Fire Dept. v. Toner

OATH Index No. 2741/15 (June 30, 2016)

Petitioner established that respondent, a carpenter, disobeyed supervisors' instructions for filling out timesheets, improperly documented overtime availability, did not respond to his supervisors' phone calls regarding availability for overtime, failed to keep supervisors informed about progress of assignments, and disobeyed orders to refrain from adding extraneous comments to work tracking forms. Penalty of suspension without pay for 20 days recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
FIRE DEPARTMENT
Petitioner
- against -
SHANE TONER
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner, the Fire Department, brought this proceeding under section 75 of the Civil Service Law alleging that respondent, carpenter Shane Toner, failed to follow supervisors' instructions for filling out timesheets, did not properly document overtime availability, did not respond to his supervisors' phone calls regarding availability for overtime, failed to keep supervisors informed about the progress of assignments, and disobeyed orders to refrain from making editorial comments on work forms (ALJ Ex. 1).

At trial on February 17, 2016, petitioner relied on the testimony of supervisor Daniel Wallen and documentary evidence. Respondent testified in his own behalf. Following receipt of post-trial summations, the record was closed on May 11, 2016.

For the reasons below, I find that petitioner proved the charges and recommend a penalty of suspension without pay for 20 days.

ANALYSIS

Background

Respondent is one of approximately 15 carpenters employed by the Fire Department. They are civilian employees responsible for maintaining more than 350 buildings, including firehouses and EMS stations, throughout the city. Because the Department provides a critical public safety service, carpenters often work overtime to make repairs (Tr. 109). To ensure fairness in the distribution of overtime, petitioner requires carpenters to follow reporting rules.

The charges stem from allegations that respondent failed to obey those reporting rules. Among other things, petitioner alleged that respondent repeatedly wrote on his timesheet that he was available for overtime when, in fact, he was not available. Respondent argued that he was not given clear instructions on how to complete his paperwork, the rules were not enforced against his co-workers, charges were made in retaliation for his complaints about the unequal distribution of overtime, and he was "targeted for discipline" for minor paperwork errors (Resp. Summ. at ¶¶ 4, 13, 20).

Petitioner's allegations were supported by a wealth of contemporaneous documentary evidence and respondent's defenses lacked merit. The charges should be sustained.

Preliminary Issue

Petitioner did not call respondent's immediate supervisors, Mr. Rainis and Mr. O'Sullivan, as witnesses; instead, petitioner relied on the testimony of their supervisor, Mr. Wallen (Tr. 18-19). Petitioner also relied on documents prepared by respondent and contemporaneous memoranda submitted by Mr. Rainis and Mr. O'Sullivan.

Most of the documents relied upon by petitioner were admissible under the business records exception to the hearsay rule because they were prepared in the ordinary course of business and, in any event, hearsay is admissible at an administrative proceeding. *See Matter of Gdanski v. N.Y.C. Transit Auth.*, 166 A.D.2d 590, 591 (2d Dep't 1990) (upholding termination of employment based on laboratory records showing positive drug test, where records were kept in the ordinary course of business and, also, hearsay was admissible at administrative proceeding); *see also* 48 RCNY § 1-46 (Lexis 2016); *Dep't of Correction v. Jackson*, OATH Index No. 134/04 at 4-5 (May 5, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 05-67-SA (Sept. 14, 2005).

Here, the memoranda prepared by respondent's immediate supervisors were especially reliable. They were created shortly after the events described, were based on personal observations, and often corroborated each other. *See Dep't of Environmental Protection v. Cortese*, OATH Index No. 1613/06 at 7 (Sept. 12, 2006) (enumerating general factors to determine the probative value and reliability of hearsay evidence in administrative hearings); *Dep't of Correction v. Woodson*, OATH Index Nos. 603/04 & 597/04 at 7 (July 1, 2004) (multiple hearsay statements from inmates sufficient to prove charges where statements corroborated each other). Respondent's testimony also corroborated much of the documentary evidence. For example, Mr. Rainis and Mr. O'Sullivan wrote that they told respondent not to add extraneous information on work orders and they told him not to claim that he was available for overtime on weekend days when he had limited availability (Pet. Ex. 1 at 9, 30, 38, 65, 67, 70). Respondent disagreed with those orders, but he did not dispute that they were given (Tr. 49, 239, 250, 280-81, 286, 304). Similarly, the supervisors repeatedly reported that respondent had failed to indicate his availability for overtime on his timesheets (Pet. Ex. 1 at 30, 32, 34, 36, 38, 40, 74). Respondent's signed timesheets and testimony confirmed that there were many occasions when he failed to indicate his availability for overtime (Tr. 305-06; Pet. Ex. 1 at 31, 33, 35, 37, 39, 41).

Claiming availability for overtime when not, in fact, available and failure to return supervisors' phone calls (Specifications A, D).

Petitioner alleged that respondent did not follow his supervisors' instructions for filling out his timesheet on 14 occasions from November 2014 to January 2016, and on 7 of those occasions he did not return supervisors' phone calls in a timely fashion (ALJ Ex. 1). These specifications should be sustained because the evidence showed that respondent repeatedly claimed that he was available for overtime when he was not actually available and he repeatedly failed to return phone calls in a timely manner.

Mr. Wallen testified that, in addition to specifying hours worked and other information on their weekly timesheets, carpenters were required to report whether they were available for overtime each day (Tr. 32). Supervisors closely monitor the number of overtime hours worked and the overtime hours refused (Tr. 34).

The procedures for distributing overtime are set forth in a handbook referred to as the Redbook (Pet. Ex. 1K at 7-11). Overtime is not distributed based on seniority; instead, it offered to the employees to whom the fewest number of overtime hours have been offered. According to Mr. Wallen, employees are not disciplined for refusing overtime (Tr. 82). However, employees who decline overtime are "charged as having been offered the number of hours worked by the employee who accepted the assignment" (Pet. Ex. 1K at 9-10). Supervisors may contact employees while they are off duty to offer overtime for emergency assignments and employees may not "intentionally avoid possible offers of overtime by failing to return calls in a timely manner" (Tr. 135; Pet. Ex. 1K at 9-10).

Petitioner presented timesheets signed by respondent where he wrote a "Y" in the overtime availability column, indicating that he was available. In each case, according to e-mails from respondent's supervisors, respondent was called to work overtime and he either failed to return the call or stated that he was unavailable for the overtime assignment (Tr. 54-56; Pet. Ex. 1 at 1-29). The specific dates are as follows:

Respondent wrote on his timesheet that he was available for overtime on Saturday, November 15, 2014 (Tr. 56-57; Pet. Ex. 1 at 2). Mr. Rainis reported that he called respondent twice shortly before 6:00 p.m. on Friday, November 14, regarding his availability the next day. Respondent did not call back until at 8:00 p.m. on Saturday, November 15 and apologized for not calling back sooner (Pet. Ex. 1 at 1).

On November 28, 2014, Mr. Rainis asked respondent whether he could work overtime the next day and respondent said "Yes," but when Mr. Rainis called respondent later that day to confirm, respondent said that he had made other plans because he did not think that there was any overtime work (Pet. Ex. 1 at 3). On his timesheet for the week, respondent wrote that he was available for work on November 29 (Tr. 58; Pet. Ex. 1 at 4). Two days later, Mr. Rainis spoke to respondent and asked for a corrected timesheet, but respondent failed to comply with that request (Pet. Ex. 1 at 3).

On Friday, December 19, 2014, Mr. Rainis called respondent about his availability for overtime. According to Mr. Rainis, respondent hesitated to answer. Mr. Rainis told respondent, "Let me know later, call me," but respondent never called back (Pet. Ex. 1 at 5). Yet, on his timesheet for Saturday, December 20, respondent wrote that he was available for overtime (Tr. 59; Pet. Ex. 1 at 6).

On December 30, 2014, Mr. Rainis asked respondent if he could stay late that day and work overtime to install a large door panel. Respondent said "No, he couldn't stay" (Pet. Ex. 1 at 7). On January 2, 2015, respondent was on annual leave (Pet. Ex. 1 at 7). Yet respondent wrote in his weekly timesheet that he was available for overtime on December 30 and January 2 (Pet. Ex. 1 at 8). According to Mr. Wallen, respondent was unavailable on December 30 and he also should have written that he was unavailable for overtime on January 2 because he was away on annual leave and not at work (Tr. 61, 128).

On February 6, 2015, respondent failed to return Mr. Rainis's call regarding his availability for overtime work over the weekend (Pet. Ex. 1 at 9). Yet respondent wrote on a weekly timesheet that he was available for overtime on February 8 (Pet. Ex. 1 at 9-10). According to Mr. Wallen, respondent should have written "N," for not available, on his timesheet (Tr. 62).

On Friday March 13, 2015, Mr. Rainis spoke to respondent on the phone and asked whether he was available for overtime during the weekend. Respondent replied, "I don't know, are we working?" Mr. Rainis replied, "Most likely, are you available?" Respondent again replied, "I don't know." Mr. Rainis asked respondent to call back later to report whether we was able to work, but respondent failed to do so (Pet. Ex. 1 at 12). Respondent wrote on his weekly timesheet that he was available on March 14 for overtime and he noted, "Not offered OT for the weekend" (Pet. Ex. 1 at 13).

On Tuesday, April 21, 2015, Mr. O'Sullivan spoke to respondent shortly after noon and asked whether he could work overtime that day. Respondent said "Yes" but asked how late it would be. Mr. O'Sullivan told him that he might have to work late because there were two locations to visit and one of those locations was on Staten Island. Respondent replied that he could not work overtime because he could only stay until 5:00 p.m. and Mr. O'Sullivan told him that he did not have enough time to complete the assignment (Pet. Ex. 1 at 14). On his timesheet, respondent wrote that he was available for overtime on April 21 (Pet. Ex. 1 at 15).

On Friday morning May 22, 2015, when asked if he was available for weekend overtime, respondent told Mr. O'Sullivan that he "should be good." However, at between 3:40 and 4:10 p.m. that day, Mr. O'Sullivan called respondent twice and left messages for him that he was needed for emergency work on Friday night and Saturday. In his messages, Mr. O'Sullivan asked respondent to return his calls. Respondent failed to do so (Pet. Ex. 1 at 16-17). Yet

respondent wrote on his timesheet that he was available for overtime on May 23 and 24 (Pet. Ex. 1 at 18, 20).

On October 3 and 10, 2015 and November 11 and 14, 2015, Mr. Rainis called respondent to ask him whether he was available for overtime. Respondent did not return any of those calls, but he wrote on his timesheets that he was available for overtime on all of those dates (Pet. Ex. 1 at 21-26).

On Friday January 15, 2016, Mr. Rainis called respondent and asked him whether he was available for overtime the next day. Respondent did not return the call, but he wrote on his timesheet that he was available for overtime on January 16 (Pet. Ex. 1 at 27-28). He should have written "no" (Wallen: Tr. 70).

In contrast to petitioner's detailed contemporaneous records, respondent offered vague, conflicting, and unpersuasive denials of any wrongdoing. For example, respondent admitted that an employee who is on annual leave is unavailable for overtime (Tr. 307). But he did not explain why he wrote that he was available for overtime on January 2, 2015, when he was on annual leave.

Respondent had no independent recollection of many events that occurred months before trial (Tr. 265, 275, 277). But in other instances he claimed to have remarkable recall of conversations that occurred a year ago. For example, he recalled that on April 21, 2015, he told Mr. O'Sullivan that he was only available for two hours of overtime and that he could not work past 5:00 p.m. (Tr. 219, 278-79). Mr. O'Sullivan told respondent that "the job's too long for you" and assigned the work to someone else (Tr. 219, 278-79). Despite his limited availability and his supervisor's assertion that the task could not be performed within two hours, respondent insisted that he was actually available for overtime that day (Tr. 279-80).

For the issue of "partial availability," respondent was particularly evasive. He testified that he never received any "verbal or written" instructions on how to fill out the time sheet where he only had "partial availability" (Tr. 214, 242-43). However, he conceded that supervisors repeatedly told him in those situations to write that he was "unavailable" (Tr. 280, 304). According to respondent, he refused to write that he was not available when he was available for a few hours; in his view, writing that he was "unavailable" would have been falsifying an official document (Tr. 249, 280).

The evidence showed that, contrary to respondent's testimony, he was given verbal instructions on how to fill out his timesheet when he was only partially available. Respondent may have disagreed with the instruction that he received, but he cannot credibly claim that he was never given any instruction on this point.

Moreover, as Mr. Wallen explained, "there is no such thing as partial availability" (Tr. 99). If respondent was only available for two hours and unable to complete a task, he should have written that he was unavailable for overtime on his timesheet (Tr. 99). Mr. Wallen conceded that this was not explicitly stated in a manual, but he explained that it was "self-evident" that if respondent could not complete a task within two hours, he was unavailable (Tr. 101). Otherwise, supervisors would have to send an employee out in the field for two hours, knowing that the job could not be completed, and send somebody else out to finish the job, which would be "bad management" (Tr. 100-01). Mr. Wallen said that it would be a trickier question if the employee was available until noon or 3:00 p.m. on a Saturday, but he ultimately testified that such an employee was not available for overtime (Tr. 142).

Respondent also offered conflicting testimony on the issue of whether he answered or returned supervisors' phone calls regarding overtime. He claimed that supervisors lied when they wrote that they called to offer him overtime (Tr. 220, 269, 284, 292). Yet respondent also testified that supervisors deliberately called him after hours "when they know I'm not available" because they did not want him to get the overtime (Tr. 225-26, 238).

In a telling exchange, respondent hedged when asked whether it should be deemed an "offer of overtime" if he failed to answer or return a supervisor's phone call offering overtime (Tr. 256). At first, respondent testified he had never come across that situation (Tr. 256). Then he testified that he did not know how to answer the question (Tr. 256). When pressed, respondent claimed that, according to the Redbook, he could not be charged with an offer or refusal to work overtime if he failed to return a supervisor's call (Tr. 256). Respondent selectively quoted a section of the Redbook which stated that, if an employee "verbally declines" overtime, the supervisor should document that fact and offer the overtime to the next employee who has been offered the lowest amount of overtime (Tr. 256-57; Pet. Ex. 1J at 9). According to respondent, he was not required to pick up the phone when a supervisor called him with an offer of overtime (Tr. 261).

Contrary to respondent's testimony, the Redbook does not state that a supervisor is barred from deeming the failure to answer or return a call as a refusal of overtime. Indeed, the Redbook specifies, "Employees shall not intentionally avoid possible offers of overtime work by failing to respond to phone calls in a timely manner" (Pet. Ex. 1K at 10). This comports with common sense. An employee who repeatedly fails to answer or call back when offered overtime is not, in any meaningful sense, available.

Based on petitioner's evidence and respondent's testimony, it appears that respondent did not accurately report his availability for overtime on his timesheets. Instead, respondent repeatedly overstated his availability. By doing so, respondent essentially tried to gain an unfair advantage over his co-workers in the assignment of overtime.

Failure and refusal to note availability for overtime (Specifications B, F).

Petitioner alleged that on ten occasions, from March 28, 2015 to January 9, 2016, respondent did not note on his timesheet his availability for overtime (Pet. Ex. 1 at 31, 33, 35, 37, 39, 41). On another occasion, April 30, 2015, respondent wrote a question mark in the space where he was supposed to write a "Y" or an "N" regarding his overtime availability (Pet. Ex. 1 at 32-33; Tr. 75). And on at least one occasion, respondent ignored his supervisor's order to note his unavailability. The undisputed documentary evidence showed that respondent did not record his overtime availability on each of the specified dates.

According to Mr. Wallen, all timesheets must be filled out completely (Tr. 73, 76, 99). Respondent testified that he may have forgotten to make an entry for a few of the dates, on at least one occasion he refused to make an entry because he disagreed with his supervisor's instructions, and he also considered the form's overtime availability space to be "pointless" (Tr. 250, 256, 305-06, 315). These specifications should be sustained because I did not credit respondent's claim that his failure to make required entries were inadvertent or justified. The evidence showed that respondent failed to report his availability as part of a deliberate effort to obtain more overtime.

Mr. O'Sullivan reported that respondent told him that he was unavailable for overtime on Saturday March 28, 2015. Later, Mr. O'Sullivan directed respondent to indicate on his timesheet whether he was available for overtime on March 28, but respondent refused to do so.

Respondent said that he disagreed with the way that his supervisor wanted him to complete the form (Pet. Ex. 1 at 30).

At trial, respondent claimed that he was available until noon on March 28, which he characterized as "most of the day," and he did not want to "falsify a city document" by writing that he was unavailable (Tr. 248-49). Respondent testified that he was a union representative but he has never heard of the concept "obey now, grieve later" (Tr. 287). He later conceded that he had heard the phrase, but claimed that he did not understand it (Tr. 288).

Under the "obey now, grieve later" principle, employees must follow direct orders when given and, if they have an objection, contest the order subsequently through formal grievance procedures. *Ferrari v. NYS Thruway Auth.*, 62 N.Y.2d at 855 (1984). There are limited exceptions to this principle: where the order is clearly outside the supervisor's authority, where obeying would threaten the health or safety of any person, or where the order is unlawful. *Donofrio v. Spinnato*, 144 A.D.2d 672 (2d Dep't 1988); *Reisig v. Kirby*, 62 Misc.2d 632 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008 (2d Dep't 1969). Those exceptions are affirmative defenses that respondent must prove by a preponderance of the credible evidence. *See Human Resources Admin. v. Minima*, OATH Index No. 1532/01 at 13-18 (May 16, 2002). None of those exceptions apply here.

This is not a case where an order was clearly unlawful or in excess of authority, *See Ferreri*, 62 N.Y.2d at 855 (order to work overtime was not clearly beyond the power of management); *see also Nelson v. Buffalo Fire Dep't*, 254 A.D.2d 761 (4th Dep't 1998) (ignoring an order to remove a t-shirt, deemed offensive by some co-workers, is misconduct even if the shirt contained an opinion protected by the First Amendment, because the employee was not disciplined for exercising right to free speech; he was disciplined for disobeying an order). Respondent had a duty to complete the timesheet and indicate whether he was available, especially when given a direct order to do so. As Mr. Warren and respondent's supervisors explained, respondent was not actually available if he could only work for a few hours and was not able to complete the assigned task.

The evidence further showed that respondent's repeated failure to note his availability was not due to inadvertence or a principled stand against making false or inaccurate statements. Rather, it was consistent with respondent's continued effort to avoid stating that he was unavailable for overtime.

That conclusion is supported by respondent's failure to make an entry for May 30, 2015. Earlier in the week, respondent told Mr. Rainis that he was going to take sick leave on Thursday and Friday, May 28 and 29 (Pet. Ex. 1 at 19). Mr. Rainis asked respondent whether he would be able to work on the upcoming weekend. When respondent said that he should be able to, Mr. Rainis asked him to call back on Friday and respondent replied "ok" (Pet. Ex. 1 at 19). According to Mr. Rainis, respondent did not call in that Friday and made no entry regarding his availability on Saturday, May 30 (Pet. Ex. 1 at 19, 21).

At trial, respondent claimed that he did not make an entry because he was ineligible for overtime due to his absence from work on the Friday before the weekend (Tr. 306). In respondent's view, the entry for overtime availability was "not applicable" (Tr. 306).

Respondent was not available for overtime on May 30, 2015. He should have noted that fact on his timesheet. Respondent did not have authority to unilaterally decide that the reporting requirement was inapplicable.

Failure to keep supervisor informed about the progress of assignments (Specification C).

Petitioner alleged that respondent was required to notify his supervisor, between 12:30 p.m. and 2:00 p.m. each day, to provide an update on the status of his work assignment. According to petitioner, respondent failed to obey that rule on four occasions from December 2014 to January 2016 (ALJ Ex. 1; Tr. 183).

According to the policy and procedure manual, carpenters are required to call their supervisors, between 12:30 p.m. and 2:00 p.m. each day, to report on the progress of the assignment, including a description of work completed, materials used or required, and an assessment of whether the work will be completed prior to the end of the workday (Tr. 23: Pet. Ex. 1K § J(3)). If a supervisor is unavailable, the carpenter is required to leave a voicemail message (Tr. 25; Pet. Ex. 1K § J2). Telephones are available at all EMS stations and firehouses (Tr. 24).

Petitioner presented evidence that in 2013 respondent was repeatedly counseled about failing to call his supervisor, as required, to report the status of his work (Tr. 44-45). Respondent refused to sign two supervisory conference memoranda regarding this issue (Pet. Ex. 1 at 76-77). According to a memorandum dated July 17, 2014, respondent was again counseled about failing to keep his supervisor informed about the status of his work (Tr. 49; Pet. Ex. 1 at 84).

On December 23, 2014, Mr. Rainis reported that he spoke to respondent on Friday, December 19, regarding availability for overtime, respondent hesitated and Mr. Rainis asked him to call back, but respondent did not call back to report on the status of his job that day (Pet. Ex. 1 at 42). On the afternoon of June 5, 2015, Mr. O'Sullivan called respondent for an update on his assigned job that day and respondent failed to call back (Pet. Ex. 1 at 44). Nor did respondent return Mr. Rainis's call on the afternoon of October 2, 2015 regarding the status of his job (Pet. Ex. 1 at 46).

Petitioner also alleged that respondent did not call either supervisor on January 11, 2016 (Pet. Ex. 1 at 48). According to Mr. Rainis, when he spoke to respondent the next day, respondent claimed that he called twice on January 11 and both calls "went to voicemail" (Pet. Ex. 1 at 48). When Mr. Rainis said that he should have left a message, respondent replied, "It was too long a message to leave" (Pet. Ex. 1 at 48). Mr. Rainis noted that there were no missed calls on his phone (Pet. Ex. 1 at 48).

Respondent had no recollection about December 19, 2014, and he did not testify about June 5 or October 2, 2015 (Tr. 273). With regard to January 11, 2016, respondent claimed that his phone records showed that he called twice that day and Mr. Rainis did not answer (Tr. 244). Neither side offered any phone records in evidence.

As for leaving a voice message, respondent testified, "I needed to speak with him . . . me leaving him a message there was no point" (Tr. 244). Respondent conceded that, despite a specific rule requiring him to leave voicemail messages with supervisors, "sometimes I leave voicemails, sometimes I don't" (Tr. 292; Pet. Ex. 1K at 5).

This specification should be sustained. Contemporaneous documentary evidence showed that, despite multiple warnings, respondent repeatedly failed to make required calls regarding the status of his jobs. The evidence, including respondent's admissions, also established that he failed to leave voice mail messages as required.

Disobeyed order to refrain from making extraneous comments on work order tracking forms (Specification E).

Petitioner alleged that respondent was repeatedly told to stop making extraneous comments on daily work order tracking forms. Despite those specific instructions, respondent added extraneous comments to those forms on four occasions from February 2015 to January

2016 (ALJ Ex. 1). This specification is supported by ample documentary evidence and should be sustained.

Mr. Wallen testified that carpenters are required to complete a daily tracking form that includes the work performed and hours worked (Tr. 29). Data entry personnel enter the information from the daily tracking forms into a Department database of all work performed (Tr. 30). According to Mr. Wallen, "it becomes confusing" when respondent includes extraneous information (Tr. 80, 126). Petitioner presented evidence that in 2014, after writing comments about "false charges" on one of his reports, respondent was warned three times not to include any comments on his daily or weekly reports that did not directly relate to his work assignments (Pet. Ex. 1 at 81). Mr. Wallen testified that he personally gave two of those warnings to respondent (Tr. 49).

Petitioner proved that, despite those warnings, respondent continued to write extraneous comments on his daily work order tracking forms. On January 7, 2015, respondent wrote, "Called in to receive notice of violation – proof of continued harassment from my supervisors" (Pet. Ex. 1 at 66). On February 11, 2015, in the column for "description of work," he noted, "Available but not asked to work O.T." (Pet. Ex. 1 at 69). For "description of work" on April 2, 2015, he wrote, "respond to false charges" (Pet. Ex. 1 at 71). And on January 22, 2016, after noting that he appeared at this tribunal for three hours, he wrote, "No copier at 58st" and "Would be helpful if a working fax was installed at 58st" (Pet. Ex. 1 at 73).

Respondent did not dispute that he wrote each of the comments and he acknowledged that supervisors told him not to make extraneous comments (Tr. 239, 247, 300, 303). When asked whether the comments were work-related, respondent replied, "You would have to ask my supervisor" (Tr. 300-01). Upon further questioning about his comment about not being asked to work overtime, respondent testified that he did not know how that could be a violation and he repeatedly claimed, "It relates to work for the Fire Department" (Tr. 301-02). He added, "It protects me when we get to this stage" (Tr. 302). Respondent also claimed that his comment about the absence of a fax machine was a request for material (Tr. 248, 303).

The evidence established that, despite repeated warnings, respondent continued to include extraneous information on daily work order tracking forms. There is a time and place for making complaints. If respondent wished to protest harassment, false charges, denial of overtime, or the lack of a fax machine, he could have done so by sending an e-mail or filing a

grievance. There was no legitimate reason to include those complaints on Department records designed to track daily work orders, especially when respondent had been repeatedly warned not to make such comments.

Retaliation and selective prosecution claims

At trial and in summation, respondent maintained that the charges were unfair retaliation for his complaints about the unfair distribution of overtime (Tr. 262). Respondent's counsel argued, "This case is nothing more than . . . retribution and revenge in seeking to inflict discipline [upon respondent] for having the courage to speak up about inequities" (Resp. Summ. at ¶ 6). Respondent also claimed that other carpenters never filled out forms properly and he "was treated differently in every time he failed to cross a T or dot an I" (Resp. Summ. at ¶¶ 8, 11). These claims lack merit.

Respondent's claim of selective enforcement or retaliation claim is not a proper defense at this administrative proceeding. *See Dep't of Sanitation v. Yovino*, OATH Index 1209/96 (Oct. 9, 1996), *aff'd in part, rev'd in part*, NYC Civ. Serv. Comm'n Item No. CD 97-109-O (Dec. 4, 1997) (selective enforcement defense only available if based on constitutionally suspect criteria and, even then, may only be asserted during judicial review of adverse administrative determination); *Fire Dep't v. Harper*, OATH Index No. 503/14, mem. dec. at 3 (Jan. 21, 2014), citing, *inter alia*, *303 W. 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 693 n.5 (1979) (selective enforcement claim is properly made only to a judicial tribunal, not to an administrative tribunal); *see also Bell v. NYS Liquor Auth.*, 48 A.D.2d 83, 84 (3d Dept. 1975) ("the proper manner in which to develop [a selective enforcement defense] is to raise it initially in an article 78 proceeding subsequent to the administrative hearing").

Even if selective enforcement or retaliation could be raised at this stage, respondent failed to prove those claims. Respondent filed a grievance on June 4, 2014, alleging that carpenters were deemed to have refused overtime that was never offered and they were not receiving overtime for being "on call" (Tr. 95, 106, 139; Pet. Ex. 2). There was no credible evidence that his supervisors retaliated against him for filing that grievance. Indeed, the evidence showed that they showed a great deal of restraint by repeatedly warning him, before and after the grievance, to follow the reporting rules and refrain from improper conduct (Pet. Ex. 1 at 76-82).

Petitioner's witness, Mr. Wallen, displayed no ill will towards respondent. According to Mr. Wallen, respondent was among the top three recipients of overtime for the past several years (Tr. 93). Though respondent frustrated his supervisors, it was not because he was outspoken; it was because he failed to follow directions (Tr. 103, 185). According to Mr. Wallen, respondent was the only carpenter who did not properly document his overtime availability (Tr. 83). Despite that, Mr. Wallen described respondent as a capable and productive worker, and respondent's supervisors continue to offer him overtime (Tr. 42).

Respondent did not dispute that, before and after the grievance, he worked a great deal of overtime (Tr. 219). His complaints about inequities in overtime distribution were based on vague suspicions and gossip among unnamed co-workers. Respondent claimed that he knew about unfairness "from talking to the guys" and "we know whose working and whose not" (Tr. 258).

None of respondent's co-workers testified. However, his union representative submitted an affidavit stating that the Department had not been "forthcoming in their overtime distribution policy nor in revealing whether overtime has been distributed equally" (Lacey Aff.). The representative claimed, without explanation, that had the Department complied with the union's request for information, the charges against respondent "could have been avoided" (*Id.*). The evidence did not support such speculation. Petitioner proved that respondent repeatedly ignored instructions, failed to comply with reporting requirements, and insisted upon including extraneous material on work orders. Respondent committed this misconduct. It was not caused by the Department's response to a union grievance.

In sum, respondent's evidence fell far short of proving that there was improper retaliation or selective prosecution.

FINDINGS AND CONCLUSIONS

1. Respondent committed misconduct when he ignored instructions and did not accurately report his availability for overtime and failed to return phone calls in a timely manner as set forth in specifications A and D of the petition.

2. Respondent committed misconduct when he neglected or refused to note his availability for overtime, as set forth in specifications B and F of the petition.

3. Respondent committed misconducted when he failed to update his supervisors regarding the status of his work on four occasions as set forth in specification C of the petition.

4. Respondent committed misconduct when he disobeyed orders and included extraneous material on four work orders as set forth in specification E of the petition.

RECOMMENDATION

After making the above findings, I requested and received a summary of respondent's personnel history. Respondent began working for petitioner in 2010 and he has no prior disciplinary history. His performance evaluations rate his work as good or very good. Mr. Wallen also testified that respondent is a "very good" carpenter (Tr. 40, 87).

Petitioner now seeks a penalty of 60 days' suspension without pay (Pet. Summ. at 16). That is excessive. The penalty for false or inaccurate paperwork and failure to follow procedures can range from a ten-day suspension up to termination of employment depending upon the frequency or severity of the misconduct and the employee's disciplinary history. *See, e.g., Dep't of Correction v. Vives,* OATH Index No. 817/05 at 14-15 (June 9, 2005), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 06-40-SA (Aug. 1, 2006) (ten-day suspension imposed where long-term correction officer, with good work record and minimal disciplinary history, failed to obey three orders and made improper entry falsely indicating that she had turned in a radio); *Dep't of Correction v. Smith*, OATH Index No. 667/13 at 46-47 (July 19, 2013), *aff'd*, NYC Civ. Serv. Comm'n Case No. 35546 (May 6, 2014) (termination of employment where computer associate repeatedly ignored orders regarding workplace policies, failed to respond to e-mails in a timely fashion, and did not comply with overtime procedures; extensive disciplinary record, which included similar charges, showed that employee had no intent to modify work habits); *see also Fire Dep't v. Buttaro*, OATH Index No. 2430/14 at 34 (Jan. 13, 2015) (termination of employment recommended where veteran firefighter repeatedly disobeyed orders to wear Department-issued clothing, engaged in conduct designed to create a hostile work environment, and lack of remorse or appreciation for his misconduct further suggested that he was unlikely or unwilling to change his behavior).

Here, a lesser penalty is appropriate. Respondent is a good worker who has shown early in his career that he is capable of making a valuable contribution to the Department. The severe penalty sought by petitioner should be reserved for the worse offenders who have demonstrated an unwillingness to change. A briefer suspension would also be consistent with the principle of progressive discipline.

Respondent needs to recognize that the proven charges arise from a workplace dispute that he has blown out of proportion. If he wanted to complain about overtime distribution, he should pursue that issue in a proper forum, using the grievance mechanism instead of refusing to follow basic reporting requirements. Respondent also needs to stop trying to manipulate the distribution of overtime by claiming that he is available when he is not, in fact, available to complete required tasks. By overstating his availability and failing to return phone calls, respondent created needless work for his supervisors (Tr. 37, 82-83). Continued failure to follow supervisors' instructions could result in a lengthier suspension or loss of employment.

In light of his unblemished prior record and his potential to be a productive worker, respondent should receive an opportunity to correct his behavior. Accordingly, I recommend a penalty of 20 days suspension without pay.

Kevin F. Casey
Administrative Law Judge

June 30, 2016

SUBMITTED TO:

DANIEL NIGRO
Commissioner

APPEARANCES:

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