

Admin. for Children's Services v. Diaz

OATH Index No. 2743/15 (Nov. 6, 2015), *aff'd*, NYC Civ. Serv. Comm'n Index No. 2015-1410
(Mar. 3, 2016), **appended**

Supervising special officer charged with failing to send reports, failing to submit tour packages, failing to obtain reports, disobeying orders, failing to attend meetings, failing to sign out keys and radios, failing to reply to e-mails, and being out of uniform. ALJ found proof sufficient to sustain most of the charges. Penalty of termination of employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
ADMINISTRATION FOR CHILDREN'S SERVICES
Petitioner
- against -
GUSTAVO DIAZ
Respondent

REPORT AND RECOMMENDATION

JOHN B. SPOONER, *Administrative Law Judge*

This disciplinary proceeding was referred to me in accordance with section 75 of the Civil Service Law. Respondent Gustavo Diaz is a supervising special officer, or sergeant, employed by petitioner, the Administration for Children's Services (ACS). Respondent is charged with failing to send tour reports, failing to submit tour packages, failing to obtain reports, disobeying orders, failing to attend meetings, failing to sign out keys and radios, failing to reply to e-mails, and being out of uniform (ALJ Ex. 1).

A trial on the charges was held before me on October 7, 8, and 14, 2015. Petitioner submitted testimony of two supervisors. Respondent admitted most of the charges.

For the reasons explained below, I find that 75 of the 82 specifications should be sustained and recommend that respondent be terminated from his employment.

PRELIMINARY ISSUE

At the commencement of the trial, counsel for respondent objected to proceeding with the amended charges, served on respondent on September 15, 2015. These charges added four specifications to the original 78 set of specifications, which were served on respondent on May 5, 2015. One of the added specifications, specification 9, alleges that, in refusing an order to work overtime and conduct an arrest as alleged in an earlier specification, respondent was also AWOL. Specifications 64, 66, and 69 allege that, in failing to follow procedures in obtaining a key and a radio on three July 2014 dates, respondent also obtained property without authorization. Noting that the informal conference on the original charges was held on May 20, 2015, respondent's counsel contended that going to trial on the four additional charges would deprive respondent of an informal conference on these additional charges and a right to elect to grieve them as provided in the collective bargaining agreement.

There is no legal support for respondent's position. This tribunal has held that the failure to conduct an informal conference, as required by either agency rules or the collective bargaining agreement, does not preclude a section 75 hearing. *See Health and Hospitals Corp. (Lincoln Medical and Mental Health Ctr.) v. Thomas*, OATH Index No. 531/04 at 2 (May 4, 2004) (motion to dismiss for failure to conduct informal conference on charges with employee present denied); *Dep't of Transportation v. Duck*, OATH Index No. 624/91 at 4-5 (Mar. 8, 1991) ("Whether the respondent was entitled to an informal conference with reference to the . . . charges is not a jurisdictional issue. It is a grievable matter, which in no way affects this tribunal's jurisdiction."); *Dep't of Correction v. James*, OATH Index No. 305/89 at 7 (May 31, 1990) (failure to conduct informal conference pursuant to agency rules held to be harmless error).

The only appropriate course of action for an employee deprived of a collective bargaining right is to file a grievance, which respondent has apparently not done. Nor is it plausible that, having already chosen to move forward with a section 75 hearing on the 78 original specifications, he would now file a grievance and accept an immediate penalty for the additional four specifications, which are virtually identical to the other specifications for which the grievance remedy was waived.

Further, under OATH Rules, "[i]f a pleading is to be amended less than twenty-five days before the commencement of the trial, amendment may be made only . . . by leave of the

administrative law judge.” 48 RCNY § 1-25. OATH decisions have stated that “[a]mendment of pleadings in administrative practice is freely granted absent irremediable prejudice. So long as the respondent is fully apprised of the claims . . . and is afforded an adequate opportunity to prepare a defense, the due process requirements of notice are satisfied.” *Dep’t of Correction v. Cross*, OATH Index No. 1109/95 at 2 (Aug. 9, 1995); *see also Matter of Zabari*, OATH Index No. 419/96 at 3 (Oct. 16, 1995); *Dep’t of Correction v. Rebecca*, OATH Index No. 151/94, mem. dec. (Sept. 17, 1993). Respondent has failed to articulate any prejudice in permitting the addition of the four charges in this case, which relied upon the same facts as the original charges.

Respondent’s application to prevent petitioner from proceeding to trial on the four additional charges is therefore denied.

ANALYSIS

The 82 specifications in this case allege an array of failures by respondent to perform his duties from June 2014 through March 2015. During this time, respondent was assigned as a supervising special officer, or sergeant, at the Crossroads Juvenile Center in Brooklyn, regularly working the night tour from 1:00 a.m. to 9:00 a.m. Crossroads houses youth between 10 and 16 years old who have been arrested and are awaiting court dates. Respondent and the other security staff at the facility, including both special officers and other sergeants, are supervised by the director of administration, Ms. Smith, and the executive director, Mr. Watts. Both Ms. Smith and Mr. Watts testified concerning the multiple allegations that respondent failed to perform his duties, failed to obey instructions, or violated facility rules.

Failure to obtain incident reports

Specifications 1 and 2 allege that respondent failed to obtain incident reports from two special officers on June 10, 2014, when the officers were involved in an incident with a resident. Specification 3 alleges that, after being ordered to obtain reports on July 18, 2014, by Ms. Smith, respondent failed to do so.

Ms. Smith testified that, in investigating an incident which occurred on June 10, 2014, she discovered that, on that date, respondent was the sergeant on the day tour when the incident occurred. When she reviewed the records, she found that, while there was an incident report from a juvenile counselor, there were no incident reports from the two officers involved in the

incident as required. On July 16, 2014, Ms. Smith wrote an e-mail (Pet. Ex. 6) to respondent asking him to explain why there were no incident reports from the officers. When respondent failed to reply, she sent another e-mail on July 17. On July 18, respondent told Ms. Smith verbally that he did not remember the officers informing him about the incident. Ms. Smith therefore sent a third e-mail on July 18 directing respondent to order the two officers to complete incident reports by July 21 and, if they failed to submit the reports, to conduct conferences with them. On July 18, 2014, Ms. Smith conducted a conference with respondent on his failure to obtain the reports and commemorated the conference in a memo (Pet. Ex. 4).

Ms. Smith did not receive anything from respondent on July 21. She therefore held another conference with respondent on August 5 (Pet. Ex. 5), ordering him to obtain and submit the reports by August 8. Respondent failed to submit anything (Tr. 72).

Respondent testified that, on June 10, no one notified him of any incident (Tr. 293-94). Respondent further contended that, between August 5 and August 8, he did not work the same tour as the other two officers, who worked the day tour and had days off on Thursday and Friday, August 7 and 8, and therefore was unable to speak with them pursuant to Ms. Smith's instructions (Tr. 300; *see also* Smith: Tr. 186-88). He also stated that he had a doctor's appointment on August 5 due to a neck injury suffered on the job and left work early the following day at 4:00 a.m. because he was sick (Tr. 297-98).

Based upon the undisputed testimony of Ms. Smith, I find that respondent was given orders to obtain the incident reports on July 16, July 18, and August 5, 2014, and, as of August 8, had still failed to comply with this order. The fact that the two officers worked on the succeeding tour did not prevent respondent from communicating with the officers during the overlap in their tours, by e-mail, or by relaying the request in writing or through another sergeant. As of August 5, the reports were already some two months overdue. Even assuming that respondent did not overlap with the two officers between August 5 and August 8, this does not excuse his failure to take action on Ms. Smith's instructions prior to August 5 or at the first opportunity after August 5. Respondent's failure to follow Ms. Smith's order violates the applicable Code of Conduct¹ sections B.1.5, requiring employees to "obey all lawful orders,

¹ Crossroads and the other juvenile centers, which were part of the Department of Juvenile Justice (DJJ) until 2010, are still governed by the DJJ Code of Conduct.

requests and directives of his/her superiors,” and section B.1.3, requiring employees to use “due care and diligence” when completing a work assignment.

Specifications 1, 2, and 3 should be sustained.

Insubordination and AWOL

Specification 4 alleges that respondent did not obey an order to obtain officers’ signatures for receipt of the code of conduct on July 16, 2014. On June 24, Ms. Smith sent an e-mail (Pet. Ex. 8) directing respondent and the other sergeants to have the officers sign for receipt of the agency code of conduct and submit, by June 28, the forms reflecting their receipt of the code. When respondent failed to submit the forms, Ms. Smith wrote another e-mail on July 16 ordering respondent to submit the forms by July 21. When respondent still failed to submit the forms, Ms. Smith wrote a third e-mail on July 28 directing him to submit the forms immediately. She then conducted a conference with respondent on August 5 and ordered him to submit the forms by August 8 (Pet. Ex. 7). Respondent failed to submit the forms by this date (Tr. 74).

Respondent did not mention this incident in his testimony.

Based upon Ms. Smith’s undisputed testimony, I find that respondent was ordered on June 24, 2014, to distribute the code of conduct and obtain officers’ signatures for receipt of the code of conduct no later than June 28, 2014. When he failed to submit the receipt as ordered, Ms. Smith gave him an order on July 16, 2014, to submit the forms by July 21 and he failed to submit them. She ordered him to submit the forms a third time on July 28, 2014, and a fourth time on August 5, 2014, he failed to submit the receipt forms. Respondent’s failure to follow Ms. Smith’s order violates the agency Code of Conduct sections B.1.5 and section B.1.3.

Specifications 5 and 6 allege that respondent failed to obey an order to release an officer early. Ms. Smith testified that, on July 30, 2014, at 3:27 a.m., she telephoned respondent and discussed how many officers he had on duty. Respondent indicated he had four officers. Ms. Smith then instructed respondent to relieve one of the officers, Officer Isley, from the night tour early at 3:30 a.m. so that he could cover the evening tour the following day. She confirmed this order in an e-mail sent at 3:41 a.m. Respondent did not release Officer Isley until 7:00 a.m. (Tr. 79-82; Pet. Ex. 10). Ms. Smith conducted a conference with respondent on August 5 about this disobedience to her order, as commemorated in a memo (Pet. Ex. 10).

Respondent testified that he received the phone call from Ms. Smith, but indicated that he could not release the officer because he needed the officer for the entire tour due to fighting among the residents (Tr. 301-02).

It is notable that Ms. Smith did not indicate that respondent ever told her about the supposed need to keep Officer Isley for the full tour either during the telephone discussion or during the conference several days later. Due to respondent's motive to deny the allegations and avoid being disciplined, as well as his failure to raise the staffing issue with Ms. Smith when given the order, I did not find respondent's uncorroborated testimony as to this charge credible. Based upon the more credible account of Ms. Smith, I find that, on July 30, 2014, at around 3:27 a.m., Ms. Smith ordered him to release a special officer early at 3:30 a.m. and that he failed to obey this order. Respondent's actions were in violation of Department Code of Conduct sections B.1.5, requiring employees to "obey all lawful orders, requests and directives of his/her superiors," and section B.1.3, requiring employees to use "due care and diligence" when completing a work assignment. Specifications 5 and 6 should be sustained.

Specification 7 alleges that respondent failed to submit a performance evaluation by May 21, 2014, as ordered. Ms. Smith testified that, on May 9, 2014, she sent respondent an e-mail (Pet. Ex. 13) directing him to submit a quarterly evaluation for a probationary officer by May 21, 2014. On May 21, when the evaluation was not submitted, she sent respondent an e-mail asking about it. On May 22, 2014, Ms. Smith conducted a conference with respondent on his failure to submit the evaluation until May 22, as referenced in a memo (Tr. 82-83; Pet. Ex. 12).

Respondent recalled that he was late submitting an evaluation but could not recall why. He suggested it could have been because he was sick (Tr. 303).

There was no dispute that respondent was ordered to complete an evaluation within 12 days after May 9, 2014, and failed to do so, apparently without explanation. While respondent's attorney contended that Ms. Smith's order was somehow improper because employees could not be evaluated before the end of an evaluation period, no legal support for this position was offered. Nor did respondent offer this as a reason for not complying with the order. Respondent's failure to complete the evaluation as ordered violated Department Code of Conduct sections B.1.3 and B.1.5 and specification 7 should be sustained.

Specifications 8 and 9 allege that respondent refused an order to complete an arrest on August 4, 2014, and was absent without leave on August 5, 2014. Ms. Smith testified that on

August 4, 2014, she sent respondent an e-mail before his tour began directing him to work overtime and conduct an arrest of a resident during the following morning tour for assaulting a member of staff. At around 1:08 a.m. she telephoned respondent and repeated this order. Respondent refused, stating that he had a doctor's appointment. Ms. Smith then asked whether respondent had informed anyone a week before that he could not work overtime. Ms. Smith again directed respondent to perform the arrest and respondent again refused, stating that his "neck is more important than an arrest" (Tr. 84-85, 87-88). Ms. Smith commemorated this incident in a memo to respondent (Pet. Ex. 14). According to Ms. Smith, respondent then left the facility at 10:10 a.m. "without authorization" (Tr. 89; Pet. Ex. 16).

Respondent recalled that Ms. Smith called him around 1:00 a.m. and spoke about an arrest of a resident later that morning. Respondent told her that he had a doctor's appointment he could not miss. Ms. Smith hung up. Later in the tour the operations manager again mentioned to respondent that he was instructed to perform the arrest. Respondent told the manager that he had a doctor's appointment and that there were no officers to do the arrest. When the manager suggested using a juvenile counselor instead of an officer, respondent replied the counselors could not go into the precinct and could not prevent an escape (Tr. 304). Testifying for respondent, Sergeant Inshiqaq stated that juvenile counselors lack authority to perform an arrest and cannot pursue a resident who tries to escape (Tr. 255). Respondent stated that he completed the arrest on Thursday, August 7, with another officer, and two female juvenile counselors (Tr. 305).

Respondent produced a note (Resp. Ex. B-2) from the Bedford Medical Office indicating that he was seen in the clinic on August 5, 2015. Respondent indicated that he submitted a similar note to Ms. Smith soon after August 5 and that the substitute note, dated May 20, 2015, was a duplicate (Tr. 295-96). Respondent also produced a doctor's note (Resp. Ex. B-3) dated August 6, 2014, indicating respondent had "high blood pressure" and would return to work on August 7.

As to these specifications, I found respondent's testimony that he had a previously scheduled doctor's appointment on the morning of August 5, as corroborated by a doctor's note, to be credible. I further find that this appointment provided a reasonable excuse for respondent to decline to work overtime as he was being directed to do by Ms. Smith. Although no rule regarding mandatory overtime was referred to at the hearing, and does not appear to be cited in

the charges, it was undisputed that security staff at Crossroads were subject to mandatory overtime when vital security posts might be vacant during a succeeding tour. However, no evidence was provided to support Ms. Smith's contention that security staff was required to obtain advance approval for doctor's appointments scheduled for successive tours, on the prospect that they might be ordered to work mandatory overtime. Moreover, there was no evidence that a security post was, in fact, left vacant and the arrest was completed by respondent the following day.

Respondent's refusal to work overtime for the succeeding tour on August 5, 2014, due to a scheduled doctor's appointment was not shown to be either insubordinate or absence without authority. Specifications 8 and 9 should be dismissed.

Failure to attend meetings

Specifications 10 and 11 allege that respondent failed to attend mandatory sergeants' meetings on May 14 and July 9, 2014.

Ms. Smith testified that a sergeants' meeting was scheduled for May 14. Respondent contacted her before the meeting and indicated that his wife was being taken to the hospital. Ms. Smith excused respondent from the meeting and asked that he document his absence. Respondent failed to submit any documentation prior to July 10, as indicated in a conference memo (Tr. 92-93, 95-96; Pet. Ex. 17).

On July 3, 2014, Ms. Smith notified respondent by e-mail (Pet. Ex. 18) of another required sergeants' meeting on July 9, 2014, at 5:00 p.m. At this meeting, respondent stated that he took a "muscle relaxant" and did not awaken until 9:00 p.m. (Tr. 92-93). Ms. Smith held a conference and wrote a memo (Pet. Ex. 17) about the alleged violation.

Respondent testified that, because he regularly works the night tour from 1:00 a.m. to 9:00 a.m., the sergeants' meetings which are scheduled for 5:00 p.m. are difficult for him to attend, even though he is paid overtime for doing so (Tr. 307). He further testified that, on May 14, his wife was hospitalized (Tr. 307). He submitted a note (Resp. Ex. A), dated May 14, 2014, from Mount Sinai Hospital indicating that respondent's wife was treated in the emergency room.

Respondent testified that, on July 9, 2014, he took a muscle relaxant and failed to awaken in time for the 5:00 p.m. meeting (Tr. 307).

Based upon the undisputed evidence, I find that respondent failed to attend the sergeants' meetings on May 14 and July 9, 2014. His absence should be excused for the May 14 meeting due to the documented excuse that his wife was taken to the emergency room that day. Specification 10 should be dismissed.

I did not, however, credit or accept respondent's uncorroborated testimony that he took medication and inadvertently missed the July 9 meeting. His statement seemed implausible, self-serving, and, given respondent's desire to avoid discipline, incredible. Furthermore, even assuming respondent took a muscle relaxant and fell asleep, he was still obliged to ensure that he woke up in time to attend the meeting. Specification 11 should be sustained.

Failure to complete tour communication reports

Specifications 12 through 18 allege that respondent failed to complete tour communication reports on June 10 and 11, July 10, 11, 16, 24, and 30, 2014. According to Ms. Smith, tour communication reports are e-mails which summarize all activity during a tour, including security staff assignments, the number of residents present, radio checks conducted, meal breaks, post rotations, equipment malfunctions, and any other notable incidents. Supervising special officers are required to send these reports by e-mail prior to the end of their tour to the director of administration and to the supervisor of the succeeding tour (Tr. 97-98). On June 6, 2013, and September 4, 2013, Ms. Smith sent the sergeants e-mail reminders of their obligation to submit the tour reports "before leaving the facility at the end of the tour" (Pet. Ex. 20). The September 4 e-mail itemizes 14 types of information to be included in the reports.

Ms. Smith testified that respondent failed to submit tour reports on any of the seven charged dates and, as of the date of the hearing, had still not submitted them (Tr. 99-100). Ms. Smith sent respondent multiple e-mails (Pet. Ex. 21) on July 11, 16, 24, and 30, 2014, asking for these reports. She also indicated that she spoke with respondent multiple times about the late reports (Tr. 163).

Respondent did not dispute his failure to submit the tour communication reports, as testified to by Ms. Smith. He contended that, due to the considerable obligations of sergeants and the short staffing, he was often unable to complete reports by the end of his tour (Tr. 308). In particular, when he was assigned to the monitor panel post, observing the surveillance cameras, he needed to watch the cameras, answer the radios, manage staff movement, and open

doors (Tr. 309-10). He also indicated that Ms. Smith did not permit overtime pay to complete the reports (Tr. 308-10).

Based upon the undisputed testimony of Ms. Smith, as corroborated by her multiple e-mails, I find that respondent failed to submit tour reports on the seven dates charged. Respondent's testimony that the facility was short staffed was confirmed by both Mr. Watts and Ms. Smith (Watts: Tr. 47; Smith: Tr. 153). The short staffing might excuse a delay of a day or two in completing the tour reports, but it did not justify respondent ignoring the assignment altogether, despite repeated e-mails from his supervisor, Ms. Smith.

Respondent's failure to submit the tour communications reports was in violation of Department Code of Conduct sections B.1.3 and B.1.5 and specifications 12 through 18 should be sustained.

Specification 19 alleges that respondent failed to mention a door malfunction in the tour communication report of July 25, 2014. According to an e-mail from Ms. Smith (Pet. Ex. 23), sent at 1:43 p.m. on July 25, 2014, to respondent, she was informed earlier in the day that there were door malfunctions during the night tour. When Ms. Smith reviewed respondent's tour communication report, she saw that respondent indicated that the doors were all operational and did not mention a malfunction. In her e-mail, Ms. Smith asked why respondent failed to report the malfunctions in his tour report. Respondent replied to Ms. Smith's e-mail, "The malfunction of door 3, 4 and 5 occurred on the p.m. tour not the nite [sic] tour. I was notify [sic] by Officer Turner." Ms. Smith replied to this e-mail that respondent "submitted an inaccurate report" and respondent did not reply to this e-mail.

Ms. Smith also commemorated the incident in an August 5, 2014 memo (Pet. Ex. 22) to respondent. In the memo, she wrote that she "was informed by Sgt. Inshiqaq that SO Jones informed him" about the door malfunctions.

Respondent insisted that, on July 25, the sergeant from the previous tour did not report a door malfunction in his tour communications report. Respondent checked the doors himself and they "was working fine on my tour" (Tr. 330-31).

Petitioner's proof as to this charge failed to establish that a door malfunction existed on respondent's tour. Ms. Smith's only apparent knowledge as to the malfunction was based upon a statement made by a staff member who was told about it from another staff member. There was no indication of any investigation to ascertain when the door malfunctions were first reported,

what they consisted of, or when they were repaired. Respondent's failure to report door malfunctions cannot be found to be misconduct. Specification 19 must be dismissed.

Specification 20 alleges that respondent submitted a false tour communication report copied from an earlier report on July 27, 2014. Ms. Smith testified that, on July 24, 2014, respondent requested and was approved to work the night tour on overtime. In the tour communication report (Pet. Ex. 25), submitted by respondent on July 27 at 8:54 a.m., certain portions, including a to/from header indicating the e-mail was sent by Sergeant Herrera at 5:01 p.m. on July 26, 2014, a mention of a census "confirmed by J/C Joassin," and a radio "changed by P.O. Coleman" appeared to have been copied from the tour report submitted earlier by a previous sergeant.

On August 5, 2014, Ms. Smith held a conference with respondent concerning his July 27 tour report, alleging that the mention of Ms. Joassin and Officer Coleman, neither of whom were working the night tour on July 27, was inaccurate. She also indicated that the report had omissions concerning meal break, patrols, and rotation information (Tr. 105). She commemorated the conference in a memo (Pet. Ex. 24).

Ms. Smith testified that it would be preferable to retype the report from scratch every day (Tr. 229).

Respondent testified that he usually created a new tour communications report by editing a previous report. He conceded that there were mistakes in the July 26 report (Tr. 333-334, 337-39, 348). He could not recall whether he ever submitted a corrected report for this tour (Tr. 352).

Based upon respondent's own admissions, I find that he submitted an inaccurate report which had been copied from an earlier report. This was in violation of Code of Conduct section J.1.2 (employee "shall not make false, deceptive, misleading, incomplete or inaccurate entries . . . on any record document or report"). There was no evidence offered to show that the report was deliberately false.

Specification 20 should be sustained on the grounds that respondent submitted an inaccurate report.

Failure to complete tour packages

Specifications 21 through 62 allege that respondent failed to submit tour packages on 42 dates: July 10, 11, 12, 15, 16, and 17, 2014; February 4, 5, 6, 8, 10, 11, 12, 13, 14, 18, 20, 21,

24, 25, 26, and 28, 2015; March 3, 5, 6, 7, 10, 11, 12, 14, 15, 17, 18, 20, 21, 23, 24, 25, 26, 27, 28, and 29, 2015. According to Ms. Smith, tour packages consist of relevant forms filled out during a given tour, including a key count form, an equipment form, post assignments, a facility census, patrol sheets, special visit forms, repair forms, and incident reports (Tr. 240-42). The forms themselves are filled out by security staff from the various posts. Sergeants are required to collect the forms and submit the tour packages to Ms. Smith by giving it to her personally, giving it to her secretary, or, if the office is closed, sliding the package under the office door (Tr. 152). Since the office is open at around 7:00 a.m., the night tour sergeants can bring their tour packages to the office (Tr. 152). Ms. Smith indicated that, if a tour has been particularly eventful, tour packages may be turned in late, with an explanation (Tr. 153).

Ms. Smith testified that respondent failed to submit tour packages at the end of his tour on any of the charged dates (Tr. 112-13). She indicated that this omission deprived her of information needed to manage the facility, including confirmations of the key counts, completion of patrols, equipment maintenance, and the census of the residents (Tr. 154-55).

On October 28, 2014, Ms. Smith conducted a conference with respondent concerning his failure to submit tour packages on July 10, 11, 12, 14, 16, 17, 18, and 19, 2014, as commemorated in a memo (Pet. Ex. 26). On April 28, 2015, she conducted a conference with respondent concerning his failure to submit tour packages on the above February and March 2014 dates, as commemorated by a memo (Pet. Ex. 27). In an e-mail dated May 11, 2015 (Pet. Ex. 28), Ms. Smith noted that she received some 41 tour packages from October 2014 and January, February, and March 2015 from respondent.

Respondent testified that prior to 2014 tour packages were placed in a box in the control room. Since Ms. Smith required the tour packages to be delivered to her daily, respondent has found it difficult to do because the tour packages are a “lot of work” and there are “a lot of things going on” (Tr. 312-13). Respondent noted that Ms. Smith does not permit overtime for the submission of tour packages (Tr. 313). Sergeant Inshiqaq confirmed that overtime was not permitted for completion of tour packages or reports (Tr. 271-72) and also testified that, if the office is closed, he submits tour packages during his next tour (Tr. 256). Sergeant Sylvester testified that some of the tour packages were too thick to fit under the office door and had to be delivered during the sergeant’s next tour (Tr. 274).

Based upon the undisputed evidence, I find that respondent failed to timely submit tour packages on 42 occasions, as charged. The issue of whether overtime was or was not permitted to complete tour packages, while possibly relevant to the penalty to be imposed, did not excuse respondent's failure to submit the packages. Respondent's failure to submit the tour packages was in violation of Department Code of Conduct sections B.1.3 and B.1.5 and specifications 21 through 62 should be sustained.

Failure to sign out keys and radios

Specifications 63 through 73 allege that respondent failed to obtain and/or to follow required procedures in obtaining a facility key or radio on July 10, 11, 12, 15, 16, 17, 18, or 19, 2014. The security staff is responsible for controlling access to the facility through the main entrance and also for permitting passage through the interior gates and doors (Watts: Tr. 36-37). The security staff maintains three fixed posts: the main entrance, the control room panel of video monitors, and the keys post managing the distribution of facility keys. These three posts must be filled at all times (Smith: Tr. 57).

According to Mr. Watts and Ms. Smith, all staff, including sergeants and special officers, are assigned keys and radios to permit them to move through the locked doors in the facility and communicate with other staff. The keys and radios are signed out by an assigned special officer in the control room and entered into an equipment log (Watts: Tr. 37-39, 41-42).

On August 5, 2014, Ms. Smith conducted a conference with respondent as to his failure to sign out keys and a radio for the week ending July 19, 2014. This was commemorated by a memo (Pet. Ex. 1). Ms. Smith indicated that she examined the key control logbook for that week (Pet. Ex. 2) and saw that there was no record of respondent signing out keys or a radio (Tr. 63). On July 24, 2014, Ms. Smith sent respondent an e-mail (Pet. Ex. 3) asking him to explain why he failed to sign out keys for the week. Respondent never replied to this e-mail (Tr. 65).

Respondent testified that, on all of the charged dates, he was in possession of the same key and radio (Tr. 315-16, 317-19). He noted that security staff used to obtain keys and radios from the control room without signing them out (Tr. 316-17).

Based upon the undisputed evidence, I find that respondent failed to sign out keys and a radio on July 10, 11, 12, 15, 16, 17, 18, or 19, 2014. According to the agency policy, keys and radios must be signed out in a log book at the beginning of each tour and signed back in at the

end of the tour. Operations Orders 01/10 and 04/03 (Pet. Ex. 35). Respondent's actions violated this policy, as well as Department Code of Conduct sections B.1.3 and B.1.5, and specifications 63 through 73 should be sustained.

Specification 74 alleges that, on July 24, 2014, Ms. Smith sent respondent an e-mail directing him to provide a reason for his failure to sign out keys the week of July 15 through 19, 2014, and that respondent failed to reply. Respondent offered no testimony or other evidence on this charge.

Based upon the undisputed evidence, I find that on July 24, 2014, Ms. Smith directed respondent to reply to an e-mail and he failed to do so, in violation of Department Code of Conduct sections B.1.3 and B.1.5. Specification 74 should be sustained.

Out of uniform

Specifications 75 through 82 allege that respondent was out of uniform on eight dates in July 2014. In an e-mail (Pet. Ex. 32) dated October 20, 2012, to all of the Crossroads sergeants, Ms. Smith stated that sergeants and officers "must be dressed in uniform before roll call begins and assignments are given." Another e-mail was sent on January 15, 2013, repeating that sergeants "are required to be in full uniform for the start of their tour." The e-mail notes that the night tour starts at 1:00 a.m. According to Ms. Smith and Mr. Watts, sergeants' uniforms consist of a white shirt with ACS patches and a sergeant's badge (Watts: Tr. 49-51; Smith: Tr. 140).

Petitioner's proof of the out-of-uniform allegations consisted of video surveillance from the eight charged dates. Following the hearing, the parties submitted a stipulation (ALJ Ex. 2) summarizing respondent's apparel as shown on the video. On three of the dates, July 10, 15, and 19, respondent is seen wearing a white shirt with a black or red cap and a black sleeveless vest. On two other dates, July 12 and 17, respondent is seen with a dark blue/black uniform shirt a black sleeveless vest, and a red cap. On three dates, July 11, 16, and 18, respondent is wearing a red T-shirt or red shirt, again with a vest and cap, for a portion of his tour.

On October 28, 2014, Ms. Smith conducted a conference with respondent, commemorated in a memo (Pet. Ex. 26) on the same date. The topic of the conference was respondent's being out of uniform on the July dates and also failing to properly supervise the officers. According to Ms. Smith, respondent refused to sign the memo "without a union rep" (Tr. 145).

Respondent admitted that Ms. Smith required all staff to be in uniform at the start of their tour (Tr. 341). He also admitted that he was at times out of uniform when his tour started. He stated that this “could have been” due to the “staff shortage” and the need to check on how many officers were present before changing into his uniform (Tr. 320). He stated that he was also out of uniform on nights when he arrived only minutes before 1:00 a.m. and did not have time to change (Tr. 342). He indicated that he believed that the uniform charges, as well as the other charges, were an act of discrimination against him because he was the “only Hispanic on that tour” (Tr. 321-22).

Respondent’s contention that he cannot be disciplined based upon selective enforcement as the only Hispanic officer must be rejected. First, this contention is based solely upon respondent’s representation that he is the only Hispanic officer “on his tour,” which often has approximately four to five other officers. Second, selective enforcement is not a proper defense at an administrative proceeding generally or at a disciplinary proceeding in particular. *See, e.g., 303 W. 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 693 n.5 (1979) (selective enforcement is not a defense at an administrative hearing); *Bell v. New York State Liquor Auth.*, 48 A.D.2d 83, 84 (3rd 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”); *Dep’t of Sanitation v. Yovino*, OATH Index No. 1209/96, at 3 (Oct. 9, 1996), *aff’d in part, rev’d in part*, NYC Civ. Serv. Comm’n Item No. CD 97-109-0 (Dec. 4, 1997) (defense of selective enforcement only available if based upon claim of constitutionally suspect criteria and can be asserted only upon judicial review of an adverse administrative determination).

I find that, based upon the video surveillance, respondent was not wearing the required white shirt for sergeants during his tours on July 11, 12, 16, 17, and 18, 2014. This was in violation of express orders and in violation of orders given October 2012 and January 2013 and of Department Code of Conduct sections B.1.3, B.1.4 (employees “shall dress in a manner appropriate” to their duties), and B.1.5. Specifications 76, 77, 79, 80, and 81 should be sustained.

As to the other three dates, July 10, 15, and 19, 2014, petitioner failed to prove that respondent was out of uniform. On each of these dates, respondent was wearing the required white shirt, with additional outer wear such as a vest and cap. It is true that, in some military or law enforcement organizations, wearing any unauthorized outer apparel is prohibited. *See Dep’t*

of Correction v. Holder, OATH Index No. 2208/07 at 5 (Sept. 14, 2007) (correction officer disciplined for wearing black leather gloves); *Dep't of Correction v. Diaz*, OATH Index No. 518/04 at 4 (Mar. 25, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 05-06-SA (Apr. 15, 2005) (correction officer disciplined for wearing exposed neck jewelry) *Dep't of Correction v. Mamon*, OATH Index No. 605/07 at 11-12 (Feb. 8, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 07-70-SA (July 24, 2007) (correction officer disciplined for having uniform shirt unbuttoned at the top, no tie, and no shield on his jacket). Respondent, however, was employed as a security supervisor during the midnight tour at a juvenile facility. Other than the white shirt requirement, neither of petitioner's witnesses explained any other uniform requirement for sergeants generally or any previous criticism of respondent specifically. There was thus no evidence offered to show that respondent's wearing of a cap or a vest constituted a violation of the uniform requirement embodied in the 2012 and 2013 e-mails, which require either a "uniform" or a "full uniform." Specifications 75, 78, and 82 should be dismissed.

In sum, I find that 75 of the 82 specifications should be sustained and the remaining 7 dismissed.

FINDINGS AND CONCLUSIONS

1. Specifications 1 through 3 should be sustained in that, on July 16 and 18 and August 5, 2014, respondent was instructed by his supervisor to obtain incident reports from two officers and failed to do so, in violation of Department Code of Conduct sections B.1.3 and B.1.5.
2. Specifications 4 should be sustained in that, on June 24, July 26, July 28, and August 5, 2014, respondent was ordered by his supervisor to obtain officers' signature for receipt of the code of conduct and failed to do so, in violation of Department Code of Conduct sections B.1.3 and B.1.5.
3. Specifications 5 and 6 should be sustained in that, on July 30, 2014, respondent was instructed by his supervisor to release an officer under his command early and failed to do so, in violation of Department Code of Conduct sections B.1.3 and B.1.5.

4. Specification 7 should be sustained in that, on May 9 and 21, 2014, respondent was instructed by his supervisor to complete a performance evaluation for an officer under his command and failed to do so, in violation of Department Code of Conduct sections B.1.3 and B.1.5.
5. Specifications 8 and 9 should be dismissed in that petitioner failed to prove that respondent's departure from the facility at the end of his tour constituted insubordination or AWOL.
6. Specification 10 should be dismissed in that respondent's failure to attend a sergeants' meeting on May 14, 2014, was due to his wife's hospitalization and was not misconduct.
7. Specification 11 should be sustained in that, on July 3, 2014, respondent was instructed by his supervisor to attend a sergeants' meeting on July 9, 2014, and failed to do so, in violation of Department Code of Conduct sections B.1.3 and B.1.5.
8. Specifications 12 through 18 should be sustained in that, on June 10 and 11, July 10, 11, 16, 24, and 30, 2014, respondent failed to transmit via e-mail required tour communication reports, in violation of Department Code of Conduct sections B.1.3 and B.1.5.
9. Specifications 19 should be dismissed in that petitioner failed to prove that there was a door malfunction during respondent's tour which he failed to mention.
10. Specification 20 should be sustained in that, on July 25, 2014, respondent submitted an inaccurate tour communication report in violation of Department Code of Conduct section J.1.2.
11. Specifications 21 through 62 should be sustained in that, on July 10, 11, 12, 15, 16, and 17, 2014; February 4, 5, 6, 8, 10, 11, 12, 13, 14, 18, 20, 21, 24, 25, 26, and 28, 2015; March 3, 5, 6, 7, 10, 11, 12, 14, 15, 17, 18, 20, 21, 23, 24, 25, 26, 27, 28, and 29, 2015, respondent was required to submit tour packages at the end of his tour and failed to do so, in violation of Department Code of Conduct sections B.1.3 and B.1.5.
12. Specifications 63 through 73 should be sustained in that, on July 10, 11, 12, 15, 16, 17, 18, and 19, 2014, respondent failed to obtain and/or to follow required procedures in obtaining a facility key and radio, in violation of Department Code of Conduct sections B.1.3 and B.1.5.

13. Specification 74 should be sustained in that, on July 24, 2014, respondent was ordered to reply to an e-mail and provide an explanation for failing to sign out keys and failed to do so, in violation of Department Code of Conduct sections B.1.3 and B.1.5 and Operations Orders 01/10 and 04/03.
14. Specifications 76, 77, 79, 80, and 81 should be sustained in that, on July 11, 12, 16, 17, and 18, 2014, respondent was out of uniform, in violation of orders given October 2012 and January 2013 and of Department Code of Conduct sections B.1.3, B.1.4 (employees required to wear “appropriate dress”), and B.1.5.
15. Specifications 75, 78, and 82 should be dismissed in that petitioner failed to prove that respondent was in violation of the uniform requirement on July 10, 15, or 19, 2014.

RECOMMENDATION

Upon making the above findings, I requested and received further personnel information about respondent in order to make penalty recommendations. He has been employed as a security officer, first with DJJ and then with ACS, since 1999. He has been disciplined three times. In 2010, he was suspended for 30 days for having a cell phone on duty and for sending a minor girl sexually explicit text messages. In 2011, he was reprimanded for not following facility procedures for the issuance of keys. In 2013, he was suspended for 45 days for excessive restraint of a resident, failure to supervise staff, and false statements. These past penalties must serve to aggravate the penalty to be invoked here.

Respondent’s 2012-13 and 2013-14 evaluations were generally poor. In 2013, he was rated “good” overall, but “conditional” as to organizing his work and preparing performance evaluations. In 2014, he was rated “unsatisfactory” overall, the lowest rating, with comments that he failed to supervise, improperly restrained residents, failed to report a use of force on a minor resident, failed to submit evaluations, tour communications reports, tour packages, and incident reports on time, and was insubordinate in failing to conduct the August 2014 arrest.

Respondent’s misconduct over the course of the last year has been extensive and egregious. Some of his failings have been relatively minor, such as missing deadlines to prepare an evaluation or to obtain signatures for distributing the code of conduct to security staff. Other derelictions were far more serious. For months, he failed to submit some 42 tour packages,

containing records essential to managing the facility, to the administration office, despite repeated orders from his supervisor to do so. He failed to submit seven tour reports. After having been disciplined in 2011 for failing to follow procedure with regard to the issuance of keys, he again failed to follow these procedures on eight occasions in July 2014. It is also notable that respondent demonstrated neither regret nor remorse for any of his misconduct, leaving the impression he will continue his pattern of ignoring any rules which he finds inconvenient.

Under the Civil Service Law, the disciplinary penalties available include suspension of up to 60 days, demotion, or termination. Petitioner has requested that respondent be terminated for the misconduct here. Conceding that most of the violations were sustained, respondent's counsel proposed that demotion, rather than termination, would be a more appropriate penalty.

Given respondent's past disciplinary history and the egregiousness of the misconduct which occurred here, another suspension penalty seems unlikely to improve his extremely poor job performance. Demotion, the penalty proposed by respondent's counsel, might be appropriate if the misconduct which respondent was found to have committed concerned supervisory assignments. *See, e.g., Human Resources Admin. v. Townsend*, OATH Index No. 1325/11 (Feb. 28, 2011), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 11-85-M (Nov. 2, 2011) (sergeant with minor disciplinary record demoted for failing to follow vouchering procedures and attempting to conceal his actions); *Transit Auth. v. Bethea*, OATH Index No. 2222/00 (Aug. 15, 2000), *modified on penalty*, Auth. Dec. (Sept. 1, 2000) (supervisor demoted for improper supervision, failing to take corrective action and threatening a co-worker); *Transit Auth. v. DiPalma*, OATH Index No. 304/91 (Jan 2, 1991), *modified on penalty*, Auth. Dec. (Jan. 31, 1991), *aff'd*, 207 A.D.2d 397 (2d Dep't 1994) (supervisor with minor disciplinary record demoted for failing to supervise subordinates and to obey orders). Termination, rather than demotion, of a supervisor is called for, however, where past discipline has been significant and the nature of the subsequent misconduct goes to fundamental employment obligations, such as obeying orders or rules, which the supervisor seems oblivious to. *See, e.g., Dep't of Correction v. Andino*, OATH Index No. 492/95 (Dec. 13, 1994) (correction captain with previous 30-day suspension terminated due to "unrepentant and incorrigible refusal to abide by fundamental rules of decorum").

In respondent's case, he has been repeatedly disciplined for ignoring agency rules. Despite these past penalties, respondent displayed no intention or even desire to improve his work performance. As to several of the charges, including those in which he ignored Ms. Smith's verbal and written orders, he offered no defense at all. As to others, he complained that he was often busy and unable to comply with the work rules. His indifferent attitude as to his repeated violations of protocol and his open defiance of Ms. Smith, his supervisor, strongly suggest that he will perform no better as an officer than he has as a sergeant. Ms. Smith made it clear that officers, as well as sergeants, must obtain keys and radios according to the facility rules and complete a variety of forms, something that respondent has shown himself unwilling to do.

Considering all of the factors in this case, I conclude that the only appropriate penalty for respondent's misconduct is termination and I so recommend.

John B. Spooner
Administrative Law Judge

November 6, 2015

SUBMITTED TO:

GLADYS CARRIÓN
Commissioner

APPEARANCES:

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Attorney for Respondent

**THE CITY OF NEW YORK
CITY CIVIL SERVICE COMMISSION**

In the Matter of the Appeal of

GUSTAVO DIAZ

Appellant

-against-

ADMINISTRATION FOR CHILDREN'S SERVICES

Respondent

*Pursuant to Section 76 of the New York
State Civil Service Law*

CSC Index No: 2015-1410

DECISION

GUSTAVO DIAZ ("Appellant") appealed from a determination of the Administration for Children's Services ("ACS") finding Appellant guilty of incompetency and/or misconduct and imposing a penalty of termination following disciplinary proceedings conducted pursuant to Civil Service Law Section 75.

The Civil Service Commission ("Commission") heard arguments from the parties on Thursday January 21, 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
Vice Chair

Concurring:
Charles D. McFaul, Commissioner

Dated: March 3, 2016