

Dep't of Correction v. Campos

OATH Index No. 1227/15 (Mar. 23, 2015)

Correction officer engaged in an inappropriate relationship with a minor. Termination from employment recommended.

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

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
GIOVANNY CAMPOS
Respondent

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORNIOTTI, *Administrative Law Judge*

This employee disciplinary proceeding was referred by the Department of Correction (“Department” or “DOC”) pursuant to section 75 of the Civil Service Law. Petitioner alleges that respondent Giovanni Campos, a correction officer, engaged in an inappropriate sexual relationship with a minor that resulted in criminal charges for third degree endangering the welfare of a child and sexual abuse (ALJ Ex. 1).

At a hearing held on March 9 and 10, 2015, petitioner submitted documentary evidence and the testimony of: the complainant, known as AR to protect her privacy; AR’s mother and step-father who both testified through a Spanish interpreter; and Detective Mead who investigated AR’s allegations against respondent. Respondent testified on his own behalf. He admitted engaging in a relationship with AR but claimed that AR told him she was 18. The record was held open until March 19, 2015, for additional submissions by petitioner.

For the reasons below, the charges should be sustained and respondent should be terminated from his employment.

BACKGROUND

Respondent testified that he joined DOC in 1999 as a motor vehicle operator, left DOC in 2003 to become an inspector for the Taxi and Limousine Commission, and returned to DOC in 2005 to become a correction officer. He is originally from Colombia, is 42 years old, and has two daughters, ages 22 and 19 (Tr. 230-35).

The off-duty relationship between AR and respondent began on December 24, 2013, and ended January 2, 2014, when it was discovered by AR's parents. At the time AR was 16 and respondent had just turned 41. Except where noted the facts are not in dispute.

On December 24, 2014, AR, her siblings, parents, and uncle were invited to their landlord's Christmas party in the basement of their building located in Queens. Around 40 people came to the party including respondent who was invited by his mother, who was a friend of AR's mother. The party began about 8:00 p.m. and was followed by a dedication to the baby Jesus, a mass with a priest, and Santa Claus bringing presents for the children. Respondent dressed up as Santa Claus for the gift giving. After midnight, alcohol was served, including shots of aguardiente. There was Latin dancing until the early hours of the morning.

AR arrived at the party when it started. Respondent came later and saw AR but did not speak to her. AR was wearing a long brown dress with slits up the sides and high-heeled shoes. AR went home for several hours because she was not feeling well and returned to the party after midnight. When she came back, she had changed into ripped jeans, a long sleeve shirt, and boots with low heels (AR: Tr. 83, 159-60; Campos: Tr. 238-39).

Respondent testified that he caught AR's eye while she was sitting with her parents and uncle and asked her to dance. They danced most of the night and were close when they danced but no one said anything to them (Tr. 239, 241). AR testified that she danced with respondent and that he would stare at her while she was dancing with other people and would cut in. AR liked how respondent danced. While they were dancing, AR told respondent that she was 16. Respondent told her it was his birthday but did not say how old he was (AR: Tr. 85-86).

AR's parents testified that respondent, who was turning 41, was touching AR and dancing with her in a way that caused them concern. Whenever AR started dancing with someone else, respondent would cut in to dance with her. Respondent was pressuring AR to give him her phone number and followed her everywhere including when she went to the bathroom

off of the kitchen. AR's parents discussed their concerns and her step-father told AR to be careful (Tr. 22-23, 39-40, 46-47, 58-60, 71). AR testified that her step-father, who was watching her with respondent, told her to be careful (Tr. 89-90, 185-86).

AR testified that respondent followed her into the kitchen and she realized that he was older because he had a salt-and-pepper beard. Respondent told AR that he had seen her earlier in her dress and that she was very pretty. AR showed respondent a photo that was on her cell phone of her in the dress. When her step-father saw AR showing respondent her phone, she knew that she would get punished. AR also testified that respondent offered her a shot of alcohol in the kitchen and she declined saying that she was 16 and not allowed to drink. Respondent asked for her cell phone number and she gave it him. Respondent texted AR and she responded when she got home and labeled his number "Gio." AR explained that she enjoyed respondent's attention and thought he was attractive (Tr. 85-89, 92).

Respondent testified that he followed AR into the kitchen and got her name and phone number. Respondent insisted that AR told him that she was 18 (Tr. 239, 242-43).

AR's step-father testified that, being a man, he knew when another man had "bad intentions" and was concerned about his step-daughter. He went up to respondent and in a "strong tone" stated in Spanish, "That is my daughter, she is 16 years old, so be careful." According to AR's step-father, respondent responded in Spanish that he "was not doing anything" (Tr. 24-25, 39). AR's mother testified that she left the party before her husband and that when he came upstairs, he stated that he confronted respondent (Tr. 60-61, 70). AR testified that as she was leaving the party at 4:00 a.m. she heard her step-father say something to respondent about his "daughter." AR's step-father told her later he did not like the way she was dancing with respondent and that he approached respondent about it (Tr. 90-91, 164-65, 186).

Respondent denied speaking with AR's step-father and testified that he saw him drinking and that he looked drunk (Tr. 241-42, 273-74). Respondent testified that he had at least five drinks that night. Around 6:00 a.m., his mother drove him home in his car (Tr. 240, 271-72).

AR testified that the next day her mother spoke to a friend about AR dancing with respondent. AR learned that respondent had two daughters and was 41 years old and her step-father expressed disgust for respondent. AR did not tell her parents that she was texting with respondent because they would be angry (Tr. 93-94).

According to AR, respondent texted her on December 25, 2013, and told her it was his birthday and that he wanted to take her to lunch. AR told her parents that she was going to a friend's Christmas party and respondent picked her up on the corner around 3:00 p.m. so that her parents would not see him. Respondent was driving a 2011 white Volkswagen SUV. On the way to the restaurant, respondent put his hand on AR's thigh and she told him that they could hold hands. They went to a restaurant where he ordered food and she had a glass of water. During the ride and at the restaurant, they got to know each other. AR told respondent that she was 16 and went to high school. She told him the name of her school and described it for him. Respondent told her that he would never have approached her at the party because of her age but that he was drunk at the time (Tr. 95-102). Respondent also told her that he had been a correction officer for eight years on Rikers Island and that he had a gun (Tr. 118-19).

After the meal, respondent wanted to take AR to the movies but all the movies had started so respondent took her to his apartment. Respondent showed AR the balcony and they kissed. When they went inside they sat on the couch and watched a movie. Respondent kept asking her to go into his bedroom but she was not comfortable with that. They kissed on the couch and AR kept moving away from respondent. Respondent put her on top of him and tried to put his finger in "her butt hole" which made her "extremely uncomfortable." She got off of respondent and told him she needed to go home. He dropped her on the corner by her house around 6:00 p.m. Later respondent texted her about meeting the next day (Tr. 102-07).

AR testified that while they were together she told respondent about an up-coming sweet sixteen party for a girlfriend and that she had a dance practice for the party the next day. AR testified that the dance practice was for an Americanized version of the Quinceañera, a Latin dance performed when someone turns 15. The dance "court" is made up of eight boys and eight girls, including the birthday girl to make the number 16. Seven couples dance around the birthday girl and her partner to celebrate the birthday. AR testified that she told respondent that she was part of the Quinceañera dance court for the sweet sixteen party (Tr. 107-10).

Respondent testified that on December 25 he got a text from AR around 10:00 a.m. and he invited her to a restaurant. He picked up AR around 12:30 p.m. in front of her house. Respondent could not recall what they discussed while they were together but was sure that AR never discussed her age and denied that AR ever told him about her high school. Respondent

recalled that he ate seafood soup and that AR had a coke and two empanadas. He brought AR to his house and showed her his balcony and they kissed. He denied touching AR's anus or vagina. Respondent dropped AR in front of her house (Tr. 242-46, 286-87). Respondent admitted telling AR that he worked at Rikers Island for DOC but denied telling her he had a gun and testified that he does not own one (Tr. 274, 287-88).

AR testified that on December 26, 2013, respondent texted and offered to take her to the dance practice. AR told her parents that she was taking the bus and had respondent pick her up on the corner around 12:30 p.m. When respondent arrived he told her that he was taking her to see the Christmas tree at Rockefeller Center. They went to see the tree and she missed her dance practice (Tr. 110-13). AR testified that on their way home, respondent stopped at a car wash and they kissed at the car wash. Respondent dropped AR on the corner near her house (Tr. 116-17).

Photographs show respondent's vehicle crossing the Queensboro Bridge into Manhattan at 12:53 p.m. and returning to Queens at 2:30 pm. (Pet. Ex. 8 at 33; Tr. 114-16).

Respondent testified they agreed to see each other on December 26, that he picked up AR in front of her house, and that they went to Rockefeller Center. While they were driving, respondent touched AR's leg and they kissed under the tree. AR was not feeling well so they left. On their way back they stopped at a car wash where they kissed. Respondent could not recall any conversation that they had that day. Respondent dropped AR off on the corner near her house as she requested and he went home (Tr. 247-50).

AR stated that after December 26, she was "kind of not feeling it anymore" because respondent kept insisting that they "make out," respondent did not make her "comfortable," and her mother was "getting real suspicious." On December 27, 2013, she and respondent texted each other. She told him that she was getting her dress fitted for the party and that she was with her mother. Respondent told her that he had to go back to work since he had been on vacation. He insisted on driving her to the sweet sixteen party saying he got out of work at 4:00 p.m. She accepted and told her uncle that he did not have to take her (Tr. 118-21).

AR testified that respondent picked her up at 4:30 p.m. on the corner and brought her to the birthday girl's house. While they were driving they talked about the party. Respondent told her how pretty she looked in her dress and kept rubbing her thigh and kissing her. When they got there, the birthday girl's father told respondent that he could pick up AR at 1:00 a.m. at the

restaurant where the party was being held. AR told respondent not to pick her up because her mother was going to do so (Tr. 121-25).

According to AR she had fun at the party but respondent kept texting her. At midnight someone told her that respondent was there to pick her up. AR was surprised because respondent had to work the next day. AR left the party with respondent. She told respondent that she wanted to go home and that her mother would be worried. Respondent took her to his apartment saying, "It would only be a little bit more." AR texted her mother and told her she was getting a ride home from a friend (Tr. 125-27).

Video footage from respondent's apartment complex (Pet. Ex. 1), shows AR walking slowly behind respondent outside the building in her red party dress and coming into the building around 1:01 a.m. Inside the lobby, respondent guides AR with his hand and AR again falls behind when they walk to the elevator. Respondent enters the elevator first, followed by AR who leans against the wall in the corner looking very tired. Respondent approaches AR and starts kissing her on her cheek. AR keeps her head down and is non-responsive. Respondent then tries to kiss AR on the lips and AR pulls away. When they separate, AR has an unhappy look on her face and she is staring away from respondent. She starts speaking to respondent and they get off the elevator (Pet. Ex. 10). AR reviewed a still photograph of respondent kissing her in the elevator (Pet. Ex. 10) and testified that she did not kiss respondent back (Tr. 154).

AR testified that when they got to the apartment they went into the living room. Respondent kept telling her to go into the bedroom and lay down. She said "no" because she was not "ready for that." Respondent said he was not going to do anything but lay down. Since she knew him, she "let her guard down." Respondent told her to get comfortable, gave her some sweatpants and a tee shirt, and left the bedroom while she changed (Tr. 127-28).

AR testified that respondent came into the bedroom in his underwear. They lay down and talked without touching. AR told respondent that she wanted to go home and he asked her to stay until he had to go to work a few hours later. AR said "no" and respondent said he would take her home but "to just lay down for a little while, let's just relax." Respondent pulled up the covers and started to hug and kiss her. AR was "extremely uncomfortable" because her step-father was the same age as respondent. She tried to move away but respondent persisted. AR got upset and turned her back to him. Respondent started moving "in a humping way on [her]

butt” and told her it was “doggie style.” AR was crying and told him to stop. Respondent asked if she was a virgin and she said “yes.” Respondent asked if he could “put the tip of his penis inside” her and she said “no.” Respondent kept talking over her. She told him that she would have sex with him the next time but to take her home. When he stopped humping her she felt “something hot” on her “butt.” When respondent got up from the bed he had a wet spot on his underwear and AR thought he had ejaculated but respondent said that she had “left him with blue balls.” AR grabbed her stuff “real fast,” respondent got dressed and they left (Tr. 128-34, 173).

Video footage from respondent’s building at 2:29 a.m. shows AR walking out of the building in sweatpants and a hooded sweat shirt and respondent carrying a plastic bag (Pet. Ex. 1). AR testified that the bag held her red dress (Tr.152-53, 172). AR testified that respondent dropped her near her house because she was scared about being left on the corner (Tr. 134).

Respondent admitted that AR told him that she had a party to go to on December 27 but denied that she ever said it was a sweet sixteen party. Respondent admitted that he offered to take AR to the party and that he picked her up on the corner because she had told her mother that she was taking the bus. He also picked up AR at the party and they went to his apartment. According to respondent, AR never objected to going there. Respondent testified that they watched TV and that AR complained that her dress was too tight so he gave her some sweatpants and a t-shirt. AR went into his room to change and then called him to come in. Respondent started kissing her. Respondent touched AR’s “buttocks” and got on top of her in the bed. They started “moving like we was having sex.” AR got on top of him. Her mother called and he took AR home. Respondent testified that AR never expressed any reluctance about him touching her and that he did not ejaculate (Tr. 250-53). Respondent admitted that he attempted to have sexual intercourse with AR but denied that they ever spoke about it (Tr. 247, 279-82).

AR testified that the next day respondent kept calling and texting her. He was talking about the day when they would have sex and she would “moan his name.” AR testified that she liked the attention but was also uncomfortable. Respondent insisted on taking her to a night club on New Year’s Eve. AR told him that she did not have a fake identification and respondent assured her that he knew the bouncer at the club and could get her in. AR said she had to stay home with her parents and uncle which made respondent angry (Tr. 135-36).

AR testified that since she had refused to go out with respondent on New Year's Eve their subsequent conversations were "rocky." She agreed to meet him on January 2, 2014, around 4:00 p.m. after respondent got off work. When respondent arrived to pick her up, AR called her mother and said she was going to the library with a friend. AR's mother insisted on taking her to the library (Tr. 139).

AR's mother testified that over those past few days AR had been acting very strangely and was always on her phone. When AR insisted, on January 2, that she needed to go to the library with a friend, she had a "bad premonition" that something was wrong and told AR to wait until she and her husband got home. AR's parents testified that when they drove up to their house around 4:00-4:30 p.m., AR's mother saw respondent sitting in his car on the corner. She recognized the car because respondent had parked it in her driveway on Christmas Eve. When she saw respondent all her "questions" about AR's strange behavior "were answered." AR's mother jumped out of the car, ran towards respondent, then ran back to tell her husband. At first he did not understand what was going on but then approached respondent who looked him in the eye, and took off "like a bullet," almost hitting AR's step-father (Tr. 26-29, 44-45, 62-63, 73).

AR testified that she was standing outside her house when her parents pulled up and saw respondent. Her mother got out yelling, ran to the corner, and came back to get her step-father. When AR's step-father approached respondent, respondent did a "crazy U-turn." AR knew she had been caught and deleted all the text messages between her and respondent. After the text messages were deleted, respondent sent another text at 4:21 p.m. saying, "Your stepfather came out" (Pet. Ex. 9). Soon afterwards, AR's parents took her phone (Tr. 139-41, 175-78).

AR's parents testified that they returned to where AR was standing and AR started crying. They took AR's cell phone and called the last number listed on her recent calls, which had the name "Gio." Respondent answered and they each spoke to respondent. AR's step-father told respondent to meet him at the police precinct because he was going to file a complaint. Respondent asked AR's step-father not to file one saying that he had two daughters, he was a correction officer, and that such a complaint would ruin his job. Respondent offered to allow AR's step-father to beat him up in lieu of filing a police report (Tr. 29-31, 41, 63-64).

AR's parents went to police and filed a complaint against respondent (Tr. 65, 74-75, 79, 141; Pet. Ex. 5). AR testified that initially she was reluctant to talk about what had happened but

eventually cooperated. The case was referred to Detective Mead in NYPD's special victims unit and AR told her about all of her contacts with respondent (Tr. 141-46, 179-81, 200).

Respondent testified that they made plans for January 2, 2014, but that they never met because AR's step-father called and said he was going to file charges. Respondent begged him not to, saying he had two daughters and was going to be a grandfather (Tr. 255-56). He learned that AR was 16 when her step-father called him (Tr. 258). On cross-examination, respondent admitted that he offered to have AR's step-father beat him up. He also denied that he was on the corner waiting for AR when her parents claimed that they saw him (Tr. 285-86).

Detective Mead testified that she interviewed AR on January 4, 2014. AR was cooperative and told her about meeting respondent on Christmas Eve and what occurred between them through January 2, 2014. Detective Mead subsequently wrote a summary of AR's description that was largely consistent with AR's testimony with the notable omission that AR did not tell her about respondent touching her anus on December 27, 2013 (Pet. Ex. 8; Tr. 201-09, 211-13, 217, 226-27). AR testified that she told Detective Mead about this (Tr. 170-71).

Detective Mead also spoke to AR's step-father who told her that on Christmas Eve he told respondent that AR was 16, she was his daughter and to stay away from her (Tr. 203).

Under Detective Mead's supervision, AR made a "control call" to respondent on January 4, 2014, from the precinct making it look like it was coming from AR's cell phone (Pet. Ex. 3; AR: Tr. 146; Mead: Tr. 212). In the call, AR told respondent that she erased the text messages between them and that her parents were not going to press any charges. When asked by AR, respondent admitted that her parents saw him on January 2. AR also asked respondent why he was telling his mother that she was 18 when he knew she was 16, and he stated that he thought AR was 18 and asked, "Everything's good now?" When AR stated he was lucky that she never told her parents about going to his house and what happened there respondent interrupted her and said, "don't say nothing," and told her "not to worry" because "nothing happened." AR got angry and said "what do you mean nothing happened" and referenced that they had "made out" and that he tried to make her "jerk [him] off." The call ended while AR was speaking.

AR testified she was angry that respondent said she was 18 because they spoke about her age every time they got together. AR denied ever telling respondent that she was 18 (Tr. 151).

Respondent maintained throughout the hearing that AR never informed him that she was 16 and had always said she was 18 (Tr. 254, 271). Respondent testified that when he got the call from AR he was suspicious because she always texted. He was tired because he had worked overtime. When AR said something about “jerking [him] off” he told her not to say anything because “there was no sex.” Respondent thought that the call was being monitored by the police and he hung up (Tr. 257-58, 270).

Detective Mead conducted an investigation to corroborate AR’s assertions (Tr. 213-14). She obtained the images from the Queensboro Bridge and respondent’s apartment complex on the dates and times AR identified (Pet. Exs. 1, 8). Detective Mead collected the sweatpants, jacket and t-shirt from AR (Tr. 174) and had the items tested (Tr. 209). No semen was found, however, there were trace elements of possible biological stains but their testing required DNA samples from respondent pursuant to a subpoena (Pet. Ex. 8; Tr. 210-11).

On January 7, 2014, respondent surrendered to Detective Mead and was arrested (Pet. Exs. 5, 6; Tr. 202). Respondent was criminally charged with endangering the welfare of a child in the third degree in violation of Penal Law section 260.10 and sexual abuse in the third degree in violation of Penal Law section 130.55 (Pet. Ex. 11).

On October 24, 2014, respondent was interviewed pursuant to Mayor’s Executive Order 16 (“MEO-16”). During the interview respondent maintained that he thought AR was 18 and that they never had sexual intercourse. He also admitted that on January 2, 2014, he was on the corner to pick up AR and that her step-father came out to speak to him. Respondent also claimed that AR came to his apartment only on the night of December 27(Pet. Ex. 2).

On January 5, 2015, respondent was given a disposition that his criminal case would be adjourned in contemplation of dismissal. An order of protection was issued prohibiting respondent from having any contact with AR (Pet. Exs. 13, 12). He also agreed to attend a sex offender program (Tr. 268).

ANALYSIS

Petitioner alleges that respondent engaged in an inappropriate sexual relationship with a 16-year old girl that resulted in him being criminally charged with third degree endangering the welfare of a child and sexual abuse. Petitioner alleges that such conduct was conduct

unbecoming an office and of a nature to bring discredit on the Department in violation of DOC rules 3.20.010, 3.20.030, and 3.20.300 (ALJ Exs. 1, 2).

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

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

AR was a credible witness who was calm and forthcoming about events that were obviously embarrassing and difficult to talk about. There was no motive offered by respondent why AR would lie about telling him that she was 16 years old and none is apparent from the record. Given that AR was under the watchful eye of her family on Christmas Eve, it seems unlikely that she would tell respondent that she was 18 as he claimed. Moreover, the testimony offered by AR, her step-father, and mother was generally consistent, it comported with common sense, and was corroborated in part by independent evidence obtained by Detective Mead after they made their report to the police. To the extent there were discrepancies in their testimony, they were minor and of the type to be expected in a hearing. Similarly, the fact that AR deceived her parents about the relationship with respondent did not render AR’s testimony about it incredible. It is understandable AR would not tell her parents that she was seeing respondent since they had told her to stay away from him but that she would come forward with details after their relationship was discovered.

On the other hand, respondent was barely audible during his testimony and gave vague statements about what occurred. Respondent also had a motive to lie to avoid a finding of

misconduct and a criminal conviction. Faced with pictures of him kissing AR and taking her to his apartment, respondent had no option but to admit to the relationship. The possible defenses respondent could raise included that he thought AR was of the age of consent and that she exaggerated the sexual acts they engaged in.

As discussed below, respondent's adamant assertions that he never discussed AR's age with her or her step-father and had no idea that she was 16 or that she was attending a sweet sixteen party were incredible and did not comport with human experience or common sense. Similarly, respondent's denial that he was on the corner near AR's house on January 2, 2014 and fled was false. His denial was contradicted not only by three credible witnesses, but also by his own text message saying that AR's step-father "came out," by his admission during the control call that AR's parents saw him, and his MEO-16 testimony. Given respondent's lack of truthfulness, it is appropriate to discredit any self-serving testimony that is inconsistent with the weight of the evidence. *Dep't of Education v. Brust*, OATH Index No. 2280/07 at 10 (Sept. 29, 2008), *adopted*, Chancellor's Dec. (Oct. 22, 2008) (if a witness is found to have been false in one instance, trier-of-fact may reject all of the witness's testimony); *see also People v. Barrett*, 14 A.D.3d 369, 369 (1st Dep't 2005) (the maxim *falsus in uno falsus in omnibus*, false in one thing, false in everything, may be applied to witness testimony).

Turning to the merits, it was undisputed that: AR and respondent met on Christmas Eve; respondent pursued AR and took her out on December 25, 26, 27, and 28; and kissed and touched her in a sexual manner. At issue is whether respondent knew AR was 16 years old when he took her out and, to a lesser extent, the nature of their sexual encounters.

The record supports a finding that respondent was repeatedly told how old AR was and that he knew the first time he met her that she was 16 years old. First, AR's step-father's testimony that he knew respondent had bad intentions and that he confronted respondent by telling him to stay away from his 16-year old daughter was credible. This was an appropriate reaction for a step-father to have upon seeing an older man pursuing his underage daughter. AR's mother corroborated her husband by testifying that she was also concerned about the situation and that her husband told her what he had said to respondent. AR also corroborated her step-father's testimony by saying she overheard him speaking to respondent and that he later told

her what said to him. Finally, AR and her step-father reported this to Detective Mead the following week.

Second, AR's testimony that she told respondent she was 16 when he offered her a drink was credible. There was alcohol at the Christmas party and respondent was drinking. It seems likely that respondent would want AR to join him and that she declined to drink in front of her family and friends from her church and community. It also seems more likely than not that while they were at lunch the following day, AR told respondent what grade she was in and where she went to high school. This is typical conversation for a teenager and would be the kind of information shared when first getting to know someone.

Third, it seems very likely that AR told respondent that she was missing dance practice for her friend's sweet sixteen party when he took her to Rockefeller Center and that she told him details about the party that he drove her to and from the following day. Certainly, the party was a big event involving friends, wearing a special dress, going to a restaurant, and dancing the Quinceañera. Since respondent is from Colombia, likes to dance, and has two daughters, it seems likely that he would have known that the Quinceañera is a traditional Latin dance done when a girl turns 15. Thus, even if AR had originally told respondent that she was 18, as he claimed, he should have realized that she was closer to 16 when she started talking about a sweet sixteen party and the Quinceañera.

Finally, based on respondent's admission that he knew the police were monitoring the control call, it seems likely that he was trying to make a record on the call when he said he thought that AR was 18. It is notable that respondent was unable to recall any of the conversations he had with AR but was sure that she never said she was 16. However, respondent was able to recall what AR wore on December 24 and 28 and what she ate on December 25. Except for admissions that would support respondent's guilt, he did not deny AR's testimony about what they talked about including her need for fake identification to enter a night club.

The record also supports a finding that respondent engaged in an inappropriate sexual relationship with AR. Respondent admitted that he repeatedly kissed and fondled AR and that he moved behind her in his bed like they were having sex. I credit AR's assertion, as corroborated by the elevator images and respondent's admission that he wanted to have sex with her, that during their last encounter, respondent tried to pressure AR to have sexual intercourse, that she

reluctantly allowed him to touch her, and was crying while he did so. As the father of two girls close to AR's age, it is shocking that respondent would take advantage of a young girl's vulnerability for his own gratification.

Generally, a civil service employee's off-duty actions are cognizable as misconduct in a disciplinary proceeding upon a showing that there is a nexus between the misconduct and respondent's employment. *See Dep't of Correction v. Muza*, OATH Index No. 236/99 at 6-7 (Dec. 23, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 00-26-SA (Apr. 10, 2000).

Due to respondent's law enforcement status, his actions of pursuing a 16-year-old girl, taking her places without her parents' knowledge and against their express wishes, and engaging in various sexual acts with her bears a nexus to his law enforcement duties. Correction officers are peace officers, required to enforce and uphold the law, which prohibits engaging in sexual conduct with minors. An officer who engages in a sexual relationship with a minor, displays a lack of judgment, self-control, and disregard of the law. Such actions constitute a violation of Department rules that officers must "not bring criticism upon themselves or the service which they represent" (rule 3.20.010) and must avoid "conduct unbecoming an officer or employee" (rule 3.20.030) and behavior that "bring[s] discredit on the Department" (rule 3.20.300). *Dep't of Correction v. DeMaitre*, OATH Index No. 1907/14 (Sept. 29, 2014), *aff'd*, Civ. Serv. Comm'n Case No. 2014-1427 (Feb. 18, 2015) (correction officer who pursued 15-year old girl and sent her a picture of his penis violated DOC rules 3.20.010 and 3.20.030).

FINDINGS AND CONCLUSIONS

Petitioner demonstrated that respondent engaged in an inappropriate sexual relationship with a 16-year-old girl that resulted in him being criminally charged with third degree endangering the welfare of a child and sexual abuse in violation of DOC rules 3.20.010, 3.20.030, and 3.20.300.

RECOMMENDATION

Upon making these findings, I obtained and reviewed an abstract of respondent's disciplinary history for purposes of recommending an appropriate penalty. Respondent was appointed as a correction officer in 2005 and has no formal disciplinary history. Respondent served a 30-day suspension for his arrest.

Petitioner seeks respondent's termination from employment. This request is reasonable under the circumstances.

Respondent's sexual encounters with a young girl display a disturbing lack of self-control and judgment that bears directly on his fitness to perform the essential functions of his job: the care, custody, and control of inmates. Respondent has demonstrated that he is a liability to the Department and cannot be trusted to supervise and interact with adolescent or female inmates.

While respondent's tenure and lack of prior discipline are mitigating factors, they are outweighed by the seriousness of the misconduct. Under the circumstances, termination from employment would not be so disproportionate to the sustained misconduct as to be shocking to one's sense of fairness. *See Pell v. Bd. of Education*, 34 N.Y.2d 222, 233 (1974).

Accordingly, respondent should be terminated from his position as a correction officer. *DeMaitre*, OATH No. 1907/14 (termination from employment for correction officer who engaged in sexual misconduct with a 15-year old).

Alessandra F. Zorgniotti
Administrative Law Judge

March 23, 2015

SUBMITTED TO:

JOSPEH PONTE
Commissioner

APPEARANCES:

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