Dep't of Health & Mental Hygiene v. Dillon

OATH Index No. 2231/15 (Sept. 15, 2015), *aff'd*, NYC Civ. Serv. Comm'n Index No. 2015-1389 (Mar. 24, 2016), **appended**

Petitioner established that computer specialist assigned to the IT Help Desk, answered the phone in a robotic voice on two occasions, created and abandoned service desk requests, left tickets to languish in initial/edit mode for excessive periods, failed to provide complete ticket descriptions, purposely misdirected callers, inaccurately re-classified a ticket, and failed to respond to his supervisor's inquiries. Petitioner also established that respondent force-closed the Department's Acceptable Use Policy on multiple occasions, to circumvent agreement. For his misconduct, I recommend that respondent be suspended from his employment for thirty days.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF HEALTH & MENTAL HYGIENE
Petitioner
- against -
RONALD DILLON
Respondent

REPORT AND RECOMMENDATION

INGRID M. ADDISON, *Administrative Law Judge*

This disciplinary proceeding was referred by petitioner, the Department of Health and Mental Hygiene ("petitioner" or "Department"), pursuant to section 75 of the Civil Service Law. In one charge detailing 12 specifications, petitioner alleged among other things, that on specific dates between January 2014 and May 2015, respondent Ronald Dillon, a computer specialist in petitioner's Bureau of Operations, engaged in misconduct in that he: failed to timely resolve service request tickets; created and abandoned service requests; failed to complete caller contact information on at least two occasions, transferring one caller to a wrong number, and making it impossible to assist the other caller; purposely misdirected a caller to the Deputy Commissioner

of Information Technology; purposely misdirected a caller to the Department of Information Technology and Telecommunications ("DoITT"); answered the phone in an unprofessional, robotic voice; and, on five separate occasions when asked, failed to provide his supervisor with an explanation of his actions (ALJ Ex. 1).

At a trial before me on July 23, 2015, petitioner presented documentary evidence and the testimony of four Department employees. Respondent testified on his own behalf and produced a copy of his job description. At the conclusion of the trial, I held the record open until July 27, 2015, for petitioner to provide additional documentation.

For the following reasons, I find that respondent answered the phone in a robotic voice on two occasions, created and abandoned service desk requests, left tickets to languish in initial/edit mode for excessive periods, failed to provide complete ticket descriptions, purposely misdirected callers, inaccurately re-classified a ticket, and failed to respond to his supervisor's inquiries. Petitioner also established that respondent force-closed the Department's Acceptable Use Policy on multiple occasions, to circumvent agreement.

I therefore recommend that respondent be suspended from his employment for 30 days.

ANALYSIS

Respondent began working for the Department around 1976 as a program research analyst, and later transitioned to a staff analyst. His responsibilities included statistical operations reporting and developing a management by objectives plan for the agency. He then worked with the finance unit, where he monitored expenditures and designed a budget program for the agency, following which he moved to the Management Information Systems Unit as a level I computer specialist, working on financial applications. After a number of years, he became a level III computer specialist with a focus on program management. He then worked as a special assistant to the chief information officer, handling projects like Y2K, the turn-of-the-century computer focus, and emergency management. His title has not changed since that time, but his responsibilities have. He testified that his current focus is software specialty, as distinct from network specialty which is part of operations. Respondent noted that his background is not in information technology. He holds a Bachelor's degree in mathematics and a Master of

Business Administration in planning and finance. Respondent expressed that he feels adept at project management, but that detailed technical work was always done by others (Tr. 146-47).

In the fall of 2009, when Jian Liu became the Chief Information Officer, respondent was assigned to a "special assignment" which involved going out to schools and measuring the distance between outlets and network jacks. In December 2009, that project was terminated and Ms. Liu assigned respondent to the NYCMED Help Desk. According to respondent, Ms. Liu told him that his work would involve supporting mainframe applications and administrating a database for an inventory system. But that never materialized, and his "professional portfolio" and operating manuals were taken away from him. He filed an out-of-title grievance and lost (Tr. 148-149).

In November 2011, Barry Novack, the current director of reporting and analysis for the Department's Division of Administration, became respondent's supervisor in the Call Center of which the IT Help Desk is a part (Tr. 33, 35, 67). The IT Help Desk has two components – the Help Desk, which provides assistance to employees, and the NYCMED Help line which provides assistance to the public (Novack: Tr. 33; Resp: Tr. 149-50; Espada: Tr. 92). In December 2012, Mr. Novack assigned respondent to the IT Help Desk (Tr. 151). Respondent complained that he was not qualified for that job and requested a transfer, which was denied. He filed a second out-of-title grievance and again lost. Respondent claimed that meanwhile, the Department did nothing to develop his skills and abilities (Tr. 154-55, 158).

Mr. Novack testified that when respondent came to the Call Center, the Department used the same ticketing system, called "Service Desk," for NYCMED-related and the Help Desk calls. The Call Center is able to determine whether an incoming call is from a member of the public or from a Department member, based on the telephone number. Mr. Novack described how the system worked and the duties of an analyst. When a call comes in regarding a technical computer problem, the analyst taking the call must open a ticket in the system and try to resolve the problem. If s/he cannot resolve the problem, s/he must still open a ticket and forward it to another IT division for resolution. Because employees indicate their availability in the system, the phone system will direct a call to the next available person. Calls may be tracked by time and matched up with the ticket created under a separate system. While Mr. Novack was

respondent's supervisor, respondent's most important tasks were to answer calls and enter tickets accurately (Novack: Tr. 33-35; Dalton: Tr. 130-31).

Mr. Novack testified that there are general Call Center rules which do not place a time limit on call resolution, but if the matter is complex, it should be indicated in the ticket. Also, there are IT Policy and Procedures which were prepared by the IT Division and to which all the analysts have access, even though the Help Desk and Call Center are not part of the IT unit. Nevertheless, the procedures provide guidance as to how tickets should be handled (Tr. 76-77).

Mr. Novack routinely discussed the tasks with respondent and focused on areas where he thought respondent could improve. He opined that respondent seemed to do his job selectively. For instance, he was more familiar with the NYCMED-related calls, and therefore resolved those tickets. But he appeared to reject the other routine requests that were handled by other analysts (Tr. 34-36, 48-49, 67, 75).

Majita Dalton, supervisor of the IT Help Desk and the NYCMED Help Desk, and a level III clerical associate, is respondent's direct supervisor of day-to-day operations. She has been with the unit for almost five years, and supervises analysts of varying civil service titles (Tr. 115-16, 126-27). Ms. Dalton spends approximately 75 percent of her day monitoring the work of the analysts, about half of which is focused on respondent, at the direction of Carlos Espada, director of her unit, who wanted to be apprised of deficiencies in respondent's work (Tr. 125, 136-38). She testified that she closely monitors respondent's work by listening in on phone calls, recording calls, and monitoring the ticket queue which he creates as a result of the phone calls that he receives, or the online requests that come in through the self-service portal. She monitors respondent more closely than she does the other analysts because they are effective at resolving issues or reassigning the tickets if they need to be escalated. On the other hand, the tickets that respondent creates based on the phone calls that he receives tend to remain in the Help Desk Queue until either Ms. Dalton or one of her other analysts find those tickets and either resolve the issue or route them appropriately, if they need to be escalated (Tr. 117-19).

At respondent's request, the Department provided copies of the Call Center's training manuals on "Telephone Speaking and Questioning Techniques," "Effective Listening Skills," and "Dealing with Difficult Callers" (Pet. Ex. 13). Ms. Dalton testified that when a new software application has been created, the creator, and sometimes the owner of the application,

schedules a training session with her before the application is rolled out agency-wide, so that the analysts can see how it functions, its purpose, and the calls they could anticipate from the user base. She has never trained respondent nor addressed issues with him because she was instructed that issues with respondent had to be directed to Mr. Espada. But Ms. Dalton acknowledged that she addresses issues with the other analysts as they arise (Tr. 138-40)

I now turn to the specific charges against respondent.

Force-Closed the Acceptable Use Policy Page (Specification C)

The Department alleged that respondent force-closed its "Authorized Use Policy" ("AUP") on multiple occasions, in violation of the Department's Standard of Conduct (ALJ Ex. 1).

Kwok Keung Yu is a programming developer with a focus on web-based applications. He has held this position with the Department for on or about 13 years. The Department has an Acceptable[1] Use Policy which is designed to monitor the proper usage of Department resources by employees (Tr. 8-9). Mr. Yu testified that annually, employees are required to review the policy and agree to its terms. The policy, which is in electronic format, automatically launches when an employee logs on to a work station with his/her user ID. The policy launches in Kiosk mode using the Internet Explorer ("IE") browser. In so doing, the employee is required to scroll down through the policy at the base of which is an "I Agree" button for the employee to depress. That operates to generate a log of the dates and times that a particular user agreed to the policy. The timestamps are tracked in a database in the data warehouse. If an employee declines to accept the policy, and instead force-closes IE by using a keyboard shortcut combination of Alt and the F4 key, the page will detect the combination and create a log-in to the database, in effect allowing the user to bypass the AUP. But it will also track the time and user IDs of employees who force-close the IE browser (Tr. 10-13, 20-23). The record of employees who have force-closed the IE browser resides on the server in the data warehouse. It is a record that is only produced upon request in order to identify the non-compliant employees (Tr. 13-14). Mr. Yu did not reveal whether he knew how many employees force-closes the IE browser.

[1] The Department's counsel referred to the policy as "Acceptable Use Policy" but the charge identified the policy as the "Authorized Use Policy." Going forward, reference will be made to the policy either as "the policy" or "AUP."

Mr. Yu generates a weekly[2] non-compliance report which he sends to all divisions and to the deputy and assistant Commissioners. He testified that the electronic AUP was first launched in 2012. Respondent agreed to it in 2012 and again in 2013. Since then, respondent has repeatedly force-closed the IE browser (Tr. 14). On February 26, 2015, Mr. Yu generated a report which he e-mailed to Deputy Commissioner Jian Liu, showing the number of times that respondent force-closed the IE server in order to bypass agreement with AUP (Tr. 15-18; Pet. Ex. 1). The report displayed respondent's full name, his user name, and multiple dates and times. It also included a column captioned "ForceCloseIE," under which were either of numbers "1" or "0" associated with each date. Mr. Yu explained that those numbers represent a Boolean data type, which gives either a true or false value. A "0" reading is a false value which indicates that force was not used and the user had accepted the policy by clicking the "I Agree" button. A "1" reading is a true value which indicates that IE was force-closed (Tr. 18-19).

The report corroborated Mr. Yu's testimony that respondent accepted the policy on September 11, 2012 and November 4, 2013, in that it displayed a false value against those two dates under the ForceCloseIE column. But it also displayed a true value on 17 different occasions over the course of 10 days (Pet. Ex. 1). On some dates, the times differed by a fraction of a second. Mr. Yu explained that the multiple true values reflected on some dates are a record of the combination of keyboard shortcuts the user executes. In other words, it reflected the number of times that respondent struck the required keys to force-close the IE browser. He posited that the only reason why a user would strike the Alt + F4 keys when the AUP launches in Kiosk mode is to bypass the AUP. Moreover, the AUP continues to launch so long as a user is non-compliant (Tr. 22-27).

Mr. Yu conceded that the AUP may pop up on a user's screen when the user is performing normal functions. The only explanation he could offer for that was based on his personal experience. He stated that he does not usually log off and on. Rather, he locks and unlocks his workstation. The AUP is triggered when a user is non-compliant. Thus, when he became non-compliant, the AUP popped up on his screen. He then scrolled down to the bottom of the policy and clicked on the "I Agree" button, which resulted in the system tracking and

[2] Mr. Yu initially indicated that the report is provided to the Deputy and Assistant Commissioners monthly (Tr. 14).

recording his stroke and making him compliant for another year. Mr. Yu posited that the AUP will always appear when a user is non-compliant (Tr. 22, 28-30).

Respondent testified that he is quite familiar with the purpose of the AUP, and that he has no option but to accept it (Tr. 160-61). Yet, he had no recollection of clicking the "I Agree button in acceptance of the policy. He claimed that pop-ups would occur while he was in the middle of a task, such as listening to a customer or completing a form. He suggested that to avoid the interference with his work, he would close the AUP. But respondent denied using ALT + F4. He stated that usually, when the policy begins to pop up, he clicks on the "x" to exit it. Respondent further stated that prior to the charges, he had not been made aware that he had been force-closing the AUP, and that it was an issue. He opined that he did not think that he was doing anything wrong (Tr. 161-62, 186-87).

Resolution of the charges hinges on the relative credibility of the witnesses and respondent. In assessing 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. 5, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998). I found Mr. Yu to be as sincere as he was knowledgeable, whereas, I found respondent to incredible. I did not believe him when he denied that he used ALT + F4 to force-close the AUP. The forced closures occurred under respondent's login on 17 different occasions over a 10-day period. Mr. Yu did not indicate that the policy could be exited in any other manner. Thus, I was not persuaded by respondent's testimony that he could exit the policy by clicking on the "x" button.

Notably, the Department did not charge respondent with violating the AUP. However, the purpose of such a policy, which is not unique to one City agency, is to make employees aware of what is permitted and what is not. By circumventing agreement with the policy, respondent was engaging in conduct prejudicial to good order and discipline.

Accordingly, this charge should be sustained.

Directed Caller to DoITT for Assistance (Specification B)

The Department charged respondent with directing a caller to the Department of Information Technology and Telecommunications ("DoITT") when it was his responsibility to do so, since DoITT would not provide service directly to the caller (ALJ Ex. 1).

Carlos Espada is the Department's Director of Information Support Services. He oversees the Call Center, and has supervised respondent since respondent came to the Help Desk three years prior. Majita Dillon is respondent's direct supervisor of day-to-day operations. Mr. Espada testified that respondent's primary responsibility is to provide good customer service. Most of the complaints that Mr. Espada receives are about respondent. Mr. Espada testified that the complaints against respondent have been wide-ranging, and include the mislabeling or mischaracterization of tickets, causing callers to be annoyed and irritated, and resulting in fellow analysts revisiting the tickets and resolving issues that respondent should have resolved in the first instance (Tr. 93-94, 111-12).

On April 1, 2015, Mr. Espada received an e-mail from a Department employee, which he followed up with a telephone call (Pet. Ex. 9). The employee reported that she called the Help Desk because she had been unable to retrieve her timesheet for a particular week. She spoke with respondent who told her that he could not assist her and would have to forward her to DoITT. When she called DoITT, the individual who answered was upset when he learned that she was not a Help Desk employee but had been referred by someone at the Help Desk. He informed her that she should not have been given DoITT's number and cautioned her not to call DoITT in the future with her issues. In her e-mail, the employee complainant wrote that not only did she have to waste time as a result of respondent's instructions to her, but she was made to feel unnecessarily humiliated (Tr. 95-96). Mr. Espada asserted that respondent was trained on how to respond to a timesheet inquiry (Tr. 97). Mr. Espada testified that timesheet matters should be handled by the IT Help Desk and not be referred out (Tr. 96-97).

Respondent acknowledged that he did not independently remember the exact call, but petitioner's exhibit of the employee's April 1, 2015 e-mail, refreshed his recollection. He maintained that the employee had called to say that she had a problem with CityTime, the City's timekeeping system. He stated that had the employee indicated that she was having a password problem, he would have sent an e-mail to DoITT to have her password re-set. Instead, she indicated that the application was not functionally correct. Since CityTime is not a Department

of Health application, a problem with the application would have to be addressed by the DoITT's and not petitioner's Help Desk. Accordingly, respondent opined that his referral was appropriate. Further, he rationalized that DoITT responded in the manner that they did because the employee must have explained her problem differently.

Respondent's explanation was incredible for the simple reason that it is not normal for someone who is experiencing problems with their password to call for assistance and use the lingo, more generally used by IT employees, that an application was not being functionally correct. Moreover, I was more inclined to believe the employee's contemporaneous e-mail that she could not recover her timesheet. The Court of Appeals has held that "a statement describing an event when or immediately after it occurs is reliable because the contemporaneity of the event observed and the hearsay statement describing it leaves no time for reflection. Thus, the likelihood of deliberate misrepresentation or faulty recollection is eliminated." *People v. Brown*, 80 N.Y.2d 729, 733 (1993). Here, the employee's e-mail to Mr. Espada was written within one hour after she first spoke with respondent and after feeling humiliated by her experience with DoITT, upon referral by respondent. Even if it was a password problem as respondent claimed, he should not have referred the employee to DoITT.

Accordingly, this charge should be sustained.

Left Service Requests to Languish in Initial/Edit Mode before Submitting Tickets;
Failed to Respond to Supervisor's Request for Explanation (Specifications H, J, L)
Failed to Timely Resolve NYCMED Ticket (Specification E)

The Department alleged that on January 7, 14 and 15, 2014, respondent left Ticket Numbers 387478, 390835 and 391501 in initial/edit mode for 52 minutes, 49 minutes, and one hour and three minutes, respectively, and that he failed to respond to his supervisor's e-mail after each occasion, requesting an explanation for the delays. The Department further alleged that on December 12, 2014, respondent opened NYCMED ticket number 540202 and failed to timely resolve the issue (ALJ Ex. 1).

Mr. Novack testified that when the Call Center receives a request for assistance either via telephone call or e-mail, the Help Desk analyst who receives it, opens a ticket if the request is deemed routine, that is, one that can be resolved at the Help Desk level. If the Help Desk analyst cannot resolve it, the ticket should still be created and the matter escalated to a higher level

within the IT unit. Resolution of a routine ticket usually takes about three to five minutes, while more complex issues may take a bit longer.

On January 7, 2014, respondent opened ticket number 387478, in which he provided a very brief description, that the caller was "locked out of Citytime." The ticket remained in initial/edit mode for approximately 52 minutes before respondent submitted it. On the same day, Mr. Novack e-mailed respondent and requested that respondent provide an explanation in a reply e-mail, for the time that elapsed before the ticket was submitted (Tr. 54-55; Pet. Ex. 6). Mr. Novack did not indicate whether or not respondent replied to his e-mail.

On January 14, 2014, respondent opened ticket number 390835, on which he described the caller's problem as "Computers are running very slow. Save function does not appear to be operating correctly." Mr. Novack stated that the ticket remained in initial/edit mode for 49 minutes before being submitted, and there was nothing to justify the time that it took to submit. So he e-mailed respondent the following day, specifically requesting that respondent send him an e-mail with an explanation for the time that it took to submit said ticket. Respondent never replied to his e-mail and never provided him with an explanation (Tr. 53-54; Pet. Ex. 5).

On January 15, 2014, respondent opened ticket number 391501. According to his brief description of the problem, the caller's computer kept shutting off. Mr. Novack assessed the problem to be a "fairly simple one" which should have been handled within the normal time range, that is, within three to five minutes. Yet, the matter remained open, not officially saved, and not submitted for one hour and three minutes. Mr. Novack e-mailed respondent on January 16, 2014, specifically requesting an explanation for the time that elapsed while the ticket was in initial/edit mode. He testified that respondent never provided him with an explanation (Tr. 49-52; Pet. Ex. 4).

On December 12, 2014, respondent opened ticket number 540202 for an NYCMED caller who was having a problem with logging in to her account. Ms. Dalton testified that with such calls, the Help Desk staff would generally encourage the caller to permit them to reset the caller's password. She maintained that this type of call is regularly handled by the Call Center and on average, takes about two minutes to resolve (Tr. 123-25). A copy of the ticket and the activity log showed that respondent opened the ticket at 11:56 a.m., and it was not closed until 3:56 p.m. on December 12, 2014 (Pet. Ex. 12).

Respondent contended that he has never received any written policies and procedures from the Department on how to handle service request calls. He claimed that at one meeting, after the Department had initiated charges against him, his union representative asked for written policies and procedures and Mr. Espada replied that there were none, and that "there are too many possibilities for us to have that." He maintained further that he never received oral instructions (Tr. 163-64). With respect to the tickets that he left in initial edit mode, respondent offered the following less than comprehensive explanation:

> Well, normally what happens is you, you have a call, you, you open up a form, and then you start filling it in, and the what you do is you, you've closed that initial step. If somebody calls up - - telephone rings, you know that it's going to be a service request. I would say, 99.90 whatever percent are, are requests that you're going to write up. If somebody calls up and says this, I'd like to be transferred to somebody else, that request is open. You don't close the request. It's just a blank form, you'll wait til (sic) the next person comes through. If you're, you know, in the process of the day, you're starting to get calls right after each other, you may open up three of them, okay. Just so that when people - - you know, the next caller comes in, you're not waiting to call up the request that's there. There's no significance to the, the time that the, the request is open, to say it's open.

(Tr. 164-65). He added that what is significant is identification of the caller. He continued explaining that if a caller is a City employee, that person's name, location and telephone number will show up. If the caller is a member of the public, that person's name would not be in the system. Hence, the analysts must get the person's e-mail address and telephone number. Respondent testified that the length of time that a ticket remains in initial/edit mode does not indicate how long he worked on the ticket. According to him, "you could have worked on the ticket for five hours, but it, it will only show in the closed state for, for 30 seconds because you opened it up, you changed the status, you closed it." Thus, he maintained, the time that a ticket remains in initial/edit mode has no meaning (Tr. 165-67).

Ms. Dalton admitted to the possibility that under the ticketing system which existed prior to March 2015, an analyst could open a number of service requests forms in anticipation of calls, and the time that the service request was opened would factor into the time that elapsed to resolution of a particular ticket. However, she noted that tickets are never pre-opened in advance

of a request. Ms. Dalton testified that via her tickler system, she is able to see a ticket after it has been created (Tr. 140-44).

When asked about Mr. Novack's requests for responses to his inquiries, respondent admitted that he did not respond. He then commenced a lengthy discourse in which he suggested that Mr. Novack was "on a fishing expedition," and mentioned meetings with Mr. Novack and Mr. Espada, at which he was precluded from having union representation and had to assert his "*Weingarten* rights."[3] Respondent contended that his responses might have had implications for discipline. Therefore, he thought it best to remain quiet (Tr. 167-68).

As an initial matter, respondent's denial that he had received any written policies and procedures or oral instructions from the Department on how to handle service calls was not credible. As previously mentioned, the Department provides training through its outside providers, such as creators, developers and owners of the applications that the Department uses (Tr. 138). Likewise, I did not find credible respondent's suggestion that he could have worked on a ticket for five hours but it will only show in the closed state once the status is changed. He offered no explanation as to why a Help Desk analyst would continue to work on a problem for five hours and not escalate the matter to a supervisor. What was apparent from his rambling explanation and his general testimony was that he felt his skills and education to be superior to the requirements of his current job, especially given the kinds of projects to which he had been previously assigned. Thus, since his transfer request was denied, and he lost his out-of-title grievances, he decided to take matters into his own hands in an attempt to frustrate his supervisors, by not addressing service requests in a timely fashion and leaving them in queue for other analysts to handle.

As far as Mr. Novack's e-mail requests for explanations are concerned, 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. *Ferreri v. NYS Thruway Auth.*, 62 N.Y.2d 855 (1984); *Strokes v. City of Albany*, 101 A.D.2d 944 (3d Dep't 1984); *Health &*

[3] The New York City Office of Collective Bargaining applied *National Labor Relations Board v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), to find that public employees are entitled, under the NYC Collective Bargaining Law, to union representation during an investigatory interview which may reasonably lead to discipline. *See Ass't Deputy Wardens v. City of New York*, 71 OCB 9 (BCB 2003) (Feb. 26, 2003). Similar rights are granted by statute to civil servants pursuant to section 75(2) of the Civil Service Law, which entitled employees to representation at the time of questioning if they are a potential subject of disciplinary action. Civ. Serv. Law § 75(2) (Lexis 2015).

Hospitals Corp. (Bellevue Hospital Ctr.) v. Tanvir, OATH Index No. 797/10 at 6 (Dec. 17, 2009). To establish insubordination, the Department must prove that: (1) an order was communicated to respondent (2) the contents of the order were clear and unambiguous; and (3) respondent willfully refused to obey. *Tanvir*, OATH 797/10 at 5; *Dep't of Citywide Admin. Services v. Phillip*, OATH Index No. 114/10 at 5 (Sept. 10, 2009); *Transit Auth. v. Wong*, OATH Index No. 1866/08 at 16 (Aug. 28, 2008). While there are limited exceptions[4] to the "obey now, grieve later" principle, none are applicable here. Moreover, respondent's attempt to link his failure to respond to Mr. Novack's e-mails to his right to union representation makes no sense, as "*Weingarten* rights" are applicable only to investigatory interviews which may lead to discipline.

Mr. Novack's clear and explicit e-mail requests for explanations constituted a direct order with which respondent failed to comply. Even though Mr. Novack did not indicate whether or not respondent replied to his January 7, 2014 e-mail, I find that respondent's admission that he did not respond as he thought it best to remain silent, is sufficient to sustain the portion of the charges that he failed to respond to his supervisor's written requests on January 7, 15 and 16, 2014, for explanations regarding the length of time that tickets which respondent opened, were left in initial/edit mode for extensive periods of time.

Thus, specifications E, H, J and L, that respondent left service requests to languish in initial/edit mode, failed to timely resolve an NYCMED call, and failed to reply to Mr. Novack's requests for explanations are sustained in their entirety.

Created and Abandoned Service Desk Requests
Failed to Respond to Supervisor's Request for Explanation (Specification I)

Petitioner alleged that on January 14, 2014, respondent opened and subsequently abandoned three password-related tickets in the queue for other Help Desk staff members to resolve. The Department also alleged that respondent failed to provide his supervisor with an explanation, as requested (ALJ Ex. 1).

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[4] 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)).

According to Mr. Novack, employees are instructed to resolve tickets on their own, but if an analyst is free and observes a ticket in the queue, s/he would accept it and work on it. When an analyst opens a ticket, the system immediately identifies that analyst as the "assignee." A ticket is considered abandoned if the analyst who opened it removes his/her name as the assignee, thereby sending the ticket into the queue for another analyst to accept (Tr. 83-84).

Mr. Novack testified that on January 14, 2014, respondent opened three tickets related to routine password issues that respondent was capable of resolving. He explained that the most common issue that people call in to the Help Desk is password-related. Thus, respondent should have been able to resolve the tickets because he was trained on how to reset passwords. Mr. Novack maintained that instead of resolving the issues, respondent left the tickets in queue for another Help Desk analyst to pick up and resolve. The Department presented copies of the tickets which respondent opened at 8:55 a.m., 9:27 a.m., and 10:36 a.m. Due to his inaction, the tickets sat in queue for 39, 51 and 97 minutes, respectively, until respondent's co-workers took them from the queue and resolved each in less than three and a half minutes (Tr. 56-60, 78-81; Pet. Ex.7).

The following day, on January 15, 2014, Mr. Novack e-mailed respondent, requesting a reply e-mail with an explanation as to why respondent was unable to resolve the callers' requests. Mr. Novack did not indicate whether or not he received an explanation from respondent.

Respondent did not deny this charge. I find the Department's evidence sufficient to establish that on January 14, 2014, respondent created three service desk requests which he then abandoned for his co-workers to assume, and that he failed to respond to his supervisor's request for an explanation the following day.

Failed to Complete Caller Contact Information; Did not Assist Caller; Failed to Respond to Supervisor's Request for Explanation; Incorrectly Closed Ticket by Changing its Category (Specifications K, A)

Specification K

The Department charged that on January 9, 2014, respondent opened ticket number 388610 for a caller but did not complete the caller contact information, and did not provide

service to the caller. The Department also alleged that respondent failed to provide his supervisor with an explanation, as requested (ALJ Ex. 1).

Accela is a system for online permit payments and permit renewals. Users of the system require a personal identification number ("PIN") to access their permits and violations (Tr. 85). On January 9, 2014, respondent opened a ticket for a caller who requested an Accela PIN look-up (Pet. Ex. 8). Mr. Novack testified that respondent did not complete the caller's contact information, nor did he assist the caller with her needs even though he was trained to do so. Mr. Novack maintained that this was a simple matter that should have taken three to five minutes to resolve, but that after the ticket went to automatic closure, supervisor Majita Dalton transferred it to her and resolved it (Tr. 60-62). The activity log of the ticket demonstrated that respondent opened the ticket at 10:59 a.m. on January 9, 2014, and that it was auto-closed at the same time. At 6:51 p.m. on January 9, approximately eight hours after respondent had opened the ticket, Ms. Dalton transferred it to herself, and resolved it in a matter of seconds.

The following day, Mr. Novack e-mailed respondent, pointing out that respondent had attended two Accela training sessions which covered PIN lookups, yet he failed to assist the caller, and also failed to complete the caller contact information in the ticket description. In his e-mail, Mr. Novack requested that respondent reply by e-mail with an explanation. However, respondent did not reply (Tr. 61; Pet. Ex. 8).

Mr. Novack posited that he was present during respondent's training because he always attended training sessions. He opined that respondent's behavior has had a negative impact on staff and affected their morale, because he was not performing as he should have been. It also affected the unit's reputation and their level of customer service. Supervisors often had to "clean up" many of respondent's tickets which were either submitted incorrectly or required follow-up (Tr. 63-64, 72, 82).

No testimony was adduced from respondent in defense of the charge that respondent opened ticket number 388610, did not complete caller information, and referred the caller to another number for assistance instead of providing assistance. Therefore, this portion of the charge is sustained. Since there was no testimony from Mr. Novack as to whether or not he received a reply to his e-mail, from respondent, explaining respondent's failure to assist the caller, that portion of the charge should be dismissed.

Specification A

The Department further charged that on May 4, 2015, respondent created ticket number INC0015202, but failed to enter caller information, and then closed the ticket as "resolved," by changing its category (ALJ Ex. 1).

In the course of monitoring respondent's work on May 4, 2015, Ms. Dalton discovered that respondent opened ticket number INC00015202, on which he wrote that the caller was "encountering proxy error when attempting to access e-Share," an application that was created by the Department to monitor patients that were tested for HIV. Ms. Dalton explained that there are templates within the system which have fields that must be completed based on the information provided by the caller, such as name, e-mail address, telephone number, and description of the issue. In this case, respondent did not use the template and did not record the caller's name or contact information. Moreover, he closed out the ticket by reclassifying it as a telephone issue, when in fact it concerned an application to capture HIV data. By so doing, the ticket would have been re-routed to a telephone technician for handling. On the same day, Ms. Dalton e-mailed Mr. Espada, notifying him about the "ZERO" information on the ticket, and about respondent's re-categorization of it (Tr. 121-23, 131-32; Pet. Ex. 11). At the base of the "Work Notes" on the ticket, respondent typed "Can access application."

Respondent did not remember the specific details but claimed to have a general recollection, after being shown the documentation related to the ticket. He testified that the call concerned a proxy server error that was introduced, he had no idea what they were talking about, obtained no facts during the call and did not engage in a discussion. He stated that the caller was an NYCMED caller, which meant that it was an external caller whose information was not available in the system, and pointed out that he had correctly identified the issue as an "e-share" problem. Because of his notation that the caller "can access application," respondent speculated that the caller had revealed this before he had the chance to ask for name and contact information. Hence, he hung up because there was no need to obtain information at that point. Respondent testified that this happens occasionally and referenced a recording which petitioner placed into evidence in support of another charge against him, but during which a similar situation had occurred (Tr. 175-78; Pet. Ex. 2).

At respondent's probing, Ms. Dalton admitted that hypothetically, a caller could call in with a problem and before the analyst could obtain profile information, the caller may self-resolve the issue and hang up (Tr. 132-34).

The documentary evidence plus Ms. Dalton's confirmation of the likelihood that callers may self-resolve issues before information can be taken favors respondent's explanation for the lack of caller profile information. Thus, I am not persuaded that respondent's failure to obtain information from the caller in this case constitutes inefficient, negligent or careless performance of duties, in violation of the Department's rule 3.19. However, respondent's explanation failed to address the re-classification of the ticket. Accordingly, that portion of the charge that respondent closed the ticket by re-classifying it as a telephone issue is sustained.

Answered Calls in a Robotic Voice (Specifications F, G)

The Department alleged that respondent answered calls on March 6 and 14, 2014, in a robotic voice, in spite of being instructed by his supervisor, both verbally and in writing, that to do so was unacceptable and unprofessional (ALJ Ex. 1).

Mr. Novack testified that the Department regularly records workers on calls as part of a call review program, in order to improve performance. He was monitoring respondent in particular because the issue of respondent answering calls in a robotic manner was a recurring problem. The Department submitted an audio recording of respondent made during a call on March 6, 2014 (Pet. Ex. 2). On it, respondent, whose voice was identified by Mr. Novack, stated in a slow, stilted and monotonous voice, "You have reached the Help Desk. This is Mr. Dillon. How may I help you?" immediately upon which he returned to a regular tone and speed which he maintained for the remainder of the conversation with the caller (Tr. 36-41). Respondent objected to the admission of the audio recording because the date that it was made was not discernible, and Mr. Novack acknowledged that he did not transfer the recording of respondent's call onto the compact disc that was presented. He explained, however, that he had recorded the call on the supervisory board of the phone system, and by so doing, the call was automatically transferred to him in e-mail format. He then had an employee copy it to the disc. I overruled respondent's objection after the Department forwarded me a copy of that e-mail with the recording which also displayed the date that it was made (Tr. 42-45).

On March 18, 2014, Mr. Novack received an e-mail from Michael Aragon, the Department's senior director of Employee and Labor Relations, who was seeking the ticket number assigned to a complaint that he had called in on March 14, 2014, and the time that he had called it in (Pet. Ex. 3). Mr. Aragon indicated in his e-mail that he wanted to "write up" respondent for using a robotic voice.

Respondent did not address the charges that he answered the telephone in a robotic voice on two occasions. Therefore, petitioner's proof in the form of an audio recording of the call on March 6, 2014, is sufficient for me to sustain that charge (specification G**).** In so far as the call on March 14, 2014, is concerned, the only evidence that petitioner presented in support of the charge (specification F), was the e-mail from Michael Aragon, its senior director of Labor Relations, to Mr. Novack, which e-mail constituted hearsay.

Hearsay is admissible in administrative proceedings and may form the sole basis for a finding of fact. *See Police Dep't v. Ayala*, OATH Index No. 401/88 at 5 (Aug. 11, 1989), *aff'd. sub nom., Ayala v. Ward*, 170 A.D.2d 235 (1st Dep't), *lv. to app. den.*, 78 N.Y.2d 851 (1991); *Gray v. Adduci*, 73 N.Y.2d 741 (1988); *People ex. rel. Vega v. Smith*, 66 N.Y.2d 130 (1985). The hearsay must, however, be found to be sufficiently probative and reliable before it may be accorded any significant weight. *See Human Resources Admin. v. Muniz*, OATH Index No. 445/88 at 2-3 (Nov. 17, 1988); *Dep't of Transportation v. Brown*, OATH Index No. 432/85 at 7 (Jan. 15, 1986).

Courts rely upon a number of factors to assess the reliability and probative value of hearsay, including the identity of the hearsay declarant, the availability of the declarant to testify, declarant's personal knowledge of the facts, the independence or bias of the declarant, the detail and range of the hearsay, the degree to which it is corroborated, the centrality of the hearsay evidence to the agency's case and the magnitude of the administrative burden should the hearsay be excluded. *See Calhoun v. Bailar*, 626 F.2d 145, 149 (9th Cir. 1980), *cert. den.*, 452 U.S. 906 (1981); *Richardson v. Perales*, 402 U.S. 389 (1971); *Dep't of Environmental Protection v. Cortese*, OATH Index No. 1613/06 at (Sept. 12, 2006); *Dep't of Correction v. Jackson*, OATH Index No. 134/04 at 5 (May 5, 2004), *aff'd*, NYC Civ Serv. Comm'n Item No. CD 05-67-SA (Sept. 14, 2005). The application of these factors to the hearsay evidence presented by the Department supports a determination that Mr. Aragon's e-mail was reliable and probative.

Therefore, the charge that respondent answered the phone in a robotic voice on March 14, 2014, is sustained.

Misdirected Caller to Deputy Commissioner of IT (Specification D)

The Department alleged that respondent ignored a Caller's request to speak with his manager, and instead, directed to her to call the deputy commissioner of IT (ALJ Ex. 1).

On February 20, 2015, Mr. Espada received an e-mail from Lourdes Campbell, client services manager for the Primary Care Information Project at NYC REACH, a division of petitioner's agency (Pet. Ex. 10). Ms. Campbell informed Mr. Espada that earlier the same day, she had called the Help Desk on ticket number 551846, which one of her staff members had submitted on January 15, 2015. She was aware that the matter had been escalated on more than one occasion and had called to receive a status update. Respondent was the analyst who took her call, and in spite of multiple requests to speak with a manager, respondent continued to insist that she should speak with Jian Liu, the Deputy Commissioner of IT. Ms. Campbell did not wish to speak with Ms. Liu because she knew that it was not proper protocol to do so. Nevertheless, respondent continued to insist that she speak with Ms. Liu, and was unwilling to further assist her. In her e-mail, Ms. Campbell lamented that:

> It is disheartening to receive such poor customer service from fellow agency staff, especially for an issue that has been outstanding for so long, through no fault of our own . . . I was polite and clear with Mr. Dillon about the request and needs we had, and did not receive any help or courtesy in return.

(Pet. Ex. 10).

Mr. Espada testified that there is written material[5] that provides guidance to the Help Desk analyst as to how to handle calls (Tr. 104-05). He could not articulate how respondent should have handled the call, except to say that referring a matter to the deputy commissioner is not the proper course to follow. Problems are first escalated to supervisors, directors and then managers (Tr. 99).

Respondent did not deny directing Ms. Campbell to the deputy commissioner. In defense of his conduct, he claimed that Ms. Campbell's call was based on a request for additional e-mail

[5] Post-trial, petitioner submitted copies of the Call Center's training materials which included manuals on: Telephone Speaking and Questioning Techniques; Effective Listening Skills; and, Dealing with Difficult Callers, which I marked as petitioner's exhibit 13.

space, and that the Department's general policy is that additional e-mail space will not be given. Thus, if someone challenges the policy, then he finds it necessary for that person to speak with Jian Liu, the deputy commissioner who issued the policy. In a snide manner, respondent stated that "if you're a deputy commissioner and you want to have e-mail space, Jian Liu is probably going to give you e-mail space. But for the lumpenproletariat, you're not getting e-mail space . . . ." (Tr.171-73). Respondent bristled at Ms. Campbell's claim that he was unwilling to assist her and attributed her comments to her reluctance to accept the policy (Tr. 173-74).

While it was troubling that Mr. Espada did not give more specific guidance as to how calls should be handled, I found respondent's arrogance and disdain for the callers and his co-workers to be more problematic because he is part of the Department's first-line responders to inquiries. The Help Desk is appropriately named to provide assistance. But instead of providing assistance in a cordial manner and referring Ms. Campbell to a manager, as she requested, he deliberately and spitefully insisted that she should be pole-vaulted to the deputy commissioner, in contravention of the Department's protocol regarding escalation of issues. This constitutes conduct that is prejudicial to good order and discipline.

The charge should therefore be sustained.

FINDINGS AND CONCLUSIONS

1. Petitioner established that respondent force-closed the Department's Acceptable Use Policy page on multiple occasions, violating Department rule 3.25, which prohibits conduct prejudicial to good order and discipline.

2. Petitioner established that on January 7, 14 and 15, 2014, respondent left service requests in initial/edit mode for excessive time periods before submitting tickets, and that he failed to respond to his supervisor's requests on January 14, 15 and 16, 2014, for explanations, in violation of Department rule 3.19, which prohibits inefficient, negligent or careless performance of duties, and rule 3.25.

3. Petitioner established that on December 12, 2014, respondent failed to timely resolve an NYCMED ticket, in violation of Department rule 3.19.

4. Petitioner established that on January 14, 2014, respondent created and abandoned three service desk requests, and failed to respond to his supervisor's request for an explanation

5. Petitioner established that on January 9, 2014, respondent opened ticket number 388610 but failed to complete caller contact information, and failed to provide service to the caller. Petitioner did not establish that respondent ignored his supervisor's request on the following day, for an explanation.

6. Petitioner did not establish that respondent violated Department rules when he failed to obtain caller information on ticket number INC00015202 on May 4, 2015. But the Department established that respondent violated its rules when closed the same ticket by re-classifying it.

7. Petitioner established that respondent directed a caller to DoITT for assistance on April 1, 2015, in violation of Department policy. Such conduct violated Department rules 3.19 and 3.25.

8. Petitioner established that on February 20, 2015, respondent ignored a caller's request to speak with a manager and purposefully misdirected her to the deputy commissioner, in violation of Department protocol. Such conduct violated Department rules 3.19 and 3.25.

9. Petitioner established that on March 6 and 14, 2014, respondent answered the telephone in a robotic voice, in violation of rule 3.25.

RECOMMENDATION

Upon making the above findings and conclusions, I requested and reviewed respondent's personnel abstract in order to make an appropriate penalty recommendation. Respondent was appointed as a Program Research Analyst with the Department in 1976. His performance evaluations for 2012 and 2013 reflect an overall rating of "unsatisfactory," and describe respondent as "uncooperative." In addition, they indicate that respondent is "resistant to following instructions and exhibits little regard for the overall good of the Help Desk." In particular, the 2013 evaluation notes that he is "uncooperative" and "refuses to answer questions during routine supervisor/subordinate feedback." The Department submitted a pro forma

evaluation for 2014 which was incomplete, and therefore provided no supervisory assessment of respondent's performance for that year.

In terms of prior penalties, on February 14, 2014, after a trial before this tribunal on similar charges as those that have been sustained, respondent received a penalty of 20 days' suspension without pay, which was affirmed by the Civil Service Commission in October 2014. *Dep't of Mental Health & Hygiene v. Dillon,* OATH Index No. 108/14 (Feb. 14, 2014), *aff'd,* NYC Civ. Serv. Comm'n Case No. 2014-516 (Oct. 7, 2014). The Department now seeks respondent's termination from employment.

This tribunal has consistently applied 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) (respondent's long tenure and clean record are mitigating factors which must be taken into account in assessing penalty); *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).

While the misconduct alleged in specifications H, I, J, K and L, which I sustained, mirror misconduct in the prior proceeding against respondent, they all predate the trial judge's report and penalty recommendation. Therefore, for those particular charges, respondent had not received the full benefit of progressive discipline. *See Dep't of Correction v. Ford,* OATH Index Nos. 734/13, 735/13, 736/13, 737/13 & 738/13 at 27-28 (May 23, 2013) (prior penalty not considered where respondent's misconduct occurred before he had received a decision and penalty in the prior proceeding); *Human Resources Admin. v. Green,* OATH Index No. 3347/09 at 19-20 (Nov. 18, 2009) (citing *Dep't of Correction v. Rice*, OATH Index No. 1467/97 (July 21, 1993)) (where penalty was administered after the acts of misconduct proved in the case, ALJ did not consider the penalty in making a recommendation).

Notably, there were only two instances during which respondent answered the phone in a robotic voice, and these occurred soon after the decision in the prior proceeding had been issued. Thus, it appears that, at least in that respect, respondent has shown significant improvement.

Of particular note also, is that even though respondent force-closed the AUP on multiple occasions, he was not charged with violating the policy, which would have been considerably more serious. While the pop-ups may have been a nuisance to respondent, he was still obligated to accept the policy annually. As Mr. Yu credibly testified, the pop-ups occur when one is non-compliant. At the same time, I find that the incidence of respondent force-closing the AUP so frequently could have been reduced, had he been cautioned by his supervisors. As Mr. Yu revealed, the assistant and deputy commissioners received a weekly non-compliance report and should have been aware that in order for respondent to work when he was clearly non-compliant, he must have been force-closing the AUP.

On the other hand, in December 2014, and in February and April, 2015, respondent inefficiently performed his duties and demonstrated conduct prejudicial to good order and discipline with his poor customer service, when he purposely misdirected callers elsewhere, causing one to feel humiliated and the other to feel frustrated with respondent's poor quality of service. He was also found guilty of re-classifying a ticket, thereby misdirecting it to another unit.

At trial, respondent demonstrated no remorse for his conduct. Instead, he was intent on trying to communicate how much he had been denied in having lost his grievances. It is abundantly clear that respondent considers himself and his skills to be well above the job that he is currently assigned to do. As well, he seems to consider himself superior to the individuals assigned to supervise the unit, namely, Mr. Novack, Mr. Espada, and Ms. Dillon. However, respondent cannot mete out his frustrations upon callers or ignore lawful directives. And unless or until he is transferred elsewhere, respondent is obligated to be civil to callers by listening to their requests and assisting them.

That being said, I find the Department's request for termination to be excessive. Given the charges which I find it appropriate to consider towards a penalty recommendation, I find that a 30-day suspension without pay to be appropriate, and I so recommend. But, I reiterate the caution that the trial judge in respondent's previous case sounded, that despite his long tenure, if respondent's insubordination persists, it could lead to his eventual termination from his employment. *Dillon*, OATH 108/14 at 16; *see also Short v. Nassau County Civil Service Comm'n*, 45 N.Y.2d 721, 723 (1978) (employee's "persistent unwillingness to accept the

directives of his superiors" warrants termination); *Office of Management and Budget v. Perdum*, OATH Index No. 998/91 at 29-30 (June 17, 1991) (19-year employee with no prior disciplinary record terminated who engaged in repeated insubordination and incompetence, where employee was "on clear notice that his conduct was unacceptable and was given ample opportunity to correct it").

In sum, I recommend that respondent be suspended from employment without pay for 30 days.

Ingrid M. Addison
Administrative Law Judge

September 15, 2015

SUBMITTED TO:

MARY TRAVIS BASSETT, MD, MPH
Commissioner

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THE CITY OF NEW YORK
CITY CIVIL SERVICE COMMISSION

In the Matter of the Appeal of
RONALD J. DILLON
Appellant
-against-
DEPARTMENT OF HEALTH AND MENTAL HYGIENE
Respondent
Pursuant to Section 76 of the New York
State Civil Service Law
CSC Index No: 2015-1389

DECISION

RONALD J. DILLON ("Appellant") appealed from a determination of the Department of Health and Mental Hygiene ("DOHMH") finding Appellant guilty of incompetency and/or misconduct and imposing a penalty of 30 days suspension following disciplinary proceedings conducted pursuant to Civil Service Law Section 75.

The Civil Service Commission ("Commission") heard arguments from the parties on February 18, 2016.

The Commission has considered the arguments presented on this appeal, and reviewed the record of the disciplinary proceeding. Based on this review, the Commission concludes that there is sufficient evidence in the record to support the findings of fact and the conclusions of law, and that the penalty is appropriate.

Therefore, the final decision and penalty imposed are hereby affirmed.

Nancy G. Chaffetz, Commissioner, Chair
Rudy Washington, Commissioner, Chair
Charles D. McFaul, Commissioner

Dated: Mar. 24, 2016