Dep't of Correction v. Hedges

OATH Index No. 1962/15 (Aug. 21, 2015), *adopted,* Comm'r Dec. (Mar. 8, 2016)

Correction officer found guilty of being out of residence without authorization while on sick leave, failing to surrender his firearm when required to do so, failing to comply with a supervisor's order, and failing to promptly notify the Department that he had legally changed his name, in violation of Department rules. Termination from employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
ERIC HEDGES
Respondent

REPORT AND RECOMMENDATION

INGRID M. ADDISON, *Administrative Law Judge*

This disciplinary proceeding was referred by petitioner, the Department of Correction ("Department"), pursuant to section 75 of the Civil Service Law. The Department alleged that while on sick leave, respondent Eric Hedges, left his residence without authorization, failed to surrender his Department-issued firearm to its Health Management Division ("HMD") when ordered to do so, and disobeyed a direct order from then Assistant Deputy Warden Michele Evans to remain in HMD until he could be escorted by Department staff to his Pennsylvania home to retrieve his firearm. The Department further alleged that respondent failed to pay personal income taxes which he owed to the State of New York for 2006 and 2007 calendar years. In addition, the Department alleged that respondent legally changed his name in 1993, and failed to notify the Department of the name change, and that respondent's conduct is in violation of various Department rules and regulations and Directive 2262R (ALJ Ex. 1).

At a trial before me on July 8, 2015, the Department presented the testimony of Deputy Warden ("DW") Evans, and supervising investigator Michael Bardales, as well as documentary evidence. Respondent testified on his own behalf and presented documentary evidence. He

stipulated to all but one of petitioner's exhibits. I held the record open for the Department to submit a list pinpointing critical times on its audio submission of respondent's interview which was conducted pursuant to Mayoral Executive Order Number 16 ("MEO 16"), and for respondent to submit proof that he had filed his income tax returns. The record closed on July 17, 2015.

For the following reasons, I find that the charges that respondent was out of residence without notification, he failed to surrender his firearm when required, failed to comply with a supervisor's order, and failed to promptly notify the Department that he had legally changed his name, are sustained. The charge that respondent failed to pay personal income tax that he owed to the State of New York for the period January 1, 2006 through December 31, 2007, is not sustained. For the charges that have been sustained, I recommend that respondent be terminated from his employment.

ANALYSIS

The Department's Sick Leave Policy and Monitoring of Sick Leave Usage

Up until July 2015, DW Evans, who has been with the Department for 17 ½ years, was the Executive Officer of HMD. At trial, DW Evans gave an overview of the functioning of HMD. She explained that because uniformed members of the Department have unlimited sick time and at some point may be on indefinite sick leave, HMD closely monitors sick leave usage (Tr. 18-19). Sick leave regulations for uniformed members are incorporated in Department Directives ("DRs") Numbers 2262R, 2258R, and 7509 (Tr. 20; Pet. Exs. 6-8).

DW Evans testified that when sick, members must call the sick desk at HMD. An attendant will record the member's name, address and phone number, and inquire into the nature of the illness and whether the member wants to visit a doctor at HMD. A member's absence due to illness is deemed to be chronic when that member uses in excess of 11 sick days, or more than eight days within a rolling 12-month period. Members whose absences are deemed chronic shall not leave their residence except for authorized purposes such as to visit their personal physician, a hospital, or HMD. To leave home for an authorized purpose, a member must call HMD and inform someone at the sick desk that he/she needs to log out, and provide a log-out destination. That information will be entered into a computer which will generate a log-out number. Upon returning home, the member must call in and use the same log-out number to advise HMD of

his/her return home. Members who are confined to home are permitted recreation time in four-hour blocks, either between 8:00 a.m. and 12:00 noon or between 1:00 and 5:00 p.m., during which they may perform personal tasks, such as purchasing medication (Tr. 20-23; Pet. Ex. 6). But there is a process in place for members to seek an extension of their recreation hours in order to leave their home for reasons not authorized by the policy (Tr. 71-73).

In an effort to control absences, random home visits are conducted. The procedure for conducting home visits is outlined in DR 7509 (Pet. Ex. 8). The absence control officer, who is generally a captain, takes to a visit, a worksheet showing the sick day that the member has taken, the member's recreation hours, address and telephone number. The captain also records on a log, the address visited, the date of the visit, and the member's name and shield number. If at home at the time of the visit, the member must sign the form. If a member is not at home, the captain calls HMD to find out if the member has logged out. If the member has not logged out, the captain would write "in violation" in the space allotted for the member's signature, and complete the worksheet. The captain will then leave a note on the member's door or with someone who answers the bell, to advise the member of his visit and notify the member that he/she will be required to appear at HMD on the following business day to account for being out of residence. The notice also directs the member to bring the Department ID, shield, and firearm. A hearing is held at HMD for a first offense, in advance of which, the member must write a report to explain being out of residence without notification to or authorization from HMD (Tr. 23-26; Pet. Ex. 8). DW Evans stated that the penalties for being out of residence without authorization are progressive. The penalty for a first offense is a loss of four vacation days. For a second offense, the penalty is a 10-day suspension. For a subsequent offense, the member will be suspended for 30 days. After that, penalties are automatic without the benefit of a hearing (Tr. 26-27, 68-70).

Out of Residence

The Department charged that on April 20, 2014, at approximately 10:51 a.m., while respondent was on sick leave, he was out of his residence without authorization at the time that Captain John Bennett performed an absence control visit at his residence (ALJ Ex. 1). The evidence in support of the charge is largely undisputed.

The Department presented an "Absence Control Investigator's Record" and an "Investigator's Daily Worksheet" prepared by Captain John Bennett, which showed that on April 20, 2014, Captain Bennett visited the homes of 13 members. Respondent and one other member were found to be out of residence. The Worksheet showed the following: respondent's recreation hours were from 1:00 to 5:00 p.m.; the captain arrived at respondent's home at around 10:15 a.m. and left at around 10:27 a.m.; the captain rang the doorbell at respondent's apartment twice and someone named Tonya, who identified herself as respondent's sister, answered and informed him that respondent had "stepped out and you might see him downstairs;" and, the captain called and left respondent a voice message on his cell phone, after which he called HMD, logged respondent out at 10:23 a.m., obtained a log-out number, and logged him back in at 10:24 a.m. (Tr. 47-52, 84-85; Pet. Ex. 1 at 10-12, 16).

Respondent, who has been a uniformed member of the Department for approximately 27 years, testified that on April 20, 2014, he was out sick due to a migraine headache which became so intense that he went to the pharmacy to get medication (Tr. 138, 195-96). He did not deny that he was out of residence when Captain Bennett arrived or that he did not call the HMD sick desk to notify them that he was leaving his residence (Tr. 142, 190). He did not bother to call HMD because, according to him, HMD does not permit members to go out to do anything outside of recreation hours (Tr. 142-43).

Given respondent's admission, the charge that he was out of residence without authorization in violation of various Department rules and DR No. 2262R, is sustained.

Failure to Surrender Firearm
Disobeyed Order to Remain in HMD for Escort to Retrieve Firearm

Under the Department's Firearms Policy and Procedures, members of the Department may be authorized to carry firearms both on and off-duty. DR No. 4511R-A (eff. June 12, 2006). Department rules require members who are suspended to promptly surrender to the supervisor notifying them of the suspension, all Department property and all handguns that they own or possess. *See* Dep't Rule 3.05.040 (eff. Mar. 27, 2013); *see also* DR No. 7504R-A(III)(B)(3) (eff. Feb. 10, 2000) (Pet. Ex. 9). DR No. 4511R-A provides that a member's firearms privileges may be revoked and the firearm confiscated by any facility, unit or division, including HMD, and that confiscation of a member's firearm shall be conducted in an expeditious manner (Pet. Ex. 10 at

35). The Department charged that respondent failed to surrender his firearm as directed to, and as required by Department Rules and Regulations, and that he disobeyed DW Evans' order to remain in HMD until she arranged for someone to accompany him to retrieve his firearm (ALJ Ex. 1).

DW Evans stated that the notice which Captain Bennett left with respondent's sister contained specific instructions for respondent. Because the notice is not written in duplicate, a copy of the actual notice that was left for respondent was not available. However, the Department presented a facsimile of the notice that an absence control officer would leave for a member who is out of residence. It apprises the member of the date of the visit, and directs the member to report to HMD at a particular time on the following business day. It also directs the member to bring his shield, ID and all personal firearms (Tr. 39-43; Pet. Ex. 2).

Respondent testified that when he returned home from his trip to the pharmacy on April 20, 2014, his sister informed him that Captain Bennett had visited. When asked whether the captain had left him a notice, respondent replied, "No, I didn't see no paper" (Tr. 142-44). This denial directly contradicted his sworn statement at his MEO 16 interview on June 9, 2014, that "When I had came (sic) home, I had the notice and everything that I was supposed to report to . . ." (Pet. Ex. 5 at 3:58-4:10; Pet. Ex. 5A at 7). He testified both at trial and at his MEO 16 interview that when he returned home and learned of the captain's visit, he called Captain Bennett to let the captain know that he was back home, but the captain refused to return to respondent's home (Tr. 144-45; Pet. Ex. 5 at 4:12-4:31). In any event, he reported to HMD the following day. In a handwritten memo to DW Evans on April 21, 2014, respondent explained his reason for being out of residence (Pet. Ex. 3 at 7). DW Evans testified that she was already aware that this was respondent's fourth violation,[1] which would mean an automatic suspension. On her Notice of Summary Suspension from Duty, and Notification of Suspension Memo to respondent, DW Evans checked that respondent refused to sign for them (Pet. Ex. 3 at 6-7). She testified that she told respondent that she was suspending him for 30 days, and requested his shield, ID and firearm, which Captain Bennett's notice had directed him to bring in to HMD. Respondent surrendered his shield and ID, but informed her that his firearm was at another residence that he has in Pennsylvania. In a separate memo to DW Evans, respondent wrote:

[1] A Log-out/Log-in History for respondent confirmed that on three prior occasions, there were captains who logged out and logged back in for him (Pet. Ex. 1 at 15-16), while his Employee Performance Service Report (Form 22R) show three previous violations of DR No. 2262 (Pet. Ex. 11).

> The reason for not having my personal protection firearm on me at this moment is that it is at another resident (sic) that I have out of State.

(Tr. 27-28, 65-66; Pet. Ex. 3 at 5). In the memo, he provided the address and telephone number of his Pennsylvania residence.

DW Evans conceded that correction officers are not required to have their firearm on them 24 hours per day, seven days per week. But she maintained that respondent should have brought his firearm with him to HMD since Captain Bennett's notice directed him to do so (Tr. 64). DW Evans noted that on-duty firearms are monitored by the facility that issues them to members. But the issuance of a personal protection firearm is a privilege. Hence, the Department takes great pains to stress the importance of securing the firearm where it could be monitored by the member, so that it would not be used without authorization, or in an unsafe manner (Tr. 79-80).

DW Evans directed respondent to leave her office and wait by the front desk while she arranged for a Department official to escort him to Pennsylvania to retrieve his firearm. She started to make phone calls to get an escort, and when she went to the front desk to apprise respondent of what had been arranged, she learned that he had abruptly left. DW Evans called respondent's telephone numbers on file with the Department, but could not contact him (Tr. 33-37, 55-56, 73-74). The following day, on April 22, 2014, respondent notified HMD that his firearm was at his Brooklyn residence. DW Evans sent Captain Yasmine Hyppolite to respondent's residence, and the captain retrieved the firearm, completed a Property Receipt Form which she gave to respondent, and brought the firearm back to HMD (Tr. 37-38, 70-71; Pet. Ex. 1 at 8).

Respondent admitted telling DW Evans that he could not surrender his firearm because it was in Pennsylvania, at a residence where his daughters and their mother live, where he periodically stays, and where he keeps his firearm in a locked box that is out of sight. But he also claimed during cross-examination that he could not surrender it because he had "forgot" it (Tr. 130-31, 140, 191, 207-08). As he did during his MEO 16 interview, respondent acknowledged that in spite of DW Evans's instructions to him to wait by the front desk, he left "because they was (sic) talking about going to my daughters' mother (sic) house out in Pennsylvania, and she gets very irate and I didn't wanna cause a problem." Respondent said that

he explained to DW Evans that if they went to Pennsylvania, his daughters' mother would fight and argue and call the police, which would have been too stressful for him because he had previously experienced something similar (Tr. 145-47, 191-92; Pet. Ex. 5 at 36:46-38:00). But DW Evans "talked very violently to [him] in everything, and, and was very confrontational with [him]" (Tr. 192).

Respondent testified that after leaving HMD, he called his daughters' mother in Pennsylvania, and she told him that the firearm was not there. He then went to the safe at his Brooklyn residence and found his firearm. By then, it was after business hours so he could not call HMD. The following day, he went to HMD without the firearm because it "slipped [his] mind" to take it with him. He told DW Evans that he had located it and she had Captain Hyppolite accompany him to Brooklyn, where the captain confiscated the firearm, and gave him a receipt for it. Respondent stated that on his previous suspensions, his firearm was at the range, so he had nothing to surrender (Tr. 132-35, 140-42, 147, 210-11). He eventually admitted that when DW Evans asked for his personal firearm, he had no idea where it was, and conceded that he is obligated to surrender his firearm when suspended (Tr. 211-13, 221).

I found DW Evans to be a credible witness who demonstrated a clear and focused insight into Department rules and procedure, and demonstrated no bias against respondent. On the other hand, respondent's testimony that he did not see Captain Bennett's notice, which directed him to appear at HMD and to bring his shield ID and firearm, was not credible. In determining witness credibility, this tribunal has considered factors such as: "witness demeanor, 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." *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 4, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998). Here, respondent had previously admitted under oath at his MEO 16 interview to having seen the notice. Thus, his testimony at trial that he did not see Captain Bennett's notice was contradicted by his prior statements.

Accordingly, I find that respondent received Captain Bennett's notice and failed to follow the instructions contained therein when he showed up at HMD the day following Captain Bennett's visit to his home, without his firearm. Moreover, his failure to immediately surrender his firearm to DW Evans when notified that he had been suspended is in violation of Dep't Rule

3.05.040, and DR No. 7504R-A(III)(B)(3), which required respondent to promptly surrender his firearm upon suspension. This charge is therefore sustained.

Even though respondent was not charged with negligence in not knowing the exact location of his firearm, I found disingenuous, his claim that he thought that it was in Pennsylvania, but eventually located it in Brooklyn. It defied logic that respondent would not first look for his firearm in his Brooklyn apartment, before making an assumption that it was in Pennsylvania. Nevertheless, having told DW Evans that his firearm was in Pennsylvania, I find that he deliberately ignored her order to remain by the front desk while she arranged to have an escort accompany him to Pennsylvania to retrieve it.

To establish insubordination, an employer must prove that: (1) an order was communicated to the employee which the employee heard and understood to be an order; (2) the contents of the order were clear and unambiguous; and (3) the employee willfully refused to obey. *Dep't of Correction v. Reuter,* OATH Index Nos. 1497/12, 1499/12, 1707/12 at 10 (Sep't. 26, 2012); *Dep't of Correction v. Centano,* OATH Index No. 857/11 at 13 (June 6, 2001), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 11-92-SA (Nov. 30, 2011). An employee is obligated to obey the lawful order of a supervisor and grieve it at a later time through appropriate channels if he disagrees with it or feels it to be improper. *See Ferreri v. NYS Thruway Auth.*, 62 N.Y.2d 855, 856 (1984); *Dep't of Correction v. Velez,* OATH Index No. 1655/02 (Dec. 3, 2002), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 05-34-SA (Aug. 11, 2005). While there are limited exceptions[2] to the "obey now, grieve later" principle, none are applicable here.

There was no question that respondent understood DW Evans's instruction to him to remain by the front desk while she arranged for an escort to accompany him to Pennsylvania, to be an order with which he needed to comply. His excuse that he wanted to avoid confrontation with his daughters' mother because of her volatility was not credible. It made no sense that he would leave his personal firearm under her custody and control if she were that volatile**.** In fact, in light of his description of her behavior, it would have been in his best interest to comply with

[2] The exceptions include orders that are: (1) in violation of federal or state statutes (*Alper v. Gaffney*, 73 A.D.2d 644 (2d Dep't 1979)); (2) unconstitutional (*Hunt v. Bd. of Fire Commissioners of Massapequa Fire District,* 68 Misc.2d 261 (Sup. Ct. Nassau Co. 1971)); (3) beyond the agency's authority (*Ferreri*, 62 N.Y.2d at 857); or (4) an imminent threat to the health or safety of the employee or others (*Reisig v. Kirby*, 62 Misc.2d 632 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008 (2d Dep't 1969); *Health & Hospitals Corp. (Queens Health Network) v. Smith*, OATH Index No. 2019/08 at 4 (Oct. 17, 2008)).

DW Evans' order and wait for a Department escort to accompany him to Pennsylvania. Notably, respondent accused DW Evans of similar behavior.

In any event, the charge that respondent disobeyed a direct order from DW Evans to remain on HMD premises while she arranged for someone to escort him to Pennsylvania to retrieve his firearm, should be sustained.

Failure to Notify the Department of Name Change

Pursuant to section 3.05.090 of the Department's rules, "Members of the Department who change their residence, telephone number, or legally change their names shall promptly report the same to their Command and the Personnel Division." Dep't Rule 3.05.090 (eff. Mar. 27, 2013). The Department charged that respondent legally changed his name by court order in 1993, and failed to inform it of said change.

For eight years, Michael Bardales has been a supervising investigator in the Department's Investigation Division. In 2014, one of his investigators, Janet Summers, was assigned to conduct an investigation into respondent, after a referral from DW Evans for a determination of whether respondent was residing outside the five boroughs of New York, and for a possible firearms violation. Investigator Bardales first ran a Consolidated Lead Evaluation Reporting background check ("CLER" check) and a Department of Motor Vehicles ("DMV") check on respondent. The CLER check revealed that respondent had a different last name, and that he possibly owed in excess of $19,000 in federal taxes (Tr. 90-94, 101). A detailed report of Investigator's Summers's investigation into respondent was submitted into evidence as petitioner's exhibit 4. The report included a copy of a 1993 Order of the Civil Court of the City of New York, Kings County, authorizing respondent to assume the name of "Eric Lester Younger." Mr. Bardales testified that after respondent produced a copy of the Civil Court Order, Investigator Summers went to his work facility to check his personnel information, which is updated annually, for any indication that respondent had given notification of his name change. She found nothing to that effect. According to Investigator Summers's report, respondent stated that he attempted to notify the personnel office at his command but was instructed to go to Department headquarters. He never got around to it and did not think that failing to notify headquarters about his name change would cause any negative consequences (Tr. 94-97; Pet. Ex. 4 at 5, 12-17).

Mr. Bardales maintained that correction officers are registered peace officers whose firearms are registered with the State, so their personal information, including names and addresses must be accurate (Tr. 99).

Respondent admitted to changing his last name to his father's last name, which he was not given at birth due to his mother's status as a welfare recipient. But he maintained that he always wanted to carry his father's last name (Tr. 175). He insisted that in 1993, he went to the personnel department at the facility where he worked and presented papers to notify the Department of the change, but claimed that the person whom he encountered became argumentative, and "came at [him] violently" (Tr. 176, 202), causing him to back off, in an effort to avoid confrontation. He did not approach that person's supervisor for fear of being placed on "a list" (Tr. 202). Nor did he seek assistance from the Union, because "back then we didn't have nobody (sic) strong like that" to represent him (Tr. 203). Respondent testified that he knew of no other way to effect his name change with the Department because he did not know that the Department had a Human Resources Division, so he pursued it no further. This contradicted his sworn testimony at his MEO 16 interview that his facility directed him to "personnel downtown" (Tr. 199-200; Pet. Ex. 5 at 3:35-4:10; Pet. Ex. 5A t 68-69). Yet he changed his name to Eric Younger on his social security card. Also, the birth certificates of three of his children identify their father "Eric Younger." He secured a lease for an apartment for his girlfriend in New Jersey under the name of "Eric Younger," and likewise changed his name to "Eric Younger" with the Department of Motor Vehicles (Tr. 154-57, 176-78, 195-207; Pet. Ex. 4 at 19, 22).

The Department's rules require prompt reporting of a legal name change. Respondent's testimony that he took steps to notify the Department of his name change in 1993, was not credible. First, his claim that when he attempted to do so, he received a vitriolic response from someone in personnel was baffling, and made no sense. Moreover, it conflicted with his statements at the MEO 16 interview that the facility directed him to personnel downtown, which suggested at a minimum that he was treated cordially. But even if it were true that respondent made an initial attempt to notify the Department of his name change and encountered a particularly offensive worker, he made no further attempt to have his name change effected with the Department in the more than 20 years that elapsed after that initial attempt. His inaction is distinctly at odds with his testimony that he always wanted to carry his father's last name. Meanwhile, he changed his name on significant documents and represented himself as "Eric

Younger," when leasing an apartment in another state, thus maintaining two separate and distinct identities.

Respondent's failure to promptly notify the Department of his name change, and his willingness to let the Department continue to identify him by his previous name for more than 20 years after he had legally changed it, is in violation of the Department's rules. The charge should therefore be sustained.

Failure to Pay Taxes

Under section 3.40.050 of the Department's rules, its members may face disciplinary charges if they fail to pay their financial obligations. Dep't Rule 3.40.050 (eff. Mar. 27, 2013). The Department charged that respondent failed to pay personal income taxes owed to the State of New York, from on or around January 2006, through December 31, 2007.

Mr. Bardales testified that the CLER check on respondent revealed that he owed about $20,000.00 to the Internal Revenue Service ("IRS") (Tr. 102-03; Pet. Ex. 4 at 26). Respondent provided Investigator Summers with paperwork which he obtained from the IRS, showing an outstanding tax balance of over $14,000.00 owed for 2006 and 2007, cumulatively (Tr. 96, 98; Pet. Ex. 4 at 18). Investigator Summers's report indicated that when asked about taxes, respondent revealed that he had not filed income tax returns in about five to ten years (Tr. 108; Pet. Ex. 4 at 4). Mr. Bardales articulated that because theirs is a law enforcement agency, the failure of a member to meet financial obligations may implicate that member's integrity, as well as the propensity for corruption. He explained that members may be tempted with financial bribes by inmates who are seeking to get their hands on contraband (Tr. 98-99).

Respondent admitted that he had not filed income tax returns since at least 2007. He asserted that he filed tax returns for 2006, but seemed unsure. He claimed that he sometimes files his returns in bulk, and acknowledged that he procrastinates. He testified that he has never filed tax returns on an annual basis, and that at one point, had owed over $30,000.00 in taxes, which he paid off in installments over a period of time. For the years that he had not filed taxes, respondent felt that he did not owe money because he had not worked much overtime. However, he discovered that that was not the case. Prior to this trial, respondent had a third party (Tax City) prepare his delinquent returns and learned that he owes approximately $8,000.00 in federal

taxes. He conceded that he did not provide the Department with copies of his delinquent returns even though they had been requested. At trial, respondent testified as follows:

> Q: And as you sit here today, have you filed your income tax returns?
> A: Yes, I have filed it.

(Tr. 149-50). Respondent submitted copies of his 2007 returns for Federal and State taxes, dated June 18, 2015, in support of his testimony (Resp. Ex. A). Both were unsigned, but they indicated that respondent owed $933.00 in Federal taxes, while he overpaid $335.00 in State taxes. Respondent stated that he could not recall the date of filing because he had given it to his "tax man" and had collected his papers the week preceding the trial. But he again posited that his returns had been filed. He initially claimed that he issued a check to pay for the amount owed, but eventually admitted that he did not, and that his tax debts were still outstanding. In spite of his sworn testimony that he had filed his income tax returns before this trial, documentation which he provided post-trial, and which I attached as a supplement to respondent's exhibit A, established that the IRS received respondent's returns for 2007 through 2014, on July 17, 2015, well after completion of the trial (Tr. 148-50, 162-64, 169, 215-16).

Regarding the IRS document which he provided the Department, showing a tax debt of over $14,000.00, respondent alleged that someone had filed income tax returns under his name, causing the outstanding tax debt. He found out when he was notified by the IRS, but he could not pinpoint exactly when he received that notification (Tr. 151-53, 165-66).

Even though the Department charged respondent with failing to pay personal income taxes owed to the State of New York for the two-year period from January 1, 2006 to December 31, 2007, respondent testified, and his documentary evidence supported, that he was delinquent with both Federal and New York State taxes for seven years, from 2007 through 2014. The Department did not request it, and I decline to conform the charge to the evidence where to do so might prejudice respondent. *See Dep't of Correction v. Patterson*, OATH Index No. 1884/02 (Feb. 25, 2003), *aff'd in part, rev'd in part,* Comm'r Decision (May 9, 2003), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 05-09-M (Mar. 10, 2005) (specification conformed to the credible evidence at trial); *Dep't of Correction v. Sostre-Valentin*, OATH Index No. 1923/99 (Sept. 22, 1999), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 00-94-SA (Nov. 14, 2000) (appropriate to conform charge to correspond to the proof since respondent and all other

witnesses were well aware of the incident charged); *Dep't of Correction v. Bovell,* OATH Index No. 1910/99 at 2, n.1 (Aug. 13, 1999) (respondent not prejudiced by conforming charge to proof presented at hearing when given opportunity to defend substantive charge). Thus, I am left with the charge, as written, which covers respondent's New York State tax returns for the calendar years of 2006 and 2007.

With respect to his 2006 tax return (January 1 to December 31, 2006), respondent presented no documentary proof that he filed returns and/or owed no State taxes for that year, and his testimony was equivocal. First he declared that he filed returns for 2006. Then he was unsure. I am not inclined to give respondent the benefit of the doubt given his proclivity for distorting the truth, especially following his testimony that he had filed his delinquent returns prior to the trial when the proof established otherwise. Notwithstanding, in a disciplinary proceeding, petitioner bears the burden of proof by a preponderance of the credible evidence. *Foran v. Murphy*, 73 Misc. 2d 486, 489 (Sup. Ct. N.Y. Co. 1973); *Antinore v. State*, 79 Misc. 2d 8, 12 (Sup. Ct. Monroe Co. 1974), *rev'd on other grounds*, 49 A.D.2d 6 (4th Dep't 1975), *aff'd,* 40 N.Y.2d 921 (1976); *Osoba v. Bd. of Education*, NYC. Civ. Serv. Comm'n Item No. CD 92-127, at 3 (Nov. 19, 1992), *aff'g*, OATH Index No. 237/92 (Feb. 28, 1992). A preponderance has been defined as the burden of persuading the "trier of fact to believe that the existence of a fact is more probable than its non-existence." *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 622 (1993); *See also Dep't of Correction v. Oudkerk,* OATH Index No. 1600/14 at 4 (May 19, 2014); *Dep't of Correction v. Tavarez,* OATH Index No. 1273/02 at 5 (Nov. 21, 2002). Petitioner presented no evidence to establish that respondent owed taxes to New York State for the calendar year that ended on December 31, 2006.

For the calendar year that ended on December 31, 2007, respondent presented evidence that his State return for 2007 (January 1 to December 31, 2007) was prepared, but there was nothing to indicate that it had been filed. Nonetheless, the return, as prepared, showed that respondent did not owe money to the State, as alleged. Furthermore, the summary data on the return reflected respondent's taxable earnings and the State and Local withholdings as shown on his W-2 form, a copy of which was superimposed on a portion of his return. Petitioner presented nothing to refute the calculations on respondent's State tax returns for 2007.

Thus, while it is clear that respondent failed to file federal and State tax returns for approximately seven years, there is no proof that he owed or owes money to the State of New York. Therefore, the charge that he owed money to the State of New York for January 1, 2006 through December 31, 2007, should be dismissed.

FINDINGS AND CONCLUSIONS

1) Petitioner established that respondent was out of residence on April 20, 2014, between 10:15 and 10:27 a.m., in violation of Department Directive No. 2262R.

2) Petitioner proved that on April 21, 2014, respondent failed to surrender his firearm as required by Department rules, when placed on suspension.

3) Respondent violated Department rules when he failed to comply with the order of his ADW to remain in HMD, while she located someone to escort him to another Pennsylvania to retrieve his firearm.

4) Respondent violated Department rules when, for more than 20 years, he failed to notify it that he had legally changed his last name.

5) Petitioner did not demonstrate that respondent owed income taxes to the State of New York for the period January 1, 2006 through December 31, 2007, which he failed to pay.

RECOMMENDATION

Sections 3.20.030 and 3.20.300 of the Department's Rules and Regulations authorize the Commissioner to impose a penalty for an employee's failure to abide by the provisions of any order and for conduct that threatens good order and discipline. Dep't Rules 3.20.030, 3.20.300. In order to recommend an appropriate penalty, I reviewed respondent's employee performance service report (Form 22R) (Pet. Ex. 11).

Respondent was appointed to the Department since March 17, 1988. From 1995 to 2006, respondent accepted the following penalties for sick leave and time and leave violations. In 1995, respondent accepted a three-day penalty for operating a Department vehicle without a valid driver's license and causing over $4,000 in damages to it. In 1996, he received five

suspension days plus the loss of six vacation days for being out of residence without HMD authorization. Also in 1996, he received five suspension days plus the loss of six vacation days for twelve occasions of lateness. In 1997, respondent suffered the loss of three vacation days for failing to timely call out sick. In 1999, respondent lost six vacation days for 18 occasions of lateness. Also in 1999, respondent received a 20-day penalty for use of force. In 2003, respondent received a penalty of 10 vacation days and was placed on limited probation for one year, for false reporting. In 2006, respondent was suspended for 10 days for being out of residence without HMD approval.

Respondent has been found guilty of once again being out-of-residence without HMD authorization, failing to surrender his personal firearm when requested, failing to comply with a legitimate order from his supervisor, and failing to notify the Department of his legal name change for over 20 years. For the current out-of-residence charge, the Department suspended respondent pre-trial for 30-days. It now seeks a recommendation of termination for the charges, collectively.

Respondent implored that I consider his years with the Department in mitigation, as well as the fact that he has not been charged with any infractions of the Department's rules since 2006. In spite of respondent's lengthy record with the Department, and the absence of disciplinary charges for approximately nine years, I find termination to be appropriate.

In arriving at this penalty, I considered not only respondent's tenure with the Department, but the principles of progressive discipline, which are intended to modify employee behavior through increasing penalties for repeated or similar misconduct, and the nature of respondent's job. A fair penalty must take into account the particular circumstances of the charges sustained and individual mitigating factors, where appropriate. *Dep't of Correction v. Phoenix*, OATH Index No. 1543/08 at 10 (Apr. 14, 2008), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 08-55-SA (Oct. 30, 2008); *Admin. for Children's Services v. Goodman*, OATH Index Nos. 986/05 & 1082/05 at 15 (Aug. 12, 2005) (respondent's lack of a prior disciplinary record is a mitigating factor).

This is respondent's third incidence of being out of residence without authorization. Penalties for out-of-residence violations have ranged from five to 30-day suspensions. *Dep't of Correction v. Patrick*, OATH Index No. 871/02 (Mar. 19, 2002) (10-day suspension for officer who was out of residence without authorization and had minor disciplinary history); *Dep't of*

Correction v. Lugo, OATH Index No. 126/99 (Nov. 2, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 00-006 (Jan. 24, 2000) (30-day suspension for second determination that respondent was out of residence during sick leave); *Dep't of Correction v. Rice*, OATH Index No. 1467/97 (July 21, 1997) (single out of residence finding with showing of mitigating circumstances commanded five-day suspension); *Dep't of Correction v. Brookins*, OATH Index No. 193/97 (Apr. 21, 1997) (15-day suspension for single out of residence finding, but with findings in separate incident that respondent was disrespectful to supervisor); *Dep't of Correction v. Winkle*, OATH Index No. 377/88 (Dec. 21, 1988) (10-day suspension for violation of sick leave policy in view of respondent's extensive use of sick leave during preceding year).

Respondent was found guilty of insubordination when he failed to comply with the instructions left by Captain Bennett and thus, did not immediately surrender his firearm as he was required to do upon being notified of his suspension. He compounded this failure to follow Captain Bennett's instructions by blatantly distorting the truth when he testified before this tribunal, in direct contradiction to his MEO 16 interview, that he did not receive Captain Bennett's notice. Further, he flouted DW Evans' authority when he failed to comply with her directive to remain in HMD, and left without explanation to anyone.

The penalties for insubordination range from five days' suspension to termination, depending upon the nature of the conduct, the context in which the conduct occurred, the employee's length of tenure, and disciplinary record. *See, e.g.*, *Dep't of Correction v. Joseph*, OATH Index No. 196/12 (Apr. 5, 2012), *modified on penalty*, Comm'r Dec. (Aug. 7, 2013), *aff'd*, NYC Civ. Serv. Comm'n Case No. 35608 (Mar. 12, 2014) (20-day suspension for officer with no record who refused orders to relinquish overtime post and refused orders in a profane manner to open and close security doors); *Dep't of Correction v. Fernandez*, OATH Index No. 1219/11 (Apr. 15, 2011) (20-day suspension for a Captain with one prior incident of discipline, for two incidents of insubordination); *Dep't of Correction v. Bee*, OATH Index No. 291/06 (May 19, 2006) (five-day suspension for officer with no record who failed to provide timely oral report of incident where fellow officer was injured); *Dep't of Correction v. Floyd*, OATH Index No. 1766/04 (Mar. 8, 2005) (five-day suspension for officer with no disciplinary record who disobeyed order to participate in a search); *Dep't of Correction v. Buford*, OATH Index No. 388/02 (June 17, 2002), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 03-49-SA (June 12, 2003) (10-day suspension for veteran officer with one prior penalty for unrelated misconduct, when he

failed to obey an order to assume post, failed to submit an ordered report, and used profanity towards and threatened a supervisor); *Dep't of Correction v. Steward,* OATH Index No. 1915/01 (Jan. 9, 2002), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 03-32-SA (Apr. 15, 2003) (seven-day suspension for officer with no prior record who failed to follow lawful order to assume post, and was discourteous to supervisor); *Dep't of Correction v. Aiken*, OATH Index No. 797/95 (Mar. 8, 1995) (five-day suspension for nine-year veteran with no prior record who was disrespectful and failed to obey order to engage in a search); *Dep't of Correction v. Bowens*, OATH Index No. 172/91 (Dec. 10, 1990), *aff'd, sub nom. Bowen v. Sielaff*, 186 A.D.2d 494 (1st Dep't 1992) (officer with prior discipline and four-year tenure terminated where he was disrespectful toward supervisors on three occasions, failed to obey an order on two occasions, submitted a false report, and failed to properly supervise an inmate).

Respondent's failure to notify the Department of his name change for over 20 years was disturbing to say the least, especially given the fervor with which he expressed his desire to carry his father's name. For an officer whose job impels conduct that is beyond reproach, this was no mere oversight. His regular pay checks and annual W-2 forms were constant reminders that he had not notified the Department of the change. Thus, I find respondent's conduct to be deliberately deceptive.

Where correction officers have been found to have engaged in fraud or deception, this tribunal has recommended termination even where the respondent has a spotless disciplinary record because "this type of dishonesty is inimical to service in law enforcement." *Dep't of Correction v. Blanc,* OATH Index No. 2571/11 at 38 (Feb. 2, 2012), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 12-40-SA (Aug. 10, 2012) (citing to *Dep't of Correction v. Bivens*, OATH Index No. 2088/10 at 9 (Aug. 20, 2010)).

The very nature of respondent's job demands honesty and integrity. But respondent appears to be saddled with a chronic compulsion to engage in falsehoods. Moreover, in spite of respondent's lengthy tenure with the Department, he demonstrated a wanton disregard for its rules which his disciplinary record exhibited, and which the proven charges continue to exhibit. The Department needs to be assured that its members, unlike the inmates that they are charged with securing, will follow rules.

Accordingly, I find that the sustained charges in the aggregate, warrant respondent's termination from employment, and I so recommend. *See Dep't of Correction v. Johnson,* OATH

Index No. 514/02 (May 30, 2002), *modified on penalty*, Comm'r Dec. (July 17, 2002), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 03-39-SA (Apr. 11, 2003) (ALJ recommended 60-day penalty for respondent who was found to be out of residence without authorization, failed to log in/out with HMD even though he did not reside at the address in the Department's records; failed to notify the Department that he no longer resided at that address; and was AWOL. Commissioner increased the penalty to termination).

Ingrid M. Addison
Administrative Law Judge

August 21, 2015

SUBMITTED TO:

JOSEPH PONTE
Commissioner

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