

Dep't of Education v. Thompson

OATH Index No. 2135/15 (Oct. 7, 2015)

Quality assurance specialist assigned to manage school bus routes charged with incompetence. Administrative law judge found proof sufficient to prove that employee was incompetent in that he was unable to perform the duties required of his job title. Termination of employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF EDUCATION
Petitioner
- against -
ROBERT THOMPSON
Respondent

REPORT AND RECOMMENDATION

JOHN B. SPOONER, *Administrative Law Judge*

This employee disciplinary proceeding was referred by petitioner, the Department of Education, pursuant to section 75 of the Civil Service Law. The petition alleges that respondent Robert Thompson, a quality assurance specialist (QAS), was incompetent and insubordinate in improperly and belatedly modifying bus routes and failing to communicate changes to school and bus personnel.

The hearing was held on September 17 and 18, 2015. Petitioner presented the testimony of a supervisor and a human resources director. Respondent testified on his behalf, admitting the factual allegations in the charges but insisting that his mistakes did not constitute incompetence.

I find the proof sufficient to sustain the charges that respondent is incompetent and recommend that respondent's employment be terminated.

ANALYSIS

Respondent has been employed with the Department since 1997. From 1997 to 2004, he was an aide in the Office of Pupil Transportation, answering phones, providing parents and schools with bussing information, and planning bus routes. In 2004, respondent was appointed

to the title of QAS for pupil transportation. According to the tasks and standards of this title (Pet. Ex. 18), QAS's perform tasks including routing buses, establishing bus schedules, inspecting bus routes, and investigating complaints about bus service. When respondent was first appointed to the title, he was assigned to inspect buses for safety. In 2007, respondent had his driver's license revoked based upon a driving while intoxicated conviction. Because he was required to drive to his bus inspection assignments, he was reassigned to process bussing for students residing in shelters. In April 2012, respondent was transferred again to work as a router in the Office of Pupil Transportation under Manhattan Borough Director Richard Scarpa. The charges here concern respondent's work performance under Mr. Scarpa from 2014 to date.

Mr. Scarpa indicated that Department QAS's are assigned to be field inspectors and bus routers (Tr. 16). There are 22 routers in his office who manage the bus routes in the five City boroughs (Tr. 17). The office supplies City bus services mandated by law to pupils living in the City who attend public and private schools (Tr. 14). Routers process requests from schools to create new stops and constantly review existing stops and routes for compliance with the bussing guidelines and for efficiency. Routers must respond to complaints from schools or bus companies and promptly and accurately communicate any bus route changes to both the schools and to the bus companies (Tr. 18).

Department rules mandate certain limits on the school bus routes. The routes must not require any pupil to be on a bus for longer than 90 minutes (Tr. 37). The bus schedule should always get pupils to their schools at least five minutes and no more than 30 minutes before classes start and should not leave school less than five minutes after classes end (Tr. 45). All changes in the bus stops or bus routes must be communicated immediately by e-mail to the affected schools and to the bus dispatchers for the affected bus companies (Tr. 52-53).

In performing their routing duties, routers use two software applications. The first, developed by the Department, is called GenEd-I. This software assists in creating new bus stops and reviewing old stops. Another commercial software application called Edulog stores all existing bus routes, provides maps of routes, and shares this information over the internet with the schools and the bus companies (Tr. 19-22). Edulog also provides estimated stop times based upon distances between the stops (Tr. 23). Routers are expected to review the Edulog times to ensure that they are reasonably accurate based upon the time of day and the anticipated traffic

(Tr. 24). Routers are encouraged to make field visits to assist them in analyzing reasonable times for various bus routes (Tr. 24).

Mr. Scarpa testified as to how respondent came to work for him. In April 2012, Mr. Scarpa attended a meeting where the unit directors were asked whether they would accept respondent as an employee (Tr. 30). The director of the inspection unit, Ms. Rocca, indicated that she would not accept respondent (Tr. 134). Because Mr. Scarpa liked respondent and wanted him to succeed, he agreed to accept respondent as a router and assigned him as a router for the Manhattan general education bus routes (Tr. 30-31). Immediately, Mr. Scarpa noticed that respondent was a “slow learner” who did not pick up instructions easily (Tr. 31). Nonetheless, Mr. Scarpa decided that he would give respondent two years to learn the router job (Tr. 32).

Respondent, like other routers, was trained by working with and watching more experienced routers as they added and subtracted stops from bus routes and created new ones (Tr. 26, 34). About a year after respondent was placed in the unit, another employee, Mr. Libasci, a former barber, was hired and rapidly became adept at managing the router assignments and assisted respondent with completing his work (Tr. 32-33).

Mr. Scarpa indicated that there were many problems with respondent’s work from the beginning. Mr. Scarpa sent respondent an e-mail (Pet. Ex. 3) in November 2013 noting that his work performance was unsatisfactory in that he failed to complete routing assignments, tried to place stops on routes that did not exist, created routes which were beyond the 90-minute route limit, and created routes where sequential stops had identical pick-up times (Tr. 37). Mr. Scarpa suspected that Mr. Libasci reviewed most of respondent’s work and prevented some mistakes from being made (Tr. 32). Beginning in 2013, Mr. Scarpa offered respondent additional training but respondent expressed no interest (Tr. 38).

The 12 specifications in the charges here allege mistakes made by respondent beginning in approximately July 2014, some two years after respondent joined the routing unit. The charges concern three fundamental types of errors: (1) failing to complete routing assignments on time, (2) failing to add or adjust bus stops within the office guidelines, and (3) failing to communicate bus stop changes to schools and bus companies. Most of the mistakes are described in either contemporary e-mails or in memos from Mr. Scarpa to respondent.

As alleged in specification 11, on July 16, 2014, respondent spent more than three days to delete two summer routes, a simple assignment. When Mr. Scarpa reviewed respondent's work, he found that a stop had been improperly eliminated with a student still on it (Tr. 39-42; Pet. Ex. 4). Mr. Scarpa noted that this mistake might have resulted in a student waiting alone on the street for a bus that would never come (Tr. 41).

On approximately July 22, 2014, Mr. Scarpa gave respondent instructions, to "eliminate stops that had no riders and to adjust the times for the schools whose session times have changed." Respondent did not complete the assignment, which should have taken no more than a week, until over two weeks later, on August 8. When Mr. Scarpa reviewed respondent's routing work for this period, he found that five buses would arrive after school started, seven buses would arrive more than 30 minutes before school started, one bus would drop off a pupil before school was dismissed, and one bus route was more than two hours long. Mr. Scarpa noted that all of these routing problems were in violation of the Department routing policy and "unacceptable" (Tr. 42-46; Pet. Ex. 5).

Due to respondent's failure to complete a variance assignment, involving bussing requests from pupils residing in a City shelter (Tr. 18), and other errors, beginning on August 14, 2014, Mr. Scarpa informed respondent by e-mail (Pet. Ex. 6) that he must present all his routing plans or modifications, "no matter how minor," to Mr. Scarpa for his review (Tr. 47).

On September 8, 2014, Mr. Scarpa received a complaint at around 8:00 a.m. from a bus company dispatcher indicating that two new stops had been added to a route without notifying the bus company. The driver failed to pick up a student at the new stop and the parent was upset and complained. When Mr. Scarpa asked respondent whether he had failed to notify the bus company of the new stop, respondent did not reply directly, saying that the dispatcher called him and "took care of the problem." Mr. Scarpa wrote that, based upon this conversation, he presumed that respondent failed to notify the bus company of the stop change and stated that this was "not acceptable." Respondent evidently did not reply (Tr. 50-54; Pet. Ex. 7). On September 12, 2014, a school employee again wrote to Mr. Scarpa to complain that respondent made a change to a bus route for the following day without notifying the school (Pet. Ex. 9).

In September 2014 respondent failed to timely or correctly complete "extended day routing." According to Mr. Scarpa, extended day routing is later bussing for students who stay

up to 37 minutes later for supplemental education (Tr. 60). Mr. Scarpa testified that he wrote a memo (Pet. Ex. 11) to respondent on September 16, 2014, recounting errors on the “extended day routing” in that respondent had placed stops on routes which did not exist (Tr. 61). Respondent also made errors on ten other routes, including routes longer than the allowable 90-minute limit and routes with multiple stops with the same pick-up times. Mr. Scarpa noted that respondent had repeatedly declined further training. At the end of the memo, Mr. Scarpa indicated that he was scheduling respondent for mandatory training with another router from 2:00 p.m. to 4:00 p.m. on Tuesdays and Thursdays. He noted that “further disciplinary action may be required.” Respondent refused to sign to confirm receipt of the memo.

On September 11, 2014, a parent wrote an e-mail (Pet. Ex. 10) to Mr. Scarpa complaining about the addition of a remote bus stop on a bus route on the Upper East Side which made the pupils 30 to 60 minutes late for school. Mr. Scarpa replied, copying respondent and stating that the route was being reviewed. Four days later, the parent complained again stating that nothing had been done to remedy the route problem and stating he had been taking his daughter to school so she could get there on time. Mr. Scarpa wrote that, when he asked respondent about the issue, respondent stated that he did not understand why he was reviewing the route (Tr. 57-60).

Mr. Scarpa testified that on September 16, 2014, he sent respondent an e-mail asking him to complete three capping requests, which involve transferring students to another school when the current school reaches its capacity. Mr. Scarpa indicated this task should have taken no more than two days. When Mr. Scarpa asked respondent about this assignment some three weeks later, on October 22, respondent said that he had not started it (Tr. 65-67).

On October 9, 2014, respondent was directed to correct a number of bus stops that did not meet the unit guidelines, including bus arrivals which were too early, departures which were too late, bus stops which were redundant, and bus stops on the same route with the same times. Mr. Scarpa indicated that this assignment should have taken no more than a couple of hours, but took respondent over a day and still needed to be returned to him multiple times for correction (Tr. 69).

Mr. Scarpa testified that, on October 20, 2014, he asked respondent to recalculate stops for the Hunter College Elementary School and assign the stops to a new route. Mr. Scarpa indicated this assignment should have taken a couple of hours. When he reviewed the work

respondent had done two days later, he found that no stop had been deleted from the old route and that a new stop had been added to the new route without adjusting the times of the following stops. Mr. Scarpa had to ask respondent several more times about the route before it was completed (Tr. 70-71). Mr. Scarpa sent respondent a memo (Pet. Ex. 12) commemorating these errors and noting that his mistakes were “completely unacceptable.” Respondent refused to sign the memo.

Mr. Scarpa testified that he was informed by the router who was assigned to train respondent on Tuesdays and Thursdays, that respondent did not attend training sessions in December 2014 or January 2015. When Mr. Scarpa asked respondent about this, respondent admitted he had skipped the training due to the requirement that he perform field assignments (Tr. 75). According to Mr. Scarpa, routers are not asked to do more than two to three field assignments per week and these could have been scheduled by respondent at times other than his two scheduled training times on Tuesday and Thursday afternoons (Tr. 76-77).

Mr. Scarpa testified that, on January 29, 2015, respondent made a field visit to a school and reported back to Mr. Scarpa that the school had no bus route problems. In fact, Mr. Scarpa was later informed that the school had a problem with a bus missing stops and that respondent had been told of this problem during his visit. Respondent admitted to Mr. Scarpa that he was informed of the problem and failed to report it (Tr. 80-82). The situation was commemorated in an e-mail exchange (Pet. Ex. 16) between respondent and Mr. Scarpa.

In late 2014 and January 2015, respondent improperly handled bussing requests for students living in homeless shelters. Mr. Scarpa testified that on January 29, 2015, he assigned respondent to analyze four requests (Pet. Ex. 14) for homeless students to use nearby bus routes. Respondent reviewed the requests and told Mr. Scarpa that there were no bus stops that any of the four students could use. Consequently the four students would have to take public transportation. When the requests were assigned to Mr. Libasci, he located nearby bus routes for all four students (Tr. 78-79).

On March 19, 2015, Mr. Scarpa met with respondent and his union representative to discuss his job performance. They discussed respondent’s failure to attend training in December 2014, and January 2015, his failure to report the bus route problem, and his failure to process the variance requests. On March 25, 2015, Mr. Scarpa sent respondent yet another memo (Pet. Ex.

13) recounting the March 19, 2015, meeting. Mr. Scarpa again told respondent that his errors may lead to disciplinary action and termination. Respondent refused to sign for receipt of the memo (Tr. 82-84).

Petitioner presented proof that, following service of the charges in March 2015, respondent's mistakes and poor work performance have continued. In July 2015, respondent was assigned to find alternatives to existing bus stops. He later delivered to Mr. Scarpa three school routes and five alternate bus stops. One of the alternative stops respondent provided did not exist. A second stop was not close enough to be an alternative. When respondent tried to again provide an alternate stop for the first error, he identified a stop that was not on the school's route and was impractical because it was two crosstown avenues away from the route (Tr. 89-90; Pet. Ex. 17).

On September 3, 2015, a school representative complained to respondent by e-mail (Pet. Ex. 17) that stops which had been requested to be added in late July were still not on the bus routes.

Also on September 3, 2015, Mr. Scarpa assigned respondent to process a request for new stops from the Epiphany School. According to an e-mail thread (Pet. Ex. 17), respondent told the school on September 3 that he would add the new stops. As of September 8, 2015, the stops had still not been added, even though respondent told the school representative that they had. On September 8, the company representative complained to Mr. Scarpa that on multiple occasions respondent had asked him to repeat explanations and e-mail information about routing changes that had been explained before. Respondent assured him that changes would be made, but nothing was done.

On September 4, 2015, a bus company dispatcher complained to respondent by e-mail (Pet. Ex. 17) that a route had been deleted and a new school and additional stops added without notifying the bus company (Tr. 114). On September 4, 2015, the same dispatcher complained by e-mail (Pet. Ex. 17) that changes respondent told her had been made were not made because they did not appear in the database (Tr. 115-16).

On September 8, 2015, a Spence School representative complained by e-mail that respondent failed to re-route stops where the last stop was more than 90 minutes after the route began, although he had been working on the error since sometime in August. Later that day,

after respondent sent a fax supposedly demonstrating route corrections, the representative complained again to respondent that “none of the routes you faxed me are ours” (Tr. 118).

On September 9, 2015, respondent sent an e-mail (Pet. Ex. 17) to a bus company adding several bus stops to a route, effective the following day. The company representative complained to Mr. Scarpa that this was insufficient notice to make this change (Tr. 120).

On September 11, 2015, according to an e-mail thread (Pet. Ex. 17) between Mr. Scarpa, the bus company, the school, and a parent, respondent added a stop and sent the route information to the wrong garage location. This resulted in two students being denied bus service and missing a day of school (Tr. 122-23).

On September 15, 2015, respondent was asked to add a stop in Lower Manhattan for the Browning School. According to an e-mail (Pet. Ex. 17) from Mr. Scarpa, respondent added the stop to the middle of a bus route on the Upper East Side, requiring the bus to go all the way from East 62nd Street downtown to Varick Street and then back uptown to a stop on East 72nd Street at rush hour, adding almost 90 minutes to the length of the bus route and making the final stop at 5:30 p.m. (Tr. 123). Mr. Scarpa referred to this routing as “so ridiculous that I found it hard to believe it was even done” (Tr. 123).

Mr. Scarpa indicated respondent was generally unable to perform any part of the router job well, that respondent could do no routing work independently, and that retraining had brought no improvement to respondent’s job performance (Tr. 131-32). After being with the unit for nearly three years, respondent still did not seem to understand the basic procedure for modifying stops or creating bus routes (Tr. 132). Mr. Scarpa estimated that 80 per cent of his work contained mistakes (Tr. 145-46). Other routers, such as Mr. Libasci, made approximately two mistakes per year, whereas respondent made mistakes in most of the assignments he was given (Tr. 148). Even though respondent worked in proximity to Mr. Scarpa, he does not ask him for help (Tr. 131). Several bus companies and school representatives have complained about respondent’s mistakes and asked not to work with him (Tr. 85). Correcting respondent’s repeated errors has caused other routers to neglect their own work and forced Mr. Scarpa to have some other routers work overtime and on weekends. He estimated that the overtime and extra work has cost the Department an estimated \$140,000 per year (Tr. 132-34).

In his testimony, respondent did not deny any of the mistakes described at length by Mr. Scarpa. He testified that he began working for the Department inspecting school buses and working on bus routes. In 2004 he was appointed as a QAS and assigned to field inspections (Tr. 164-65). After that unit “broke up,” he was briefly reassigned to the administrative department to work on variances (Tr. 166) and then, in 2012, took a position as a router with Mr. Scarpa (Tr. 166-67). According to Mr. Scarpa, the scandal in the inspection unit occurred well before respondent left the unit due to his driver’s license suspension (Tr. 137), a statement that respondent did not dispute. Respondent insisted that, as of 2012, he had “no training in [routing] whatsoever” (Tr. 167). Yet he admitted that from 1990 to 2004 part of his job was planning bus routes (Tr. 178).

Respondent admitted that he reviewed most of his work with Mr. Libasci until Mr. Libasci left the unit in August 2015 (Tr. 184). In his defense, respondent testified that he created “thousands” of stops per year (Tr. 169), that he occasionally made mistakes and corrected them by contacting the school and the bus company (Tr. 169), that he regularly asked Mr. Libasci and other routers for help (Tr. 170), and that he did not recall the percentage of mistakes he himself made. He insisted that other routers also made mistakes (Tr. 169). He stated that he was unaware that his requests for assistance from other routers interfered with their work.

The only factual allegation contested by respondent was whether he attended any of the training sessions during December 2014 and January 2015. Respondent stated that he did not attend much of the training in December 2014 and January 2015, but insisted that he went to “some” training in December 2014 and “most of them” in January 2015 (Tr. 173).

As to respondent’s training attendance, Mr. Scarpa testified that respondent failed to attend any sessions in December 2014 and January 2015. Mr. Scarpa further stated that respondent admitted not attending the training when he was asked about it. Respondent’s testimony that he attended some of the sessions was uncorroborated and, given respondent’s considerable motive to avoid being disciplined, was not credible. I therefore find that, after being ordered in September 2014 by Mr. Scarpa to attend training two afternoons per week, respondent failed to attend training sessions in December 2014 and January 2015, as alleged in specification 3. This was insubordinate and in violation of respondent’s obligation to obey the orders of his supervisor.

Based upon the undisputed testimony of both Mr. Scarpa and respondent, I also find that respondent committed all of the errors charged in the first 11 specifications. These errors included repeatedly failing to complete or even begin assigned tasks on time, improperly removing necessary stops, adding stops without adjusting the other times on the route and without providing timely notice to the schools and the bus companies, failing to find bus stops for shelter students, repeatedly ignoring the 90-minute limit for bus routes, failing to communicate bus route complaints to his supervisor, and creating bus routes which arrived after the start of school and left before the end of school.

Specification 12 alleges that, between July 2014 and January 2015, respondent committed repeated mistakes which constituted a failure to carry out his duties and that he failed to seek assistance or retraining to avoid the mistakes. The specification further alleges that these mistakes “jeopardized the welfare and/or safety of DOE students” and “wasted DOE resources, assets, and/or finances.” Mr. Scarpa’s testimony was sufficient to establish this specification.

Department rules generally provide that employees may be disciplined if they are incompetent or inefficient in performance of their duties. Rules and Regulations Governing Non-Pedagogical Administrative Employees § 9.18. Pursuant to past decisions of this tribunal, incompetence under Civil Service Law section 75 is defined as the inability to perform one’s job as well as the persistent unwillingness or failure to do the work. *See Transit Auth. v. Kalligeros*, OATH Index No. 475/14 at 10 (Dec. 18, 2013) (staff analyst found incompetent due to repeated mistakes in reviewing and processing budget requisitions); *Transit Authority v. Wong*, OATH Index No. 1866/08 at 13-14 (Aug. 28, 2008) (computer specialist found incompetent due to inability to perform basic computer-related tasks); *Employees Retirement System v. Myrick*, OATH Index No. 505/95 at 31 (Apr. 11, 1995) (computer associate found guilty of multiple charges of incompetence and insubordination). A determination of incompetence is generally measured by whether the employee is able to meet the minimally acceptable threshold requirements of the duties of his title. *Taxi & Limousine Comm’n v. Kowal*, OATH Index No. 1614/10 at 7 (Mar. 16, 2010), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 11-26-A (May 4, 2011); *Myrick*, OATH Index No. 505/95 at 20.

In the instant case, petitioner’s undisputed proof of respondent’s repeated errors established that, even after two years on the job, he is unable to perform the routing duties

required of a QAS. Respondent persistently makes basic mistakes such as not passing along bus route complaints to his supervisor, not notifying schools and bus companies of bus route changes. He apparently fails to complete most assignments on time and without multiple mistakes. Even after some three years on the job, he continues to create bus routes longer than 90 minutes, in violation of the unit standard. Respondent also adds new bus stops without making time adjustments for the following stops, so that multiple stops are scheduled for the same time, an elementary error. He creates bus routes that don't arrive until after classes have started.

Respondent's counsel contended in his closing that respondent "tries hard" (Tr. 189) and has made no more than a "handful of mistakes" (Tr. 189). In fact, the evidence at the hearing was to the contrary. Respondent refuses to acknowledge the significance of his repeated errors or show any motivation to improve, as shown by his unwillingness to avail himself of additional training without being ordered to do so. Respondent displayed an indifferent attitude toward all of his work, disregarding assignment deadlines, not replying to e-mails, initially ignoring offers of retraining and then failing to attend training even after being ordered to go, and procrastinating for days before starting various assignments.

I find that all of the charges should be sustained and, further, that respondent's repeated mistakes demonstrate incompetence to perform the duties of a QAS.

FINDINGS AND CONCLUSIONS

1. Specification 1 must be sustained in that, on January 29, 2015, following a field visit to a school, respondent failed to advise his supervisor that the school was having bussing problems, in violation of Rules and Regulations Governing Non-Pedagogical Administrative Employees section 9.18.
2. Specification 2 must be sustained in that, between October 2014 and January 2015, respondent improperly processed variance requests for students residing in homeless shelters, in violation of Rules and Regulations Governing Non-Pedagogical Administrative Employees section 9.18.

3. Specification 3 must be sustained in that, in December 2014 and January 2015, respondent failed to attend training sessions as ordered by his supervisor, in violation of Rules and Regulations Governing Non-Pedagogical Administrative Employees section 9.18.
4. Specification 4 must be sustained in that, on October 20, 2014, respondent was assigned to modify school bus stops and failed to timely or properly complete the assignment, in violation of Rules and Regulations Governing Non-Pedagogical Administrative Employees section 9.18.
5. Specification 5 must be sustained in that, on October 9, 2014, respondent was assigned to correct bus stops which did not meet the requirements and failed to timely or accurately do so, in violation of Rules and Regulations Governing Non-Pedagogical Administrative Employees section 9.18.
6. Specification 6 must be sustained in that, between September 16, 2014, and October 22, 2014, respondent was assigned to process capping requests and failed to do so, in violation of Rules and Regulations Governing Non-Pedagogical Administrative Employees section 9.18.
7. Specification 7 must be sustained in that, on September 11, 2014, respondent was ordered to review a parent complaint about a bus stop making students late for school and failed to do so after four days, in violation of Rules and Regulations Governing Non-Pedagogical Administrative Employees section 9.18.
8. Specification 8 must be sustained in that, on September 8, 2014, respondent failed to notify the school and bus company of the change, in violation of Rules and Regulations Governing Non-Pedagogical Administrative Employees section 9.18.
9. Specification 9 must be sustained in that, in September 2014, respondent was assigned to complete extended day routing and failed to timely and correctly do so, in violation of Rules and Regulations Governing Non-Pedagogical Administrative Employees section 9.18.

10. Specification 10 must be sustained in that, in July and August 2014, respondent was assigned to adjust bus stops according to ridership and failed timely or correctly do so, in violation of Rules and Regulations Governing Non-Pedagogical Administrative Employees section 9.18.
11. Specification 11 must be sustained in that, in July 2014, respondent failed to timely and correctly delete two summer routes, in violation of Rules and Regulations Governing Non-Pedagogical Administrative Employees section 9.18.
12. Specification 12 must be sustained in that, between July 2014 and January 2015, respondent committed repeated mistakes which constituted a failure to carry out his duties, a threat to the safety of students, a waste of Department resources, and a failure to seek assistance or retraining, in violation of Rules and Regulations Governing Non-Pedagogical Administrative Employees section 9.18.

RECOMMENDATION

After making the above findings, I requested and received a summary of respondent's personnel history in order to make an appropriate penalty recommendation. He worked for the Department briefly in 1992 and continuously since 1997. He has been disciplined twice. Respondent lost his driver's license for one year in 2007 after being convicted of driving while intoxicated. This conviction resulted in misconduct charges, which were settled in 2010 when respondent agreed to accept a 30-day suspension as a "last-chance" agreement (Pet. Ex. 19). In 2011, respondent settled disciplinary charges of excessive lateness, early departures, and absences for another 30-day suspension in another "last chance" agreement (Pet. Ex. 20). He was suspended for 30 days in April 2015 as a result of the instant charges. Respondent's past penalties provide grounds to increase the penalty in this case.

Petitioner contends that the only appropriate penalty for an employee's two years of incompetent job performance, accompanied by at least one act of insubordination, is termination. Past cases from this tribunal support this conclusion. *See Transit Auth. v. Kalligeros*, OATH Index No. 475/14 (Dec. 18, 2013) (staff analyst who failed to complete assignments, accidentally deleted a critical electronic file, and submitted an inaccurate report terminated); *Myrick*, OATH Index No. 505/95 at 31 (computer associate who repeatedly and insubordinately failed to

perform his job functions terminated); *Dep't of Finance v. Smalls*, OATH Index No. 316/94 (Jan. 27, 1994) (supervisor of cashiers who repeatedly failed to submit reports, was insubordinate to his own supervisors, failed to meet productivity standards, refused training, and ignored time-sensitive documents demoted); *Dep't of Buildings v. Almodovar*, OATH Index No. 833/91 (July 18, 1991), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 92-11 (Jan. 31, 1992) (boiler inspector who issued baseless violations and defied directions from supervisors terminated); *Bd. of Education v. Cook*, OATH Index No. 733/90 (Apr. 9, 1990) (food services manager who failed to keep accurate records, failed to complete reports, failed to manage ordering of food supplies, and failed to observe nutritional guidelines for school menus terminated); *Dep't of Consumer Affairs v. Zakzouk*, OATH Index No. 219/90 (Dec. 22, 1989), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 90-96 (Oct. 25, 1990) (inspector who falsified time entries, wrote baseless violations, and disobeyed orders terminated).

Respondent's repeated mistakes have had severe consequences. On one occasion, students who were not picked up due to respondent's failure to properly notify the bus company of a route change missed a day of classes. On other occasions, both bus dispatchers and school personnel were forced to send repeated e-mails to respondent and Mr. Scarpa, requesting that route changes respondent was responsible for be completed. Respondent's failure to complete assignments and errors have taken a toll on the entire unit, with multiple routers being required to work overtime in order to complete their own work after spending their work hours on respondent's assignments.

As in many of these past cases, respondent in this case provided little reason to believe that his work performance will ever improve. Respondent was disciplined for misconduct with lengthy suspensions twice, was warned in writing several times by Mr. Scarpa that his repeated errors and failure to obey orders would result in disciplinary action, and was served with disciplinary charges in March 2015. He was required to attend extra training sessions since September 2014. Yet the record shows that suspensions and threats of further discipline have had little effect. Since March, respondent continues to make the same errors, including failing to complete assignments and failing to notify school and bus companies. The bus route he created on September 15, routing a bus from the Upper East Side, down to the tip of Manhattan, and then back uptown, as pointed out by Mr. Scarpa, was outrageously incompetent, violating not only the

90-minute limit but common sense. It is also apparent that the additional training respondent was ordered to take for the past year has not improved his work performance, as illustrated by the string of persistent and similar errors which he has made since the charges were served in March 2015. Nor is the penalty of demotion an option here, since, as shown by the testimony of the human resources director, respondent's title of QAS has no title below it to which respondent could be demoted.

Respondent suggested that, despite his dismal record as a bus router, he should nonetheless be permitted to remain employed as a QAS assigned to perform field inspections, as he did prior to 2012. There is, however, little evidence to suggest that respondent performed the field inspections well. His former supervisor, Ms. Ruocca, declined to return respondent to the field inspection unit in 2012 due to problems with his past job performance. Furthermore, the tasks and standards of a QAS (Pet. Ex. 18) demonstrate that workers in this title are required both to assist in the routing of buses and to investigate and report on complaints regarding bus service. The proof here exhaustively demonstrates that respondent is incapable of performing either of these essential tasks.

Accordingly, I find that the only appropriate penalty here for respondent's proven incompetence and other misconduct is termination of employment and I so recommend.

October 7, 2015

John B. Spooner
Administrative Law Judge

SUBMITTED TO:

CARMEN FARIÑA
Chancellor

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