Admin. for Children's Services v. Silverman

OATH Index No. 2614/14 (Sept. 4, 2014), *adopted*, Comm'r Dec. (Oct. 20, 2014), *aff'd sub nom. Silverman v. Carrion*, 2015 N.Y. Misc. LEXIS 3944 (Sup. Ct. N.Y. Co. Jul. 6, 2015)

Respondent, a case management supervisor, violated agency rules by copying her attorney on an e-mail to her supervisors which contained the confidential information of juveniles. Respondent's defense that it was a privileged communication was unsupported. Her further claim that her disclosure met the exception under petitioner's rules and the City Charter, because she was reporting waste, was also unsupported. Respondent found guilty of insubordination when she walked out of a meeting with her supervisors, in spite of being cautioned by the executive director that her failure to remain would result in disciplinary charges. ALJ did not find respondent insubordinate when, later the same day, she did not remain in her supervisor's office when another supervisor was called in for what was intended to be a one-on-one meeting. ALJ recommends that respondent be suspended for 23 days without pay.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
ADMINISTRATION FOR CHILDREN'S SERVICES
Petitioner
-against-
TAMARA SILVERMAN
Respondent

REPORT AND RECOMMENDATION

INGRID M. ADDISON, *Administrative Law Judge*

The Administration for Children Services ("petitioner" or "ACS") brought this disciplinary proceeding under section 75 of the Civil Service Law, against respondent Tamara Silverman, a case management supervisor at Crossroads Juvenile Detention Center ("Crossroads"). Petitioner alleged that on two separate occasions on April 9, 2014, respondent failed to comply with orders of supervisory personnel when: 1) she left a meeting which was intended to review her performance evaluation, in spite of being cautioned by the executive director that her failure to participate in the meeting would constitute insubordination; and 2) she

declined to meet with her immediate supervisor in the presence of the director of operations. Petitioner further alleged that on April 10, 2014, in an e-mail correspondence to Crossroads' executive staff, respondent disclosed confidential information concerning Crossroads residents, and in so doing, compromised the integrity of ACS, when she copied a non-ACS-employed individual on the e-mail. Petitioner charged that respondent's behavior on April 9, 2014, violated sections III (B)(1), (24), and (42) of ACS Code of Conduct, and that her inclusion of a non-ACS-employed individual on her e-mail of April 10, 2014, violated section C.1.12 of the Standard of Conduct governing the Division of Youth and Family Services, and section 2604(b)(4) of Chapter 68 of the City Charter (ALJ Ex. 1).

At a hearing before me on July 23, 24, and 25, 2014, petitioner presented the testimony of Louis Watts, Crossroads Executive Director, Yshanda Springer, its Programs Director, and Jennifer Romelien, Executive Director of Program Services, as well as documentary evidence. Respondent presented as character witnesses, the testimony of case workers Tyrone Davidson, Marie Pierre Louis, Nelia Then, and Jose Quinones, as well as that of Winifred York, recreation director, and documentary evidence. Respondent also sought to introduce the manual governing the discipline of workers at the New York State Department of Civil Service, which I denied since respondent is bound by petitioner's Stand of Conduct.

I held the record open until August 15, 2014, for the parties to brief the single issue of whether respondent's reason for remitting an unredacted e-mail to her counsel satisfied the disclosure exception in section 2604(b)(4) of Chapter 68 of the City Charter.

For the following reasons, I find that petitioner proved most of the charges and recommend that respondent be suspended for 23 days without pay.

ANALYSIS

Respondent has been employed by ACS since 2006, and is a case management supervisor at Crossroads, where she oversees a staff of six case managers (Resp: Tr. 331; Davidson: Tr.192; Then: Tr. 370; Quinones: Tr. 373-74). Prior to Crossroads, respondent worked at Horizon Detention Center ("Horizon") for four years, and before that, at the now defunct Bridges Juvenile Center (Tr. 275).

Crossroads is a juvenile detention center in Brooklyn, New York. It houses youths from as young as ten years old, who are accused of crimes and whose cases are pending. Louis Watts,

its Executive Director since 2011, has general oversight of the facility and is responsible for staff, residents and visitors, as well as the facility's day-to-day operations. Mr. Watts directly supervises Yshanda Springer, Crossroads' director of programs and respondent's immediate supervisor (Watts: Tr. 21-23; Springer: Tr. 100). Mr. Watts testified that he has known respondent for at least eight years, and has seen a decline in her performance within the last 18 months (Tr. 25-26, 82). The conduct underlying the charges against respondent allegedly occurred on April 9 and 10, 2014.

April 9, 2014

Petitioner charged that on April 9, 2014, respondent violated sections III (B)(1), (24), and (42) of ACS Code of Conduct, when she walked out of a meeting with Mr. Watts, Ms. Springer, and another director, Jennifer Romelien, and later walked away from a meeting with Ms. Springer (ALJ Ex. 1).

Section III (B)(1) of ACS Standard of Conduct requires employees to be courteous and considerate in their contact with others. Section III (B)(24) requires employees to obey all oral and written regulations and orders of ACS supervisory personnel, immediately, without regard for advice offered by labor representatives. Section III (B)(42) forbids employees from engaging in conduct detrimental to ACS, or which would undermine the effectiveness of the employee in her duties (Pet. Ex. 1).

<u>Charge III (Specification I) - Walking Out of a Meeting with Supervisors</u>

Mr. Watts testified that he scheduled a meeting to be held on April 9, 2014, for him, Ms. Springer and Ms. Romelien to meet with respondent. Ms. Romelien is the executive director of program services at Crossroads and Horizons detention centers, and at other non-secured detention facilities (Tr. 148). Mr. Watts stated that Ms. Springer had previously attempted to meet with respondent who was resistant, had declared that Ms. Springer could not supervise her, and had accused Ms. Springer of harassing her. Hence, Ms. Springer felt uncomfortable meeting with respondent alone. Because respondent had previously made allegations of harassment and unfair treatment, Mr. Watts contacted respondent's union prior to the meeting and requested that a representative ("rep") be present (Tr. 27-28, 31, 69).

As the meeting convened, Mr. Watts informed respondent that he had requested her union rep to be present and that the meeting was being held to review her annual performance

evaluation. Respondent expressed that she wanted her attorney to be present but Mr. Watts told her that she was not entitled to have an attorney present for her evaluation, and that her union rep was there to ensure that she was treated fairly (Tr. 28-29, 90). When they were all seated, Ms. Springer handed respondent her evaluation. Respondent glanced at the evaluation and returned it to her supervisors stating that she would not accept anything with a rating of "unsatisfactory." Mr. Watts claimed that respondent "tossed" and "flung" the evaluation back to the supervisors (Tr. 30, 57, 92), while Ms. Springer and Ms. Romelien testified that she "slid" and "pushed" it in their direction (Springer: Tr. 107; Romelien: Tr. 150, 179). At some point, either before or after she was presented with her evaluation, respondent dismissed the union rep, told her supervisors, "I'm not doing this" and proceeded to walk out (Watts: Tr. 29-30, 57-58; Springer: Tr. 105, 107; Romelien: Tr. 150-51). At that, Mr. Watts said to respondent, "Ms. Silverman, please do not walk out of my o- (sic), out of the office, I would like to continue to go through this meeting. You have to go through [your] performance evaluation" (Tr. 92). Respondent replied, "I will do no such thing" and left (Tr. 92).

Mr. Watts and Ms. Romelien maintained that the ultimate purpose of the meeting was to review respondent's evaluation, and in fact, Ms. Romelien seemed mystified when asked if there was an ulterior purpose. However, Ms. Springer revealed that the meeting was also intended to serve respondent with a "write-up" (Watts: Tr. 32; Springer: Tr. 104, 107; Romelien: Tr. 149-50, 154-55, 159). All three concurred that the purpose of the performance evaluation was staff development and improvement. It was meant to provide respondent with feedback on the areas of work that she performed well, and point out where she needed improvement. It was neither disciplinary nor intended to be punitive (Watts: Tr. 84; Springer: Tr. 107; Romelien: Tr. 150, 159). But Mr. Watts stated that respondent's failure to participate in the process created a difficult environment in which to work and supervise, hence the preference of charges against her (Tr. 85).

Mr. Watts and Ms. Romelien conceded that respondent's tone was not elevated, she did not use profanity, and her exit from the meeting did not cause a disturbance at ACS (Watts: Tr. 76, 83; Romelien: Tr. 155-56). But they insisted that her departure constituted insubordination. Mr. Watts testified that he had not concluded the meeting when respondent proceeded to walk out, in spite of him asking her to sit down and continue to review her performance evaluation.

Ms. Romelien testified that respondent was told that she could not leave the room, yet she walked out (Watts: Tr. 77-78; Romelien: Tr. 177-78).

Ms. Springer has been employed by ACS for almost two years. She holds a Bachelor's degree in political science, and a Master's degree in social work. She is also completing a Master's degree in Divinity. Before she became its director of programs and respondent's supervisor, Ms. Springer was the operations manager at Crossroads (Tr. 100-01, 104). In her current role, she oversees program services including case management, medical/mental health, educational and religious services (Watts: Tr. 23-24, 27; Springer: Tr. 101). Ms. Springer's testimony about what transpired at the meeting with respondent on April 9, 2014, essentially corroborated Mr. Watts' testimony. She noted that Mr. Watts had cautioned respondent that leaving the meeting would constitute insubordination, and added that respondent retorted "see you in court" immediately before walking out (Tr. 107-08). Ms. Springer documented the incident in a memo to respondent dated the same day with the subject line reflecting "Insubordination" (Tr. 109-12; Pet. Ex. 5). The memo was unsigned and there was no evidence that respondent ever received it. But Ms. Springer credibly testified that she wrote it the same day. Her explanation as to why it was unsigned is the basis for the second charge of insubordination on April 9, 2014, that respondent refused to meet with her in the presence of another supervisor.

Respondent denied that she was insubordinate at the meeting with Mr. Watts and the other supervisors on April 9, and insisted that she was polite and cordial at all times (Tr. 235, 254). Much ado was made about the meeting being rescheduled from April 4, and the reason for its rescheduling, which I found irrelevant to the conduct complained of on April 9. Nevertheless, in an e-mail on April 3, 2014, regarding the originally-scheduled meeting, Mr. Watts informed respondent that she would be meeting with him and Ms. Romelien, and she was entitled to have two union reps present, but not her attorney. He further informed her that failure to appear at the meeting may result in disciplinary action (Tr. 307-09; Resp. Ex. G).

Respondent testified that the calendar invitation that she received for the April 9, 2014 meeting with Mr. Watts was addressed only to her (Tr. 341-42). In anticipation of the meeting, she e-mailed her attorney on April 7, surmising, "I guess, Mr. Watts just wants to talk to me. No union reps were invited. I guess, (sic) it is just a routine meeting, since I have not been at a meeting with Mr. Watts since last summer" (Resp. Ex. D). She stated that she "had absolutely

no reason to believe that this meeting would be a serious meeting with evaluation, otherwise [she] would have immediately contacted [her] union rep" (Tr. 343).

On the day of the meeting, respondent was surprised to find a gentleman whom she had never met, seated outside Mr. Watts' office. When she learned that he was a union rep, her reaction was one of "quiet indignation" because she had not invited him. Moreover, if a union rep were required, she had to be given seven days' advance notice (Tr. 238-39). Accordingly, she excused the union rep (Tr. 281, 321-22). Respondent insisted that she had a right to be represented by an attorney at the meeting "because it turned out to be an administrative hearing and evaluation." She claimed that only under those circumstances would a supervisor request to have a union rep at a meeting (Tr. 266-67, 282).

Respondent testified that she is a speed reader with a photographic memory. As such, she challenged her supervisors' testimony that she barely glanced at the evaluation at the meeting on April 9, 2014. She claimed that when it was handed to her, she reviewed two pages of the evaluation, disagreed with its contents, expressed her disagreement, pushed it away, stated, "this meeting is over," and left (Tr. 250-51, 253, 286, 322-23, 328-29). She later testified that the entire evaluation contained only two pages (Tr. 325-26). Respondent conceded that Mr. Watts warned her that her failure to participate in the meeting would constitute insubordination, and that as she was leaving, he said, "Ms. Silverman, you will leave the meeting when I say so" (Tr. 251, 286). But she decided to leave because she "felt confined" (Tr. 329).

Charge III (Specification II) - Refusing to Meet with Supervisor

Ms. Springer testified that later, on April 9, she tried to serve respondent with her memo of the events that had occurred earlier, which she deemed to be insubordination. She called respondent up to her office. When respondent got to her doorway, Ms. Springer indicated that the meeting would be held in the office of Kisha Hancock, director of operations. Respondent expressed that she would meet with Ms. Springer only and turned and left (Tr. 113-14). Ms. Springer e-mailed Mr. Watts initially informing him that she tried to have a conversation/meeting with respondent but that respondent refused to meet with her in the presence of Ms. Hancock or anyone else and walked out of Ms. Springer's office (Tr. 114-15, 120; Resp. Ex. D). In a follow-up e-mail to Mr. Watts, Ms. Springer wrote that she had "tried to serve [respondent] with two conferences," but before she could do so, respondent walked out of her office (Pet. Ex. 6).

Respondent testified that when Ms. Springer called her and asked her to come upstairs for a meeting, respondent asked Ms. Springer if she will be alone or it is "an ambush" (Tr. 256). Ms. Springer assured her that it was not, and that the meeting would be private. When respondent got to Ms. Springer's office, she was invited to sit down. However, Ms. Springer then called out to Ms. Hancock to come to her office. At that, respondent got up and left. She stated that she neither asked for nor was given permission to leave, but maintained that she felt confined and her "business was to be discussed with another person who has nothing to do with [her] case" (Tr. 256, 330-31, 336-37). Respondent accused Ms. Springer of having a combative personality, but she herself became combative when asked about walking out on both meetings on April 9 (Tr. 334). She stubbornly maintained that she complied with the requests to attend the meetings but left because "it was not necessary to stay" (Tr. 335-36).

Overall, I found the testimony of respondent's supervisors to be more credible than respondent's, even though I detected some embellishment in Mr. Watt's testimony that respondent "flung" and "tossed" the evaluation, and Ms. Springer's testimony that respondent claimed that she would see them in court. The other supervisors present testified that respondent slid the evaluation across the table, while Ms. Springer's contemporaneous memo did not include any threat of court action by respondent. On the other hand, respondent frequently chose to couch her responses in a manner that could only be described as cagey.

With respect to her April 9, 2014 meeting with Mr. Watts, Ms. Romelien and Ms. Springer, there is no dispute that respondent walked out on her supervisors. She advanced different reasons for her actions: first, that she felt confined; second, that she disagreed with the evaluation; and third, that she was unrepresented by counsel.

It was clear from respondent's e-mail to her counsel on April 7, 2014, that she was unaware of the purpose of the meeting with her supervisors. Mr. Watts' e-mail appointment did not reveal its purpose in the subject line, and there was nothing to suggest that respondent was otherwise informed that the meeting was scheduled at least in part to discuss her annual evaluation, resulting in her surprise to find the union rep present. But evidently, Mr. Watts was at his wits end with respondent's contentious behavior towards and the accusations levelled against her supervisor, hence his invitation to the union to have a representative present. Mr. Watts' frustration was well borne out at the hearing during which respondent was unable to restrain herself from responding even after I sustained objections. In addition, she was hardly

able to conceal her contempt for Ms. Springer, whom she considered to be "functionally illiterate" (Tr. 233-34). Respondent may have more experience in her job than Ms. Springer, but she is nevertheless expected to treat her supervisor with deference. Her inability to contain herself during the hearing gave me some insight into the type of behavior respondent perpetuates in the office and lent credence to Mr. Watts' testimony that respondent was resistant and had declared that Ms. Springer could not supervise her.

Respondent's claim that she disagreed with her evaluation did not justify her decision to walk out of the meeting, especially in light of Mr. Watts' directive to stay or risk insubordination charges. While she may have felt deceived at not having advance notice of the subject of the meeting, I did not believe her claim that she felt confined. Rather, I found it more likely than not that she was incensed at having received a less than exemplary evaluation from one whom she considered less superior. Nonetheless, respondent was obligated to remain for the duration of the meeting until excused. *See Human Resources Admin. v. Corbett,* OATH Index No. 471/99 at 5 (Nov. 20, 1998). Neither her lack of awareness of the meeting's purpose nor Ms. Springer's revelation that she intended to serve respondent with a "write-up" gave respondent cause to leave the meeting on the basis that she was unrepresented. Under section 75(2) of the Civil Service Law ("CSL"), employees are entitled to have their union representative present if "an employee . . . at the time of questioning appears to be a potential subject of disciplinary action," and must be notified in writing of such right in advance of the meeting. *See Dep't of Correction v. Wright,* OATH Index No. 1984/11 at 7 (Aug. 10, 2010), *modified on penalty,* Comm'r Dec. (Nov. 28, 2011) ("An employee has the right to refuse to submit to an employer's interview without the presence of a union representative if the employee reasonably believes that the interview could result in disciplinary measures, and the employee requests such representation). Service of a write-up did not translate into an interview or interrogation. But even if it did, under the CSL, respondent was only entitled to have a union rep present. But remarkably, she dismissed the union rep from the meeting. In any event, respondent's supervisors credibly testified that the meeting was not disciplinary in nature (which would have triggered her right to have her union rep present), and that Mr. Watts' request for the union rep was to make respondent feel comfortable, given her previous accusations of unfair treatment. Thus, there was no reason for respondent to be given advance notice of the union rep's presence. As to her claim that she was

entitled to have an attorney present because the meeting with her supervisors turned out to be an "administrative hearing," I find that to be vacuous.

In determining whether certain behavior is proscribed and constitutes misconduct, this tribunal has considered whether, among other things, the behavior demonstrated insolence, discourtesy and disrespect. *See Human Resources Admin. v. Bichai,* OATH Index No. 211/90 at 14-16 (Nov. 21, 1989), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 90-54 (June 15, 1990); *Health & Hospitals Corp. (North Bronx Healthcare Network) v. Wolfe,* OATH Index No. 2844/08 at 6 (Sep. 8, 2008) (citing *Dep't of Correction v. Bond,* OATH Index No. 1589/97 at 4 (Oct. 16, 1997), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 99-59-SA (June 3, 1999)). Whether a particular remark or manner amounts to sanctionable insubordination or disrespect in any given case is a factual question to be decided in the totality of the circumstances. *Dep't of Correction v. Martin,* OATH Index No. 431/95 at 14 (Jan. 17, 1995).

Here, respondent flouted the authority of senior staff and demonstrated insolence and her total lack of respect for them when she ignored Mr. Watts' warning and walked out of the meeting. *See Admin. for Children's Services v. Springer,* OATH Index No. 665/05 at 20 (Jan. 5, 2006), *modified on penalty,* Comm'r Dec. (Feb. 3, 2006), *modified on penalty,* NYC Civ. Serv. Comm'n Item No. CD-07-17-0 (Feb. 7, 2007). I find such behavior to be disrespectful, discourteous and insubordinate, in violation of sections III(B)(1) and (24) of petitioner's Code of Conduct. Because the incident occurred in a confined space, away from the earshot of others, and the supervisors testified that respondent did not raise her voice, there was nothing to indicate that her effectiveness in performing her duties was undermined by her conduct. Therefore, her conduct did not violate section III (B)(42) of petitioner's Code of Conduct. With that exception, specification I of Charge III should be sustained.

With respect to her later meeting with Ms. Springer on April 9, 2014, I was not convinced that respondent's behavior constituted insubordination. While it may have been rude for her to walk away from her supervisor, there was no testimony either from Ms. Springer or respondent that Ms. Springer had issued an order for respondent to stay in her office after Ms. Hancock was invited to the meeting. Neither did Ms. Springer indicate it in her contemporaneous e-mail to Mr. Watts. Accordingly, respondent's decision to leave the meeting with her supervisor, notably before it started, when someone else was invited, did not violate any of petitioner's rules. Therefore, specification II of Charge III should be dismissed.

Charges I & II – Disclosure of Confidential Information in April 10, 2014 e-mail.

Petitioner charged that on April 10, 2014, respondent violated section C.1.12 of the Standard of Conduct governing the Division of Youth and Family Services, and section 2604(b)(4) of the City Charter, by disclosing confidential information regarding current residents at Crossroads in an e-mail to her supervisors which she copied to her attorney (ALJ Ex. 1).

Section C.1.12 of the Standard of Conduct governing the Division of Youth and Family Services provides as follows:

> An employee shall not disclose any information of a confidential nature concerning current or former residents, property, affairs or government nor shall any employee use such information to advance his/her financial or private interest or the interests of others. (This section shall in no way be construed to prohibit or restrict the reporting of criminal conduct or other wrongdoing.)

(Pet. Ex. 4).

Section 2604(b)(4) of Chapter 68 of the City Charter provides:

> No public servant shall disclose any confidential information concerning the property, affairs or government of the city which is obtained as a result of the official duties of such public servant and which is not otherwise available to the public, or use any such information to advance any direct or indirect financial or other private interest of the public servant or of any other person or firm associated with the public servant; provided, however, that this shall not prohibit any public servant from disclosing any information concerning conduct which the public servant knows or reasonably believes to involve waste, inefficiency, corruption, criminal activity or conflict of interest.

City Charter § 2604(b)(4) (Lexis 2014).

Mr. Watts testified that on April 10, 2014, in an e-mail string reply to Ms. Springer about information relating to summer youth employment applications ("SYEP"), respondent complained about the number of times that she had previously provided the same information (Tr. 39, 46-47; Pet. Ex. 3). Respondent's e-mail was written in bold font and underlined, and read as follows:

> **DOP Springer has received the requested information on SYEP applications on many occasions, not acknowledging the continuous receipt of requested information. Thus, below is the entire gamut of already regurgitated information:**

The e-mail string, which contained screenshots revealing the names of at least 18 Crossroads' residents, their dates of birth, ages, and document status of ten to twelve of those residents, was copied to Mr. Watts, Ms. Romelien, and to respondent. It was also copied to respondent's attorney, who is not an ACS employee (Watts: Tr. 47; Springer: Tr. 123-25; Romelien: Tr. 151; Silverman: Tr. 320).

Mr. Watts testified that he immediately spoke to Ms. Springer, who printed all her e-mail requests to respondent and all of respondent's replies. His review of those e-mails led him to conclude that Ms. Springer was doing her job as respondent's supervisor in requesting information, giving direction and following-up (Tr. 53-54). He stated that if an employee is dissatisfied with a supervisor, he/she may approach the higher level supervisor in the chain of command. If still dissatisfied, the employee may complain to the Equal Employment Opportunity Unit or the Union (Tr. 54-55). Mr. Watts maintained that respondent breached the confidentiality of the residents in Crossroads' care by copying someone outside the agency (Tr. 50). Respondent's e-mail to an outside party was especially disturbing to him since Crossroads' residents are juveniles. Moreover, the e-mail contained information on whether ACS was able to contact parents, the whereabouts of at least one parent, and the name of at least one other (Watts: Tr. 52; Romelien: Tr. 152; Pet. Ex. 3).

Respondent did not dispute that she copied her attorney on the e-mail and that it contained confidential information about residents which she did not redact because she considered her communication with her attorney to be privileged and confidential (Tr. 230, 232, 320). Respondent alleged that there is enormous waste at Crossroads. She accused Ms. Springer of sending a "massive amount of e-mails" that "run into each other" (Tr. 232-33).

Respondent testified that on April 10, 2014, she received at least 16 e-mails from Ms. Springer. The time consumed in replying to the e-mails was the reason why she considered them to be an enormous waste of time (Tr. 261). By widely disseminating her e-mail response with the attached screen shots, she hoped to bring attention to:

> the massive volume of waste of agency resources, time and efforts performed by seven people that labored very hard to procure the entire gamut and volume of information that was requested by Ms. Springer. It was done on many, many different occasions prior to her e-mail, and I was just flabbergasted by the sheer waste, impropriety, disrespectful tone . . . .

(Tr. 227). She maintained that she had previously complained to Mr. Watts about the excessive e-mails but he had done nothing (Tr. 348-49).

When asked whether she considered her supervisor to be less experienced than she, respondent refused to answer directly, stating instead that she "never stated it, never [wrote] it and never said it to anybody" (Tr. 332). But she opined that the e-mails that she receives from Ms. Springer "are written by a person that is functionally illiterate" who makes "rambling statements, rambling demands" (Tr. 232-33). She stated that she has a problem with unintelligible instructions, wasteful e-mails and very bad English, but is not opposed to e-mails that are "concise, precise and . . . well-spaced" (Tr. 333-34).

Respondent denied violating section C.1.12 of the Standards of Conduct, which prohibits disclosure of confidential information concerning residents. She argued that the parenthetical to the section provided an exception where, as here, the disclosure pertained to wrongdoing and massive amounts of waste (Tr. 290). Respondent advanced the same argument with respect to the allegation that she violated section 2604(b)(4) of Chapter 68 of the City Charter, because the section provided for exceptions where the disclosure of confidential information related to waste and inefficiency (Tr. 292-93). In her post-trial brief, respondent underscored that the purpose of her e-mail was to expose Ms. Springer's waste and inefficiency (Resp. Brief at 2-3).

Generally, this tribunal is loath to make findings that the conduct which an agency charges as misconduct under the Civil Service Law, also violates the City Charter[1] or some other law. *Human Resources Admin. v. Anonymous,* OATH Index No. 2246/13 at 17 (Oct. 31, 2013), citing to, *Human Resources Admin. v. Anonymous,* OATH Index No. 2596/10 at 6-7 (Jan. 31, 2011). But where, as here, petitioner charged a violation of the City Charter, and respondent devoted a significant portion of her defense to the exception to disclosure provided under the Charter, I find it appropriate to at least discuss the parties' arguments.

I am not even slightly convinced that Ms. Springer's e-mails to respondent, repetitive or not, constituted waste. A supervisor is entitled to make repeated requests for information if she feels that her subordinate's response is insufficient, inadequate or inappropriate. Mr. Watts investigated respondent's complaints about excessive e-mails from Ms. Springer and found the

[1] The Conflicts of Interest Board ("Board") is the body authorized to enforce violations of the Conflicts of Interest Law. The Charter provides that if the Board deems a violation to be minor or if related disciplinary charges are pending, it shall refer the matter to the head of the agency served by the public servant. Charter § 2603(e) (Lexis 2014).

e-mails to be warranted in the performance of Ms. Springer's duties. At the hearing, there was no doubt in my mind that respondent objected to Ms. Springer's inquiries primarily because she felt superior to her supervisor. Even if respondent's intention was to report waste, she was still not permitted to disclose the personal identification information of the juveniles within the custody and care of Crossroads.

Arguing otherwise, respondent relied on an appellate decision from the District of Columbia which, though non-binding, is worthy of discussion because it addressed government employee whistle-blowing and the disbursal of information to support the employees' assertions. *Martin v. Lauer,* 686 F.2d 24 (D.C. Cir. 1982) concerned federal government employees who were convinced that certain action proposed by their employer, the Office of Juvenile Justice and Delinquency Protection ("OJJDP") was illegal. They retained counsel to contest OJJDP's proposed action and notified Acting Administrator Charles A. Lauer ("Lauer") of their decision to file a lawsuit. Lauer reacted by issuing a memorandum restricting the employees from providing information or documents to their attorney or to any persons assisting them or their attorney. Lauer also notified the employees of a Department of Justice regulatory procedure governing the release of information involving litigation. *Id* at 27. In addition, he instructed them that requests under the Freedom of Information Act ("FOIA") should not be responded to until he had been informed of the nature of the request and the information that they proposed to release in response. The memo warned that disciplinary action would be taken to assure the protection of the government's interests. *Id* at 28. After the employees filed suit, Lauer issued a second memorandum in which he narrowed his disclosure prohibitions to "Government information which could be subject to the Privacy Act." *Id* at 28. The district court upheld the agency restrictions on the employees' ability to communicate with their counsel in their lawsuit challenging the proposed agency action.

The appeals court found overbroad a blanket ban barring disclosure to the attorney of ANY information which came under ANY FOIA exemption (emphasis added). The court balanced the employees' First Amendment rights and interest in speaking freely with their attorney versus the government's interest in nondisclosure. It found that "the confidentiality of attorney-client communications facilitates [the] process by encouraging the client to supply his attorney with relevant information." *Id* at 33.

Respondent argued at the hearing and in her brief that her communication with her attorney was privileged and confidential (Tr. 230, 232, 320; Resp. Brief at 4-5). But I found that argument unsupported. As petitioner correctly countered, privilege did not attach to respondent's April 10, 2014 e-mail to her supervisors which she copied to her attorney (Pet. Brief at 3).

The attorney-client privilege "enables one seeking legal advice to communicate with counsel . . . secure in the knowledge that the contents of the exchange will not be revealed against the client's wishes." *People v. Osorio,* 75 N.Y.2d 80, 84 (1989). The communication over which privilege is asserted must have been made for the purpose of obtaining legal services and advice in the course of a professional relationship. *Rossi v. Blue Cross & Blue Shield of Greater New York,* 73 N.Y.2d 588, 593 (1989). The party asserting attorney-client privilege bears the burden of establishing that the communication is protected. *Spectrum Sys. Int'l Corp. v. Chemical Bank,* 78 N.Y.2d 371, 377 (1991); *Conflicts of Interest Bd. v. Katsorhis,* OATH Index No. 1531/97, mem. dec. at 4 (Sept. 25, 1997), citing *Priest v. Hennessy,* 51 N.Y.2d 62, 69 (1980). Moreover, "the protection must be narrowly construed . . ." *Spectrum Sys. Int'l Corp.,* 78 N.Y.2d at 377.

There was nothing remotely confidential about respondent's e-mail because it was actually directed to her supervisors, not to her attorney, clearly venting her frustrations at Ms. Springer's persistent demands to which she objected. This was not an attempt to solicit legal advice nor could it be interpreted as such. Rather, by copying her attorney, respondent's apparent intent at the very least, was to signal to her supervisors that someone else was watching, or possibly to intimidate them. Thus, her claim that her e-mail to her supervisors which she copied to her attorney constituted a privileged and confidential communication cannot be sustained. *Poteralski v. Colombe,* 84 A.D.2d 887, 888 (3d Dep't 1981).

Even if her communication with her lawyer via the April 10, 2014 e-mail were a privileged communication, her reliance on *Martin v. Lauer,* 686 F.2d 24 (D.C. Cir. 1982), is misplaced. While the court noted that the strength of the government's interest varied based on the nature of the information and the likelihood of public dissemination, it recognized that "the government's interest in nondisclosure is generally greater when a specific statute prohibits dissemination of information." *Id* at 34. Neither *Martin v. Lauer,* 686 F.2d 24, nor its progeny, cited in respondent's brief, stand for the proposition that the agency could not restrict disclosure

of sensitive information, the disclosure of which is prohibited by law. In fact, at a later juncture in the litigation, the *Martin* court, which did not reach the issue of disclosure of information that could violate the Privacy Act, referenced assurances made by the employees' attorney to the lower court "that disclosure of sensitive information was not involved in this case . . . and that she had 'not asked for, nor . . . received from [her clients], information that . . . could even arguably be within the reach of a Fourth Amendment or a Privacy Act consideration." The court further noted the attorney's representation that "we have no quarrel here with the Privacy Act exclusions . . . . I don't want that information. I can't use that information, and I think it would be offensive for me to have that information . . . ." *Martin v. Lauer,* 740 F.2d 36, 40 n.5 (D.C. Cir. 1984).

Here, the New York State Social Services Law is the broad umbrella under which the confidentiality of Crossroads' records on its juveniles falls. It provides that public boards, commissions, institutions and individuals who are charged with the care and custody of abandoned, delinquent, destitute, neglected or dependent children are obligated to keep records of their charges confidential, and shall safeguard such records:

> From coming to the knowledge of and from inspection or examination by any person other than one authorized, by the department, by a judge of the court of claims when such records are required for the trial of a claim or other proceeding in such court or by a justice of the supreme court, or by a judge of the family court when such records are required for the trial of a proceeding in such court, after a notice to all interested persons and a hearing, to receive such knowledge or to make such inspection or examination. No person shall divulge the information thus obtained without authorization so to do by the department, or by such judge or justice.

Soc. Serv. Law §§ 372(1), 4(a) (Lexis 2014). As petitioner aptly argued in its post-hearing response brief, the law provides mechanisms for the disclosure of confidential information (Pet. Brief at 5). Thus, even if Ms. Springer's e-mails could be considered waste and the disclosure of the personal information contained in those e-mails were critical to respondent's claim of establishing such waste, respondent did not have carte blanche authority to disclose it. Otherwise, she could have sent the e-mail after deleting the confidential information.

In sum, respondent did not establish that: 1) her supervisor was engaged in wasting city resources; 2) her April 10, 2014 e-mail to her supervisors which she copied to her attorney was a

legitimate report of a waste of city resources; or 3) her communication with her attorney via that e-mail was a privileged communication. Thus, her disclosure to her attorney of the personal information on Crossroads' juveniles and some family members contained within the e-mail, was in violation of section C.1.12 of the agency's Standard of Conduct. Moreover, it was not protected by the disclosure exception under section 2604(b)(4) of the City Charter.

Accordingly, petitioner's charges I and II against respondent are sustained.

FINDINGS AND CONCLUSIONS

1. On April 9, 2014, respondent was disrespectful towards her supervisors when she walked out on a meeting scheduled to review her annual evaluation, in spite of the Executive Director's caution that her failure to participate in the meeting would constitute insubordination. Respondent's conduct violated section II(B), and sections III(B)(1) and (24) of petitioner's Code of Conduct, but did not violate section III(B)(42).

2. On April 9, 2014, respondent did not violate petitioner's Code of Conduct when she did not remain in her supervisor's office after another supervisor was invited to what respondent was led to believe would be a one-on-one meeting.

3. On April 10, 2014, respondent violated section C.1.12 of petitioner's Standard of Conduct governing the Division of Youth and Family Services, when she copied her attorney on an e-mail to her supervisors containing the names, dates of birth, and other personal information of at least 18 Crossroads' juveniles and some of their family members. Such disclosure did not fall within the exception to disclosure under section 2604(b)(4) of the City Charter.

RECOMMENDATION

Upon making my findings, I requested from petitioner, respondent's personnel abstract. Respondent has worked for ACS's Department of Youth and Family Justice ("DJJ") and its predecessor, the Department of Juvenile Justice, since on or about October 2006, initially as a caseworker. Prior to DJJ's merger with ACS in 2008, respondent was nominated for an Employee Recognition Award. In 2009, respondent sat and passed the Citywide Personnel

Services Exam for a Level I Social Services Supervisor (Resp. Ex. F). She was promoted to that title on April 19, 2010, with a 12-month probationary period. Respondent passed the exam for a Level II Social Services Supervisor in 2012. There is no indication that she was ever promoted to a Level II Supervisor. In the three years preceding this hearing, only one performance evaluation has been completed for respondent. It covered the period April 1, 2013 through March 31, 2014, and she received an overall rating of "conditional." That evaluation, which was the purpose of respondent's meeting with her supervisors on April 9, 2014, remains unsigned by respondent. Respondent has no prior discipline.

Respondent was found guilty of insubordination by walking out on a meeting with supervisors even though she was warned that disciplinary charges would be forthcoming if she left. More importantly, she was found guilty of disclosing without authorization to a non-ACS employee, the personal information on approximately 18 juveniles and even on some of their family members.

For respondent's misconduct, petitioner seeks a recommendation of 45 days' suspension without pay. Given respondent's clean disciplinary record, I find that to be excessive.

Respondent called several character witnesses, most of whom she supervises, and who appear to hold her in high esteem. Caseworker Tyrone Davidson praised respondent's dedication to the residents in what he described as a challenging environment (Tr. 195-96). He testified that he has never seen respondent act discourteous to anyone, and that her interaction with Ms. Springer at case conference meetings is cordial (Tr. 193-96). According to caseworker Marie Pierre Louis, respondent is "loving, caring [and] respectful," and she has never witnessed respondent being disrespectful to anyone (Tr. 364). Likewise, caseworker Nelia Then exuded high praise, claiming that respondent was the "best boss" she ever had, who is very respectful and is, in turn, respected by her co-workers, staff and the residents at Crossroads (Tr. 367-69). Caseworker Jose Quinones testified that respondent has been his supervisor for just over two years, and she is an "excellent" person whom he has never observed being disrespectful to anyone at Crossroads (Tr. 375). Winifred York, Crossroads' recreation manager, praised respondent's devotion to the residents and her readiness to step in and provide case management services in the absence of one of her workers. Ms. York testified that at the case conference meetings, respondent always comports herself professionally. She has never heard respondent raise her voice at anyone or be insolent or disrespectful (Tr. 209, 212-13, 215-16, 218).

While there is no doubt that respondent treats her workers well, it was apparent that they did not have a window into her behavior towards her supervisors. Respondent's insolence towards her senior level supervisors at Crossroads on April 9, 2014, cannot be condoned. At the same time, I found some mitigation in the fact that she was caught off-guard by the number of persons in attendance at the meeting, and was not mentally prepared for a review of her annual evaluation. Thus, her glimpse of an "unsatisfactory" rating on her evaluation, caused her to bristle and react without thought of the consequences.

This tribunal has often recommended suspensions without pay of five or more days for misconduct involving insubordination and disrespect, including the use of profanity. *See Health & Hospitals Corp. (Kings County Hospital Ctr.) v. Gathers,* OATH Index No. 236/08 (Oct. 22, 2007) (eight-day suspension recommended for respondent who was rude and argumentative with supervisor and tore up a document during a staff meeting, and had a record of repeated acts of discourtesy in the workplace); *Dep't of Correction v. Aquino,* OATH Index No. 188/07 (Dec. 15, 2006), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 07-93-M (Sept. 25, 2007) (officer with no prior discipline suspended for 10 days without pay for addressing a captain twice in a profane and aggressive manner, disobeying an order to leave, and filing a misleading report about the event); *Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. McMillian,* OATH Index No. 1402/06 (July 24, 2006) (long-term employee with no prior disciplinary record suspended for five days without pay for engaging in loud, disrespectful and disruptive confrontation with supervisor during which respondent pointed her finger close to supervisor's face); *Dep't of Environmental Protection v. Berlyavsky,* OATH Index No. 1011/06 (Apr. 19, 2006) (five-day suspension for employee who shouted accusations at his supervisor in front of others, but had no prior discipline); *Admin. For Children's Services v. Papa,* Comm'r Dec. (Oct. 21, 2005), *modifying on penalty,* OATH Index No. 1622/05 (Aug. 30, 2005) (30 days' suspension recommended for paralegal aide who was discourteous or insubordinate on five occasions); *Dep't of Environmental Protection v. Schnell,* OATH Index No. 2262/00 (Oct. 25, 2000) (employee with no prior discipline suspended for 10 days without pay for disobeying a lawful order and shouting and threatening supervisor); *Dep't of Correction v. Bluemke,* OATH Index No. 320/92 (Jan 7, 1992), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 94-11 (Feb. 18, 1994) (10 days for using profanity toward superior officer who intervened during incident with inmates).

Because respondent's conduct was tempered, in that it was not loud or obstrusive and she used no profanity, there was no disruption to the work place. Nevertheless, for her insolence towards her supervisors, I find that a suspension from employment without pay for three days to be an appropriate penalty, and I so recommend.

For the more serious charge, that respondent disclosed confidential information of juveniles and some of their family members to a non-ACS employee, in violation of petitioner's Standard of Conduct, I find that a more significant penalty is warranted. By copying her attorney on her e-mail to her supervisors on April 10, 2014, respondent demonstrated a wanton disregard for petitioner's rules. The defense mounted by her attorney was flawed because, as previously discussed, no privilege attached to the e-mail. Respondent testified that she meant no harm (Tr. 264), and I do not believe that she did. However, it is troubling that one in a supervisory capacity at a facility that houses at-risk juveniles would act so recklessly from frustration, to the point of violating rules. For that, I find a penalty of 20 days' suspension from employment without pay is appropriate and I so recommend.

In sum, for the proven charges, I recommend that respondent be suspended from her employment for a total of 23 days without pay.

Ingrid M. Addison
Administrative Law Judge

September 4, 2014

SUBMITTED TO:

GLADYS CARRIÓN, ESQ.
Commissioner

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