). Yet, he conceded that it was highly likely that the invoices that were the subject of the e-mails had already been paid by the time the e-mails were deleted (Tr. 36-37). This is consistent with respondent's testimony that the 2010 e-mails concerned invoices that had been paid by September 2010 (Tr. 115-17). Petitioner submitted no evidence of ongoing collection efforts with respect to the invoices that were the subject of the deleted e-mails. Thus, there appears to have been no need for respondent to follow up with any of the 2010 invoices at the time the e-mails were deleted.

Accordingly, the charges relating to deletion of the e-mails should be dismissed.

Failure to Call a Staff Member as Directed

On or about September 11, 2013, a DOT supervisor directed respondent to call a DOT staff member regarding an audit and respondent claimed to have called that staff member the

previous day. Petitioner alleged that the supervisor determined that no such call was placed and charged that respondent was insubordinate, engaged in conduct prejudicial to good order and discipline and tending to bring DOT and the City of New York into disrepute, and that she performed her duties improperly or inefficiently (ALJ Ex. 1).

Dominick Carpentieri, Director of Finance in the Department's Office of the Coordinated Street Furniture Franchise, supervised respondent's work on an audit of one of the Department's accounts. According to Mr. Carpentieri, after respondent sought work commensurate with her experience with audits, he assigned her to help with an audit that was being conducted by the internal audit group, a different division from the revenue unit (Tr. 55-56, 60-61).

In an e-mail dated September 11, 2013, 10:57 a.m., Mr. Carpentieri asked respondent about the status of the audit and told her to contact Ms. Gosine, an employee in the Department's internal audit group, for a status report on the audit and to report back to him (Tr. 61; Pet. Ex. 5). Respondent replied a few minutes later, at 11:07 a.m., by e-mail:

> I tried to call Ms. Savitri Gosine yesterday, but I could not reach her. I called her today also. I would not like to leave a message for her. I will call her later on. Is it okay if I go to her and speak in person?

(Pet. Ex. 5).

Mr. Carpentieri thought that it did not make sense for respondent to have called and not have left a message (Tr. 61-63). At 11:09 a.m., he e-mailed her: "You could have left a message because that is what you do when someone is not at their desk. Please call her and leave a message if she is not there." Ten minutes later, at 11:19 a.m., Mr. Carpentieri e-mailed respondent that he spoke with Ms. Gosine, who said she never received a call from respondent and asked respondent why she had claimed that she called Ms. Gosine (Pet. Ex. 5). Respondent answered, at 11:21 a.m.: "I called [XXX-XXX]-7177. I tried to get some information about our call. And I just left a message for her" (Pet. Ex. 5).

Respondent sent another e-mail to Mr. Carpentieri at 11:30 a.m. She stated that Ms. Gosine told her they would discuss the audit at a meeting in two days. However, Mr. Carpentieri was dissatisfied with her response and, at 11:39 a.m., he wrote:

> That is not what I asked you. You told me you tried calling her yesterday and Savii told me that she received no call from you yesterday. These phones pick up missed calls as well and no

> missed calls from you to Savii YESTERDAY. She told me you just called her for the first time today.

(Pet. Ex. 5) (emphasis in original). Respondent replied by e-mail at 11:46 a.m.: "I do not want to speak about yesterday. I called her today before e-mailing you. And then I called her again. She got only my message. If you want you can call IT and look at my call history from yesterday and today. I am confused also" (Pet. Ex. 5).

Mr. Carpentieri replied that the reason respondent did not want to speak about yesterday was because she never called Ms. Gosine. He further stated that had she made the call, it would have registered on Ms. Gosine's phone, and concluded, "I don't care if you don't want to talk about it or not" (Pet. Ex. 5). In response, respondent wrote: "I do want to talk about this. I called her on September 10th, 2013, at 9:9:54 AM. It is exact [sic] time when I called her," to which Mr. Carpentieri replied that he would pull the telephone records and advised respondent: "[i]n the meantime, do your job and stop with these petty e-mails. You did it to Syed and now you are doing it to me" (Pet. Ex. 5). Mr. Carpentieri subsequently obtained the Department's telephone records for respondent and Ms. Gosine (Tr. 64-68; Pet Exs. 1, 2).

Christopher Becker is DOT's Executive Director of Telecommunications, which oversees the Department's telephone system (Tr. 88-89). Mr. Becker testified that the Department's phone system stores in a database records of incoming and outgoing calls, but does not capture the actual conversations that occur (Tr. 90-91). The system makes a record of calls to the Department's telephones and of attempted as well as completed outgoing calls made from a telephone in the system (Tr. 91). An attempted outgoing call is one in which the caller picks up the receiver, dials a few digits, then hangs up the telephone before completely dialing the telephone number. Thus, the system records outgoing calls if the telephone keys are pressed (Tr. 91). Incoming calls are recorded as soon as the Department's telephone rings. If someone were to call and let the telephone ring at least once and then hang up, that call should be registered in the database as an incoming call (Tr. 96-98). The date and time of each call is determined by the central system and employees cannot alter those settings on the screens of their assigned telephones, nor can they erase the telephone call records that are maintained in the Department's database (Tr. 99-100).

Petitioner submitted into evidence telephone records reflecting incoming and outgoing call activity from respondent's and Ms. Gosine's DOT telephone extensions between 12:00 a.m.

on September 10, 2013, and 11:59 p.m. on September 11, 2013 (Tr. 90; Pet. Ex. 1). The call history provides the calling party number, which is the number where the call originated; the original number called, which is the number the caller dialed; the final number called, which shows if the call went to another extension such as voicemail; and the duration of the call (Tr. 94-95). The records for respondent's telephone do not show any phone calls made from her extension to Ms. Gosine's extension on September 10, nor do records for Ms. Gosine's telephone indicate that she received a call from respondent's extension on that date (Pet. Ex. 1; Tr. 92-93).

Respondent maintained that she called Ms. Gosine on September 10, 2013, and that she did so on her own initiative (Tr. 129, 132). According to respondent, after Mr. Carpentieri "made a very big deal" about the call on September 11, 2013, she e-mailed the IT help desk to ask if she could get a list of her calls, and she reviewed the call history on her telephone and located her call to Ms. Gosine (Tr. 122). On the afternoon of September 11, 2013, respondent used her cell phone to take photographs of the display on her work telephone (Tr. 133; Resp. Ex. A). The first photograph depicts an illuminated panel on what appears to be a Cisco telephone displaying "91212…, 09:09:54 AM 09/10/13." The second photograph is of a panel displaying Ms. Gosine's telephone number next to "placed, 09:09:54 a.m." (Resp. Ex. A). Respondent testified that she scrolled from the initial screen on her telephone to the second screen, which provided more details about her call, including the telephone number she dialed (Tr. 126-28).

Petitioner maintained that respondent was insubordinate because when she was directed to call Ms. Gosine on September 11, 2013, she misrepresented that she had already done so on September 10, 2013.

As discussed above, to establish insubordination, an order must be clearly and unambiguously communicated to the employee, who willfully refuses to obey. Petitioner conceded that respondent complied with her supervisor's directive to call Ms. Gosine on September 11 (Tr. 147). Furthermore, it is undisputed that respondent was not directed to contact Ms. Gosine on September 10; therefore, petitioner has failed to establish that respondent refused to obey an order that was communicated to her.

The remaining issue to be resolved is whether respondent engaged in conduct prejudicial to good order and discipline and tending to bring DOT and the City of New York into disrepute, and whether she performed her duties improperly, inefficiently, or negligently. Petitioner contended that respondent falsely represented to her supervisor that she telephoned Ms. Gosine

on September 10, while respondent maintained that she made the call on that date, but did not leave a message.

In making credibility determinations, this tribunal may consider such factors as witness demeanor; consistency of witness' testimony; supporting or corroborating evidence; witness motivation, bias, or prejudice; and the degree to which a witness' testimony comports with common sense and human experience. *Dep't of Sanitation v. Menzies,* OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff'd,* NYC Civ. Serv. Comm'n, Item No. CD 98-101-A (Sept. 9, 1998). While I found some inconsistencies in her testimony, overall respondent was a credible witness.

On the other hand, there is some indication that Mr. Carpentieri had a heightened concern about respondent's honesty and work performance, which concern may have negatively affected his interactions with her. For example, Mr. Carpentieri testified that he was already suspicious of respondent before questions arose about whether she called Ms. Gosine as he instructed. According to Mr. Carpentieri, he knew that respondent had deleted e-mails from Mr. Rahman and was "on [his] guard" about whether respondent was trustworthy (Tr. 70-71). The tenor of Mr. Carpentieri's e-mail communication with respondent also demonstrates that there was some mistrust and concern about how she had interacted with her other supervisor, Mr. Rahman, that informed Mr. Carpentieri's assessment of respondent. After several e-mails back and forth between respondent and Mr. Carpentieri about the phone call to Ms. Gosine, he admonished respondent to: "do your job and stop with these petty emails. You did it to Syed and now you are doing it to me" (Pet. Ex. 5). Clearly, Mr. Carpentieri was predisposed to viewing respondent's conduct in a less than favorable light.

Moreover, I find that petitioner's evidence regarding whether respondent called Ms. Gosine to be less than reliable. Petitioner relies on telephone records to show that respondent did not make the call on September 10, 2013, as she claimed. However, a review of the records raises questions as to whether they reflect all calls that were made between the two telephone extensions. Specifically, the record of telephone calls between respondent and Ms. Gosine on September 11, 2013, shows that there were four calls from respondent's extension to Ms. Gosine's telephone: (1) at 11:01:18 a.m. that lasted for two seconds; (2) at 11:10:37 a.m. that lasted for 50 seconds; (3) 1:38:05 p.m. that lasted for one second; and (4) at 1:39:11 p.m. that lasted for 29 seconds (Pet. Ex. 1). Petitioner's witness testified that the Department's phone system keeps a record of incoming calls as well as outgoing calls (Tr. 96-98). Thus, the four

telephone calls respondent made to Ms. Gosine should be reflected as incoming calls on Ms. Gosine's telephone records. Yet, two calls from respondent to Ms. Gosine that were made on September 11 at 11:01:18 a.m. and at 11:10:37 a.m. do not appear on Ms. Gosine's phone records as incoming calls. One of these calls lasted for 50 seconds. There is no explanation in the record for this discrepancy.

Petitioner's evidence creates an inference that the Department's telephone system did not record all the telephone calls between respondent's and Ms. Gosine's extensions. Thus, even in the absence of a record in the Department's database of a call from respondent to Ms. Gosine on September 10, 2013, respondent's claim that she called Ms. Gosine on September 10 cannot be discounted. This is even more so because there is some evidence in support of respondent's contention that she called Ms. Gosine on September 10. Respondent submitted, over petitioner's objections, photographs that respondent maintained reflect the call history from her telephone. The photographs show a call to Ms. Gosine's extension at 9:09:54 a.m. (Resp. Ex. A). Other than respondent's testimony, there is nothing to prove that the photographs were of respondent's phone and not some other phone, or when the photographs were taken. However, respondent's testimony is bolstered by her e-mail to Mr. Carpentieri, sent two hours after he expressed doubt about whether respondent had made the call, that provides call date and time information identical to that captured in the photographs (Pet. Ex. 5). The e-mail, with the photographs of the telephone, supports respondent's assertion that she called Ms. Gosine on September 10.

Where the evidence is evenly balanced and petitioner bears the burden of proof, the charge must be dismissed. *See, e.g., Rinaldi & Sons, Inc. v. Wells Fargo Alarm Service, Inc.*, 39 N.Y.2d 191, 196 (1976); *Figueroa*, OATH 940/10 at 11. Here, the evidence is equally balanced and suffers from similar deficits.

Accordingly, I find that the charges are not substantiated by the weight of the credible evidence.

FINDINGS AND CONCLUSIONS

1. Petitioner failed to establish by a preponderance of the credible evidence that respondent engaged in misconduct by deleting e-mails from her supervisor without having read them on August 4, 14, and 29, 2013.

2. Petitioner failed to establish by a preponderance of the credible evidence that respondent engaged in misconduct by telling her supervisor, after he directed her to call a Department staff member on September 11, 2013, that she had already made the call when no such call had been placed.

RECOMMENDATION

I recommend dismissal of the charges.

Astrid B. Gloade
Administrative Law Judge

September 17, 2014

SUBMITTED TO:

POLLY TROTTENBERG
Commissioner

APPEARANCES:

IFEAMAKA IGBOKWE, ESQ.
Attorney for the Petitioner

LAW OFFICES OF FAUSTO E. ZAPATA, JR. P.C.
Attorneys for Respondent
BY: KELLY TADDONIO, ESQ.