

## ***Dep't of Correction v. Ramos***

OATH Index No. 1903/15 (June 19, 2015), modified on penalty, Comm'r Dec. (June 9, 2016),  
**appended**

Petitioner proved that captain filed an untimely and incomplete report and was AWOL for five days. ALJ recommended that respondent be suspended for 20 days for the AWOL charges and given a reprimand for the report charges. Commissioner imposes 21 day suspension and reprimand noting that in compliance with the FLSA all suspension days imposed on captains must be served in 7 day increments.

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

*In the Matter of*  
**DEPARTMENT OF CORRECTION**  
*Petitioner*  
*- against -*  
**EUGENIO RAMOS**  
*Respondent*

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### **REPORT AND RECOMMENDATION**

**ALESSANDRA F. ZORNIOTTI**, *Administrative Law Judge*

This employee disciplinary proceeding was referred by the Department of Correction ("DOC") pursuant to section 75 of the Civil Service Law. Petitioner alleges that respondent, Captain Eugenio Ramos, filed an untimely and incomplete report and was absent without leave ("AWOL") for five days in violation of various DOC rules (ALJ Ex. 1).

A trial was held on June 4, 2015. Petitioner presented documentary evidence and the testimony of Assistant Deputy Warden ("ADW") Bennett and ADW Tyler. Respondent testified and denied engaging in misconduct. The charges should be sustained and respondent suspended for 20 days for the AWOL charges and given a reprimand for the report charges.

### **ANALYSIS**

#### *Untimely and Incomplete report charges*

Petitioner alleges that respondent failed to file a timely and complete report. Respondent argues that due to confusion about who would be doing the investigation, his absence for military

leave, and delays in getting the necessary paperwork, he is not guilty of misconduct. These charges should be sustained in relevant part.

Except where noted the facts are not in dispute. Respondent is assigned to the Special Operations Division (“SOD”) which is responsible for the overall security of Rikers Island. On November 15, 2013, an unusual incident occurred when an intoxicated civilian drove across the bridge to Rikers Island. ADW Bennett instructed respondent to detain the civilian and to call the 114<sup>th</sup> police precinct to have the civilian arrested. DOC’s intelligence unit (“IU”) also responded, arrested the civilian, and brought him to the precinct (Bennett: Tr. 14-19, 60; Ramos: Tr. 88-90). According to ADW Bennett, IU broke the chain of command by failing to notify him that it was responding to the scene (Tr. 18, 44-49).

Because SOD and IU responded, there was a discussion about which unit would be assigned to investigate the unusual incident. The discrepancy also resulted in a delay in notifying the central operations desk (“COD”) the following day (Pet. Ex. 2). After the incident was reported to COD on November 16, 2013, ADW Bennett verbally assigned respondent to investigate the incident but also told him that it may be reassigned to IU. The following day, ADW Bennett advised respondent that the incident had been reassigned to IU (Bennett: Tr. 19-24, 42; Ramos: Tr. 90-91).

ADW Bennett testified that prior to going on vacation on November 20, 2013, he verbally notified respondent that the investigation was again his to complete. ADW Bennett testified that since this was not a use of force incident and respondent’s objectivity was not compromised, there was no problem assigning respondent to the investigation even though he had responded to the scene (Tr. 42-44).

While ADW Bennett was on vacation, he received a call from ADW Emans asking whether respondent was assigned to the investigation. ADW Bennett told ADW Emans that it was respondent’s assignment. ADW Bennett called respondent between November 25 and 27, 2013, and directed him to complete the investigation of the unusual incident with the civilian but not to address the breach in protocol with IU or the late reporting to COD (Bennett: Tr. 25-29; Ramos: Tr. 91-94).

Respondent acknowledged that as of November 27, 2013, he was assigned to investigate the civilian incident. He testified that he needed to get documents from IU, including the

civilian's arrest paperwork, and that he did not receive them until December 1, 2013 (Tr. 95-97, 113). Respondent was on military leave between December 3 and 8, 2013 (Pet. Ex. 5).

On December 9, 2013, ADW Bennett asked respondent about the investigation. Respondent said he had been on military leave but that he had all the necessary documentation to complete the report (Bennett: Tr. 29; Ramos: Tr. 98-99). ADW Bennett testified he thought it odd that respondent had not completed the investigation but trusted it would be done soon based on respondent's representations that he had all the materials and would be putting it together (Tr. 29-35, 61). Respondent testified that ADW Bennett said because of the "whole debacle" with IU and the late report to COD "there was no timeframe" to do the report. As a result respondent "assum[ed]" that "there was no rush" to complete it (Tr. 99-100, 122).

Respondent testified that he submitted the report to ADW Emans on the day it was dated, December 25, 2013 (Pet. Ex. 1; Tr. 100-01, 123). ADW Bennett testified that he did not know when respondent submitted the report (Tr. 51-52) but that he read it.

ADW Emans prepared a command discipline ("CD") for respondent dated December 31, 2013, and alleged that even though respondent had not yet submitted a report assigned to him on November 25, 2013, the report submitted on January 2, 2014, was incomplete. ADW Emans asserted that respondent failed to include the COD log book entry and failed to transcribe the COD number on each page of the report (Pet. Ex. 4). ADW Emans also prepared an unusual incident report dated January 2, 2014, stating that respondent would be made the subject of a CD for his failure to submit a timely and complete report (Pet. Ex. 3). Respondent refused to accept the CD and the matter was referred for a memorandum of complaint.

Respondent testified he was on sick leave on January 2, 2014, and that ADW Emans's assertion that the report was submitted on that day was incorrect (Pet. Ex. 6; Tr. 101). Respondent testified he has had prior conflicts with ADW Emans that resulted in charges that were dismissed. Respondent also asserted that around this same time, he criticized DOC on the news. In retaliation for his activities, he was given a drug test and psych referral but was cleared in both instances (Tr. 102-05).

DOC Directive 5000R-A requires that all unusual incident reports be completed within ten business days of the incident. Reports must also include all documents relative to the incident and the incident identification number. *See* Directive 5000R-A, V-E (1) and (3).

There is no dispute that, initially, there was confusion about who would prepare the report following the November 15, 2013 incident. Moreover, since ADW Bennett was unsure whether he spoke to respondent about the assignment on November 25 or 27, and respondent admitted that it was November 27, the best assignment date to use is November 27, 2013.

It also seems more likely than not that respondent submitted the report to ADW Emans on the day it was dated, December 25, 2013. ADW Emans's hearsay statement that the report was submitted on January 2, 2014, is unlikely. Respondent was on sick leave on January 2, 2014, and there are date discrepancies in ADW Emans's reports which suggest that the January 2, 2014 date was incorrect (Tr. 38; Pet. Exs. 4, 5). Since ADW Emans did not appear and clarify this discrepancy (Tr. 39-40, 140), December 25, 2013, is the appropriate filing date to use.<sup>1</sup>

Respondent was on military leave from December 3 through 8, 2013, and those days, as well as his regular days off on November 29 and 30, and December 5, 6, 11, 12, 17, and 18, 2013 should be excluded from the calculation (Pet. Ex. 5). Starting the ten business days from November 28, 2013, the day after the assignment was made, the report was due on December 19, 2013.

Respondent admitted that as of December 1, 2013, he had all the necessary paperwork to complete the report. At no time did respondent advise his supervisors that he was having trouble completing the report or needed any additional time to do so (Tr. 63-64, 97-98). Thus, his argument that his report was delayed due to outstanding paperwork was not credible.

It was also undisputed that the day respondent returned from military leave, on December 9, 2013, ADW Bennett asked him about the report. Despite this inquiry, respondent waited another 16 calendar days before submitting it. ADW Bennett's claim that respondent assured him that the report would be completed shortly was more credible than respondent's assertion that ADW Bennett told him to take his time to complete it.

The report was filed six business days after it was due. Thus, the charge that respondent filed an untimely report should be sustained.

There is no dispute that respondent failed to include the incident identification number as required by Directive 5000R-A. This portion of the incomplete report charge should be sustained.

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<sup>1</sup> Since respondent's version is being credited over ADW Emans's hearsay statements, there is no need to address respondent's motion for a negative inference for petitioner's failure to call ADW Emans as a witness.

Except for ADW Emans's hearsay allegation, there was no proof that respondent failed to include the COD log book entry in his report. ADW Bennett's testimony that respondent failed to include this entry (Tr. 36; Pet. Ex. 3) was based on his reading of ADW Emans's CD, not his own personal knowledge. Similarly, no one with personal knowledge was able to verify that the photocopy of the report (Pet. Ex. 1; Tr. 140) was a true and accurate copy of the report submitted by respondent. Accordingly, this portion of the charge should be dismissed.

*AWOL charges*

Petitioner alleges that respondent was AWOL on August 10, 11, 12, 13, and 16, 2014. These charges should be sustained.

The facts pertaining to this charge are not in dispute. Respondent was scheduled to be on vacation starting July 20, 2014, and returning to work on August 10, 2014. Respondent testified that on July 20, 2014, he woke up with severe back and shoulder pain. After several days with no improvement, respondent reported to the DOC's Health Management Division. Respondent's vacation days were converted to sick leave for the period July 25 through August 1, 2014. Respondent resumed taking annual leave for the balance of his scheduled vacation (Tr. 106; Pet. Exs. 7, 8).

On July 30, 2014, while respondent was still on vacation, respondent faxed a memorandum to Warden Griffith explaining his medical condition and requesting that his vacation be extended by the number of days he was on sick leave, from August 10 to 17, 2014. The request was denied by the warden on August 1, 2014 (Pet. Ex. 7). ADW Taylor testified that it is the employee's responsibility to find out whether a vacation request has been granted or denied (Tr. 79, 84).

Respondent testified that he made the request to extend his vacation so that he could meet his family in Puerto Rico. His family had gone on vacation while he stayed home due to his back problems. Respondent testified that no one ever called to tell him that his request was denied and that he did not call his command. Respondent assumed it was okay for him to extend his vacation but that when he did not hear from anyone, he knew he would be considered AWOL as part of his overall harassment by DOC (Tr. 107-10, 120-21).

Respondent did not appear for his scheduled work days on August 10, 11, 12, 13, and 16, 2014. Other captains were required to work overtime to cover his missed shifts (Tr. 69-75; Pet. Exs. 9-13).

There is no dispute that respondent was AWOL on the dates charged. I credit the testimony of ADW Taylor that it was respondent's responsibility to verify whether his request to extend his leave was granted, especially since respondent was absent when he submitted the request. Moreover, the request was made while respondent was on approved sick leave and it was denied eight days before his original vacation was going to end. Respondent failed to provide a reasonable excuse for unilaterally extending his vacation and admitted that he knew he was AWOL. While it was unfortunate that respondent's medical condition interfered with his family vacation, DOC had no obligation to grant respondent's request. *See* DOC Operations Order 07/09 (providing that the needs of DOC supersede a captain's vacation request) (ALJ Ex. 3; Tr. 77).

#### **FINDINGS AND CONCLUSIONS**

1. Petitioner demonstrated that respondent filed an untimely report as charged.
2. Petitioner demonstrated that respondent filed a report that did not include the identification number on each page as required by Directive 5000R-A, but failed to show that he did not include a required document.
3. Petitioner demonstrated that respondent was AWOL on August 10, 11, 12, 13, and 16, 2014, as charged.

#### **RECOMMENDATION**

Upon making these findings, I obtained and reviewed an abstract of respondent's personnel history for purposes of recommending an appropriate penalty. Respondent was appointed as a correction officer in 1989 and became a captain in 2001. In 1992, respondent was suspended for 30 days for refusing a toxicology examination. In 1998, respondent forfeited six vacation days for failing to log in and out. For the last 17 years respondent has had no disciplinary record.

Petitioner seeks a 15-day suspension for the late and incomplete report and a 25-day suspension for being AWOL for five days. Respondent's 26 years of service, remote disciplinary history, and 30 years of military service (Tr. 78) are mitigating factors to be considered.

Respondent's late and incomplete report were minor infractions. The report was six business days late and there was no evidence that this short delay had any repercussions. Similarly, there was no evidence that the failure to write the incident identification number on each page of the report caused a problem. While a supervisor should take his responsibilities seriously, a 15-day suspension is excessive under the circumstances. In light of the above-mentioned mitigating factors, the nature of the misconduct, and the context in which it arose, a reprimand seems more appropriate for the proven charges. *Dep't of Correction v. Reiser*, OATH Index No. 1890/04 (Feb. 17, 2005) (reprimand for officer with long tenure and no prior disciplinary history who failed to timely submit a report).

Penalties for similar AWOL charges generally fall within a range of three to five days. *See, e.g., Dep't of Correction v. Jones*, OATH Index No. 2051/13 (Sept. 25, 2013) (three-day penalty for officer guilty of being AWOL for part of his tour for failing to call in for an extension of his emergency leave); *Dep't of Correction v. Edwards*, OATH Index No. 1575/04 (Apr. 18, 2005) (three-day suspension for an unauthorized absence after a personal emergency leave where officer had 15-year tenure and minimal disciplinary history); *Dep't of Correction v. Ellam*, OATH Index No. 873/03 (June 17, 2003) (five-day suspension for twice failing to report to work after personal emergency leave was denied where officer with 13-year tenure had a minimal disciplinary history).

Respondent's long tenure and remote disciplinary record warrant mitigation. However, respondent's absence was irresponsible, intentional, and it resulted in his colleagues working overtime so that he could spend more time on his summer vacation. Under the circumstances a four-day penalty for each absence, which is in the middle of the range, seems appropriate.

Accordingly, respondent should be suspended for 20 days for the AWOL charges and given a reprimand for the report charges.

Alessandra F. Zorghiotti  
Administrative Law Judge

June 19, 2015

SUBMITTED TO:

**JOSPEH PONTE**

*Commissioner*

APPEARANCES:

**ALAN ALVAREZ, ESQ.**

*Attorney for Petitioner*

**FRANKIE & GENTILE, PC**

*Attorneys for Respondent*

**BY: JAMES FRANKIE, ESQ.**

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In the Matter of  
Department of Correction,

Petitioner:

-against-

OATH Index No.1903/15

Captain Eugenio Ramos #1451,

Respondent.

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### **ACTION OF THE COMMISSIONER**

In case DR #B0084/2014, Capt. Eugenio Ramos was charged with conduct unbecoming a member and of a nature to bring discredit upon the Department based upon the following facts. On November 15, 2013, at approximately 1640 hours, an intoxicated civilian male drove past the Riker's Island security check point. The intoxicated driver was stopped by CO M. McLaughlin #17242 on the Riker's Island side of the bridge. The Patrol Supervisor, Capt. Eugenio Ramos responded to the scene. The intoxicated driver was placed under arrest. Immediately after the occurrence ADW Edwin Bennett #1015 instructed Capt. Ramos to NOT commence an investigation. On November 16, 2013, ADW Edwin Bennett #1015 assigned Capt. Ramos COD Investigation #1423/13 regarding this incident. The assigned investigation was to be completed within the 10 days allotted by Directive 5000 R-A. On November 18, 2013, Capt. Ramos was provided with instruction as to how to conduct an investigation and submit written findings.

On November 20, 2013 ADW Bennett went on vacation. While away on vacation, ADW Bennett was contacted by ADW Dario Emans #325 who informed ADW Bennett that Capt. Ramos was under the impression that ADW Bennett had instructed Capt. Ramos NOT to conduct the above mentioned investigation. ADW Bennett contacted Capt. Ramos by phone and instructed Capt. Ramos to conduct said investigation; Capt. Ramos agreed to conduct said investigation.

On December 8, 2013 ADW Bennett asked Capt. Ramos about the status of the investigation and Capt. Ramos stated that he had been out on military leave and had not completed the investigation. Capt. Ramos stated to ADW Bennett that Capt. Ramos had all the information he needed and would type it and submit it shortly thereafter. On December 31, 2013, ADW Emans asked Capt. Ramos about the status of the investigation and Capt. Ramos stated in sum and substance that he had it but was not completed. On January 2, 2014, Capt. Ramos submitted the investigation report but it was incomplete. A copy of the COD logbook entry was not included and Capt. Ramos failed to transcribe the COD number on the right hand upper corner of each sheet of

paper submitted.

In case DR #B0394/2014, Capt. Eugenio Ramos was charged with conduct unbecoming a member and of a nature to bring discredit upon the Department based upon the following facts. On Sunday, July 20, 2014, Capt. Ramos commenced his assigned vacation. On Friday, July 25, 2014, Capt. Ramos contacted the Health Management Division and reported sick. Capt. Ramos' vacation was automatically stopped and he was placed on sick report status until his return to duty on August 3, 2014.

On July 30, 2014, Capt. Ramos faxed a request to adjust his vacation time and continue his vacation until August 17, 2014, for the amount of days he was out sick. On August 1, 2014, Warden Linda Griffin denied Capt. Ramos' request. On August 10, 2014, Capt. Ramos failed to report for duty and failed to make further notification to his command of such absences on the following five (5) consecutive dates: Sunday, August 10, 2014; Monday, August 11, 2014; Tuesday, August 12, 2014; Wednesday, August 13, 2014; and Saturday, August 16, 2014. Capt. Ramos subsequently returned to duty on Sunday, August 17, 2014 for the 1500x2331 tour.

On June 4, 2015, the aforementioned matters were tried jointly at OATH before Administrative Law Judge Alessandra F. Zorgniotti. The Department was represented by Attorney Alan Alvarez and respondent was represented by attorney James Frankie. On June 19, 2015, ALJ Zorgniotti issued her report and recommendation finding that the Department proved that Capt. Ramos filed an untimely report which did not include the incident identification number as required by Directive 5000R-A, as alleged in specifications 1 and 2 of DR #B0084/2014. ALJ Zorgniotti found that the Department failed to prove that Capt. Ramos did not include the COD log book entry in his report, as alleged in specification 2 of DR #B0084/2014. ALJ Zorgniotti found that the Department proved that Capt. Ramos was AWOL on August 10, 11, 12, 13 and 16, 2014, as alleged in specification 1 of DR #B0394/2014.

Regarding case DR #B0084/2014, Judge Zorgniotti opined that Capt. Ramos' late and incomplete report were minor infractions, that the report was six business days late and there was no evidence that this short delay and the failure to write the incident identification number on each page of the report had any repercussions or caused a problem. Judge Zorgniotti recommended that Capt. Ramos receive a reprimand for case DR #B0084/2014. Regarding case DR #B0394/2014, Judge Zorgniotti opined that Capt. Ramos failed to provide a reasonable excuse for unilaterally extending his vacation and Capt. Ramos admitted to knowing he was AWOL. Judge Zorgniotti recommended that Capt. Ramos be suspended for four (4) days for each one of his five tour of duty absences, totaling twenty (20) suspension days.

On September 11, 2015, pursuant to Matter of Fogel v. Comm'r of Educ. of the State of New York, 76 A.D.2d 1010 (1980), the department requested that attorney James Frankie provide the Department, within ten days, with any comments relative to the report and recommendation issued by Judge Zorgniotti. Mr. Frankie did not provide any comments to the Department.

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Based on the City policy in compliance with the Fair Labor Standards Act ("FLSA") all suspension time imposed on Captains must be levied in 7 day increments. Judge Zorngiotti's recommendation of twenty (20) suspension days does not comport with the seven day increment standard, consequently the penalty is amended to twenty-one (21) suspension days.

Joseph Ponte, Commissioner

Dated: June 9, 2016