Dep't of Correction v. Klopman

OATH Index No. 984/15 (Mar. 13, 2015), *modified on penalty*, Comm'r Dec. (Apr. 2, 2015), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2015-0385 (June 17, 2015) **appended**

Agency attorney charged with disclosing confidential information through e-mails sent to a private attorney representing an inmate in a lawsuit against the City. Administrative law judge found evidence sufficient to prove charges. Penalty of 45-day suspension recommended.

Commissioner adopts ALJ's findings of fact but increases the penalty to termination of employment. Civil Service Commission affirms the decision and penalty imposed by DOC.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
DAVID KLOPMAN
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. Petitioner, the Department of Correction (DOC), charged that respondent David Klopman, an agency attorney, disclosed confidential information to a private attorney representing an inmate in a lawsuit against the City.

At a hearing held on January 22, 23, and 26, 2015, petitioner presented copies of e-mails from respondent, as well as the testimony of an investigator, respondent's supervisor, two other DOC attorneys, and two attorneys involved in the inmate's civil lawsuit. Respondent testified on his own behalf and also called the attorney to whom the e-mails were sent. On February 9, 2015, both parties submitted written closing arguments.

For the reasons provided below, I find that the evidence was sufficient to sustain the charges and recommend that respondent be suspended for 45 days.

ANALYSIS

Respondent has worked as a DOC attorney since 1988 in the DOC Trials Division. Beginning in 2004, he has been a supervising attorney. One of his primary responsibilities was representing DOC in disciplinary actions against DOC employees conducted at OATH. In early 2014, respondent was assigned as the lead DOC attorney on a high profile disciplinary case against five correction officers and a captain named Behari, who were involved in an alleged use of excessive force on an inmate named Hinton in April 2012. The instant charges concern five e-mails, sent by respondent between January 8 and March 21, 2014, during the pendency of the OATH disciplinary case to Ms. Conti-Cook, a private attorney retained by Mr. Hinton to sue the City for damages caused by the April 2012 incident. Included in the e-mail transmissions were transcripts of DOC staff members' investigatory interviews conducted pursuant to Mayor's Executive Order 16 (MEO 16), a police complaint lodged by a DOC captain against Mr. Hinton, the DOC captain's address and medical information, and information about Mr. Hinton's prison location and housing classification.

The first e-mail (Pet. Ex. 2A) was sent on January 8, 2014, approximately a month before Mr. Hinton was scheduled to testify at the OATH trial. In this e-mail, respondent attached the transcripts of MEO 16 interviews with the six DOC staff members charged with use of force violations and asked Ms. Conti-Cook about setting up another meeting with Mr. Hinton in order to prepare him for the OATH trial. The transcripts of the officers' interviews were later introduced into evidence at the OATH trial on February 18, 2014 (Klopman: Tr. 436).

Respondent testified that, in April 2012, he was assigned to the disciplinary case involving the five officers and captain who were alleged to have used force on Mr. Hinton. In preparing for the trial in late 2013, he discovered that the inmate was represented by Ms. Conti-Cook, an attorney he knew from her representation of another inmate in a different disciplinary case (Tr. 434). He recalled having "pleasant conversations" with her and believed that she cared about her clients (Tr. 435). He admitted sending Ms. Conti-Cook the interview transcripts in January 2014 in order to "maintain the relations with her," as a "professional courtesy," and because he thought she would get them "eventually" in the federal lawsuit (Tr. 429, 438). He acknowledged that this was a "mistake" and that he should have "gone through the legal division" in obtaining approval for the release of the transcripts (Tr. 438-39). He testified that, at

the time, he did not believe that his actions violated the DOC or conflicts rules. Respondent denied that he used the transcripts in any way during his preparatory meetings with Mr. Hinton and Ms. Conti-Cook in December 2013 and January 2014 (Tr. 439).

In the second and arguably the most problematic e-mail, sent on February 21, 2014 (Pet. Ex. 2B), respondent forwarded an e-mail thread from a DOC investigator with the message "FYI" and with an attached police report filed against Mr. Hinton by Captain Behari. The forwarded e-mails also included information about Captain Behari's hospital discharge, the decision to take away his firearm, his parent's home address, and his own home address.

In explaining this e-mail, respondent testified that he obtained a copy of the Behari police report from an investigator and forwarded it to Ms. Conti-Cook, because the incident "involved her client" and it would be a "courtesy" to forward the document to her (Tr. 443-44). Respondent stated that, as with the interview transcripts, Ms. Conti-Cook would receive the police complaint as discovery in the federal lawsuit (Tr. 524, 526).

He believed that Ms. Conti-Cook was "aware of her responsibilities as an attorney" and would keep the information in the complaint "confidential" (Tr. 452-53). He did not review the contents of all the e-mails included in the forwarded e-mail chain and did not realize that they included many personal details about Captain Behari. Respondent indicated that, if he had known the e-mail thread contained these details, he would not have sent it (Tr. 446). He indicated that he received other records from the investigator, including internal DOC memos and e-mails, and did not send these to Ms. Conti-Cook because "she was not entitled to them" (Tr. 448). When Ms. Conti-Cook told respondent that a New York Times reporter was requesting copies of the uncorrected OATH hearing transcripts, respondent advised her that these transcripts could not be released and would have to be sought in a Freedom of Information Law (FOIL) request to DOC or OATH (Tr. 453-54). Respondent repeatedly acknowledged that he had made a mistake in providing DOC records to Ms. Conti-Cook without going through the DOC legal division (Tr. 438-39, 446, 466).

Mr. Hinton was re-arrested in March 2014 (Klopman: Tr. 372). The other three e-mails all contained information concerning Mr. Hinton's subsequent incarceration. On March 17, 2014, respondent sent an e-mail (Pet. Ex. 2C), replying to Ms. Conti-Cook's earlier e-mail of March 14, indicating Mr. Hinton was back at Riker's Island and being threatened by officers.

Respondent stated that Mr. Hinton was at a specific facility on Rikers Island and that he had "suggested to my bosses that since he testified [at OATH] that he be moved somewhere where he is protected from retaliation."

On March 19, 2014, respondent replied to an e-mail (Pet. Ex. 2D) from Ms. Conti-Cook about Mr. Hinton being involved in yet another use of force. Respondent wrote that he was forwarding the information to the investigation division and that he believed "they are sending out investigators to Suffolk County to interview [Mr. Hinton] tomorrow about what happened."

The last e-mail (Pet. Ex. 1 at 00777) was sent on March 21, 2014, from respondent to Ms. Conti-Cook. In reply to a question as to why Mr. Hinton might be placed in punitive segregation, respondent wrote, "I was told by our investigator that [Mr. Hinton] is in protective custody not punitive segregation."

Respondent stated that he sent the information regarding Mr. Hinton's incarceration location and his security status to Ms. Conti-Cook because "she had a right to know where [the inmate] was and that we were doing our best to try and make sure he wasn't retaliated against" (Tr. 451). Respondent believed that the 2014 use-of-force incident involving the inmate, which occurred only a few days after he was back in custody, might have been retaliation for his lawsuit concerning the 2012 use of force (Tr. 449-50).

Testifying for respondent, Ms. Conti-Cook acknowledged receiving the five e-mails from him. She indicated that she did not request any of this information and did not read the transcripts of the interviews (Tr. 344-46). She denied providing respondent with anything in exchange for the records he provided to her (Tr. 346). She was present during respondent's witness preparation meeting with Mr. Hinton and stated that none of the interview transcripts were ever discussed with the inmate (Tr. 350-51).

The disclosure of the interview transcripts was discovered by Mr. Frankie, the attorney for Captain Behari in both the OATH disciplinary proceeding and the federal lawsuit. Mr. Frankie testified that on April 25, 2013, he received discovery from Ms. Conti-Cook in the federal lawsuit. Included in this discovery was a copy of the January 8 e-mail from respondent to Ms. Conti-Cook forwarding the transcripts. Mr. Frankie indicated that, as of this time, none of these transcripts had been provided in discovery by the City attorney representing DOC. The transcripts had also not yet been submitted at the OATH disciplinary hearing. Mr. Frankie

contacted Mr. Watford, the attorney representing the other officers, and they both expressed concern that the transcripts might have been used to prepare Mr. Hinton to testify at the upcoming February 8 OATH trial (Tr. 126-28).

Mr. Frankie further testified that, during the course of the OATH trial, he and Mr. Watford had expressed concern about their clients' safety based upon Mr. Hinton's alleged gang membership, a confrontation between Mr. Hinton and Captain Behari near Captain Behari's home, and Mr. Hinton's taking photos of the officers' faces during the OATH proceedings (Tr. 132; Pet. Exs. 1, 5).

Ms. Logan, the DOC assistant commissioner of trials, has supervised respondent since 2012. She testified that she became aware of the instant accusations against respondent on the evening of April 25, 2014, when she received a telephone call on her cell phone from Mr. Isaacs, a partner in the law firm that represents correction officers. Mr. Isaacs told Ms. Logan that respondent was "colluding" with an inmate's attorney by providing her with confidential DOC records. He asked for a meeting with Ms. Logan and DOC general counsel, which occurred on April 28 (Tr. 155-56). On the same day, Ms. Logan met with respondent and asked him if he had sent the e-mails as alleged by Mr. Isaacs. Respondent admitted that he had because the attorney was "going to get them in discovery anyway." He forwarded the Conti-Cook e-mails to Ms. Logan for her review (Tr. 207-08).

Respondent indicated that, following the discovery of the e-mails to Ms. Conti-Cook, he was transferred to the DOC Health Management Division to review medical incompetence cases (Tr. 460). The new location required that he park and walk for a half mile, which he found difficult due to medication he was taking for cancer (Tr. 466). He was suspended for 30 days after a preliminary hearing in October 2014. Following his suspension, he was placed back on payroll but remained suspended from duty (Tr. 464). He indicated that he had filed a discrimination action, and later a retaliation action, against Assistant Commissioner Logan and General Counsel Grossman based upon their refusal to provide a reasonable accommodation in reassigning him and suspending him some six months after the disclosure was discovered (Tr. 557).

Following the discovery of respondent's e-mails, the attorneys for Captain Behari and the other officers moved for a mistrial in the OATH disciplinary case based upon respondent's disclosure of confidential information to Ms. Conti-Cook.

On September 25, 2014, Judge Richard issued her report on the use-of-force charges concerning Mr. Hinton. *Dep't of Correction v. Behari*, OATH Index Nos. 781-86/14 (Sept. 25, 2014). In the report, Judge Richard recommended that the misconduct charges be sustained against all six DOC employees. In ruling on the employees' motions for a mistrial and other sanctions, Judge Richard denied the motion for a mistrial but found that respondent's e-mail of February 21 contained confidential information which should not have been disclosed. She further found that the interview transcripts contained in the DOC investigation file were confidential pursuant to section 50-a of the Civil Rights Law and should not have been disclosed. Due to the improper disclosure of this confidential information and the possibility that the information had been used to prepare Mr. Hinton for his testimony, Judge Richard held that the testimony of Mr. Hinton should be stricken from the record. Judge Richard's recommendation that the charges be sustained and that the six DOC employees be terminated was adopted by DOC Commissioner Ponte on January 21, 2015.

The records and information shared by respondent in his e-mails with Ms. Conti-Cook were unequivocally confidential pursuant to DOC rules as well as New York City and State law. DOC rules make all agency records confidential:

> All records, files, indices, testimonies, and commitments in this Department shall be regarded as confidential. No employee, except with the consent of the Commissioner, the Chief of Department or the Commanding Officer shall take any records, files, indices or testimonies from Central Office or any facility under the control of the Department.

Department rule 4.30.030. DOC rule 3.55.060 prohibits employees from disclosing "confidential information" concerning "government or affairs of the City." DOC business and procedures are also confidential:

> All members of the Department shall treat as confidential the official business of the Department. They shall not talk for publication, be interviewed or make public speeches on departmental business, nor shall they impart information relating to the official business of the Department to anyone, except:
> a. By due process of law.
> b. With the permission of the Commissioner.

> c. As authorized by these Rules and Regulations.
> d. The Commanding Officer upon obtaining permission from the office of the Deputy Commissioner of Public Information, may advise a properly identified representative of the press of current news.

Department rule 8.05.050.

In addition to being confidential under the DOC rules, the records here were confidential under a number of state laws. Civil Rights Law section 50-a provides that "[a]ll personnel records used to evaluate performance toward continued employment or promotion, under the control of" DOC are confidential and may not be disclosed without the written consent of the correction officer. The interview transcripts were part of the DOC investigation regarding the use of force and were contained in the DOC investigation file and therefore confidential under section 50-a.

The records here would also be confidential under the New York State Rules of Professional Conduct. These rules provide that attorneys may not disclose any information which a client has requested be confidential and must competently represent the client's interests in all legal work done. NY State Rules of Professional Conduct Part 1200, Rules 1.1(a) and 1.6(a)(2). Since respondent's client, DOC, has adopted rules making these records confidential, it was respondent's obligation as an attorney not to share them with outside parties. It was also respondent's obligation to thoroughly review any e-mails or records shared with other attorneys to ensure that his client's rights to confidentiality were not breached.

Finally, respondent's disclosure violated the City conflicts of interest law. Pursuant to City Charter section 2604(b)(4), a public servant shall not disclose any "confidential information" concerning the "affairs or government of the city" obtained due to his employment. Sharing documents and information classified as confidential with Ms. Conti-Cook violated this provision.

The confidentiality of the interview transcripts, the police report, and the information contained in the e-mails was attested to by three other City attorneys. Ms. Mello, DOC senior counsel and FOIL officer, described the procedure for dealing with FOIL requests. If she receives a FOIL request for use-of-force investigation records, she will determine whether the investigation is active and, if so, will deny the request (Tr. 265). If the investigation is closed, she redacts any private information, such as a date of birth, address, telephone number,

disciplinary actions, or medical information, and then releases the records (Tr. 264, 276). If the case involved disciplinary charges pending at OATH, she would not disclose the records (Tr. 265). She would also not disclose any transcripts of staff interviews done as part of an investigation without a written release from the employee interviewed (Tr. 266). Any internal DOC e-mails could only be released if personal information was redacted (Tr. 269). She would have released the police complaint, but only after details such as the employee's date of birth, the location of the incident, the employee's telephone number and address, and any information which might be a security risk to the employee were redacted.

Ms. Stackhouse, an attorney from the City Law Department, was assigned to represent the City in the lawsuit filed by the inmate. On February 14, 2014, as part of the mandated discovery procedures in the federal lawsuit, Ms. Stackhouse submitted a letter (Resp. Ex. B) identifying the relevant investigation records, including the inmate file, a use-of-force packet, the investigation file, and compact discs containing unspecified records (Tr. 324). She did not provide copies of these records to opposing counsel because the federal case was stayed pending the outcome of the OATH disciplinary case (Tr. 310, 324). When shown Captain Behari's police complaint against the inmate, Ms. Stackhouse said she would not have provided this in discovery without redacting the details regarding Captain Behari's address and other personal information (Tr. 314). When shown the February 21, 2014, e-mail, Ms. Stackhouse stated that she would not have provided it in discovery at all due to its irrelevance and the mention of the captain's address and assigned equipment (Tr. 316-17). After it was discovered that Ms. Conti-Cook had received personal information about Captain Behari, Ms. Stackhouse contacted Ms. Conti-Cook who agreed that the records provided to her by respondent would be for the attorneys' eyes only (Tr. 321, 337).

Ms. Ajayi, a DOC attorney who acted as a discovery liaison with the Law Department, stated that personnel files of officers, including disciplinary histories and evaluations, would only be provided to the Law Department if a protective order was issued (Tr. 282). No records are provided from a pending investigation (Tr. 284-85). Ms. Ajayi stated that she provided the investigation file concerning the 2012 Hinton use of force to the Law Department in early 2014, only after the investigation was concluded (Tr. 299-300).

It must be noted that the personal details concerning Captain Behari contained in the police report and the February 21, 2014 e-mail thread were particularly sensitive. The police complaint contained the captain's address and the nearby location where the encounter with Mr. Hinton occurred. It indicated that Captain Behari told police that Mr. Hinton's remark, "[s]o this is where you live," caused the captain "annoyance and alarm." The e-mail thread to which the complaint was attached mentioned the captain's recent hospital discharge, the decision to take away his firearm, his parent's home address, and his own home address. All of these details were security-sensitive, highly confidential, and should not have been disclosed to anyone outside the Department, and particularly not to an attorney representing an inmate in a federal lawsuit against the City.

The e-mails regarding Mr. Hinton's incarceration after March 2014 also contained confidential information.[1] Mr. Hinton's security category, his involvement in another use of force, and the scheduling of an upcoming interview by Department investigators all concerned "departmental business" which should not have been divulged without appropriate approval.

In his closing, respondent's counsel contended that sending the transcripts of the employee investigatory interviews was "neither improper nor sanctionable" because it fostered a cooperative working relationship with a "key witness." At the time the transcripts were sent, however, the transcripts were, in fact, confidential, as part of the investigation file in an open disciplinary case. In addition, the inmate and his attorney had already articulated a willingness to cooperate with respondent and testify at a disciplinary hearing, since sustaining the disciplinary charges would improve the inmate's chances of a financial recovery in the federal lawsuit. According to an e-mail sent by Ms. Conti-Cook to respondent on October 23, 2013, Mr. Hinton was "willing and eager to testify" in the pending disciplinary case (Pet. Ex. 1 at 00767-68). This assurance as to Mr. Hinton's willingness to testify cast doubts on respondent's assertion that he felt compelled to send out the transcripts to Ms. Conti-Cook in order to gain her and Mr. Hinton's cooperation.

Respondent further argues that the delivery of the interview transcripts was not improper because the transcripts became public approximately five weeks later when they were entered into the record at the OATH disciplinary hearing. While this argument suggests that the

disclosure of the transcripts was of limited import since the transcripts were only within weeks of becoming public, it does not change the fact that, at the time respondent e-mailed the transcripts to Ms. Conti-Cook, they were confidential records pursuant to Civil Rights Law section 50-a and DOC rules and should not have been disclosed. Similarly, respondent's proof that home addresses of many individuals, including Captain Behari, are not difficult to obtain from the internet pursuant to name searches (Ellis: Tr. 404-05; Resp. Ex. F) does not negate the fact that such personal information, when contained in DOC records and communications, is confidential and cannot be disclosed. It is worth mention that in a case in which respondent appeared on behalf of DOC, *Department of Correction v. Pearson,* OATH Index No. 391/14 (Dec. 18, 2013), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2014-0252 (July 10, 2014), he contended that an officer who, among other undue familiarity activities, divulged confidential information to an inmate regarding a colleague's work location was guilty of serious misconduct.

In sum, because the DOC records, the personal information about Captain Behari, and the information about Mr. Hinton's incarceration were confidential under both DOC rules and multiple laws, respondent's e-mails transmitting these records and information were misconduct. All five of the charges should be sustained.

FINDINGS AND CONCLUSIONS

1. Specification 1 should be sustained in that, on January 8, 2014, respondent sent an e-mail to a private attorney attaching the confidential interview transcripts of Department employees, in violation of Department rules 3.55.060, 4.30.030, and 8.05.050, Civil Rights Law section 50-a, the NY State Rules of Professional Conduct Part 1200, rules 1.6(a)(2) and 1.1(a), and City Charter section 2604(b)(4).

2. Specification 2 should be sustained in that, on February 21, 2014, respondent sent an e-mail to a private attorney attaching a police report with confidential contact information and an e-mail thread with confidential personal, security, and medical information concerning a Department employee, in violation of Department rules 3.55.060, 4.30.030, and 8.05.050, Civil Rights Law section 50-a, the NY State Rules of Professional Conduct Part 1200, rules 1.6(a)(2) and 1.1(a), and City Charter section 2604(b)(4).

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[1] Mr. Hinton's location in the DOC prison system was not confidential, since a DOC website provided this information (Tr. 109).

3. Specifications 3, 4, and 5 should be sustained in that, on March 17, March 19, and March 21, 2014, respondent sent e-mails to a private attorney containing confidential Departmental business concerning an inmate's security classification, his involvement in another use of force, and the scheduling of an upcoming interview by investigation staff, in violation of Department rules 3.55.060, 4.30.030, and 8.05.050, Civil Rights Law section 50-a, the NY State Rules of Professional Conduct Part 1200, rules 1.6(a)(2) and 1.1(a), and City Charter section 2604(b)(4).

RECOMMENDATION

Upon making the above findings, I requested and received summaries of respondent's personnel history in order to make an appropriate penalty recommendation. Respondent was appointed to DOC in 1988. He received a "corrective interview" in 2009 for unspecified inefficient performance of duty and has no other disciplinary record.

Petitioner seeks respondent's termination due to the seriousness of the disclosure here as well as due to the adverse repercussions, which included Judge Richard's sanction of striking Mr. Hinton's testimony in *Behari*. In support of this argument, petitioner contends that respondent "compromised his integrity," "compromised" his ability to prosecute disciplinary cases, and damaged the DOC prosecution in *Behari*.

There is no question that respondent's disclosure of confidential information warrants a severe penalty. Respondent's actions compromised the pending disciplinary case by creating the appearance that respondent, while representing DOC, was actively assisting Mr. Hinton and his counsel in successfully suing the City for damages. His conduct also fomented mistrust among the attorneys who represent correction officers and captains and the DOC employees themselves, who fear that DOC attorneys may treat them unfairly. There is merit to the argument of petitioner's attorney that respondent's violation of his obligations as an attorney and as a DOC employee has tarnished both his reputation and that of DOC.

Nonetheless, multiple mitigating circumstances exist here which establish that termination is inappropriate. Respondent has served DOC for some 26 years and has a good work record. To terminate an employee like respondent for his first serious disciplinary violation would be inconsistent with the concept of progressive discipline. "It is a well-established principle in employment law that employees should have the benefit of progressive discipline wherever appropriate, to ensure that they have the opportunity to be apprised of the

seriousness with which their employer views their misconduct and to give them a chance to correct it." *Dep't of Transportation v. Jackson*, OATH Index No. 299/90 at 12 (Feb. 6, 1990). The theory of progressive discipline is to avoid termination for all but the most egregious misconduct and instead modify employee behavior through increasing penalties for repeated same or similar misconduct. *Police Dep't v. Schaefer*, OATH Index Nos. 1114 and 1169/99 at 14 (July 2, 1999), *aff'd*, 281 A.D.2d 163 (1st Dep't 2001).

Respondent's latest evaluation for 2012 was "outstanding." Assistant Commissioner Logan noted that respondent was "extremely timely" in submitting written work, "extremely prepared" at pretrial conferences, "meticulous" in preparing witnesses and exhibits for trial, and a "committed DOC employee with a strong sense of justice." This evaluation confirms that respondent has been an excellent and productive employee whose legal skills and diligence have served his agency for many years.

Respondent was forthright and honest when confronted about the e-mails to Ms. Conti-Cook. He fully cooperated with his supervisor's request to provide copies of all the e-mails. At the hearing, he also acknowledged making a serious mistake, displayed considerable remorse, and repeatedly stated that he would not disclose confidential information again: "And in retrospect had I, if I had to do it over again, I would have gone through the legal division and asked if I could provide those documents, and I'm sorry for that" (Tr. 467). As to other DOC records requested by Ms. Conti-Cook, he appropriately directed her to seek the documents by official channels through the DOC counsel's office. It is true that neither of the reasons provided by respondent for his actions, that he wished to obtain the cooperation of Mr. Hinton in testifying and that Ms. Conti-Cook would likely receive most of the records during the federal litigation, fully explain why respondent sent the e-mails. One plausible explanation is that the e-mails were an ill-advised effort to ensure "justice" for Mr. Hinton, who was severely injured by DOC staff.

Respondent's actions have already had serious adverse consequences. He was immediately reassigned to a different division and location and was preliminarily suspended for 30 days. At the new location, he is required to walk a considerable distance which he finds difficult due to his medical condition.

Past cases involving long-term attorneys indicate that suspension, not termination, would be the most appropriate penalty for the misconduct here. In *Department of Housing*

Preservation and Development v. Brannon, OATH Index No. 1723/08 (May 23, 2008), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 09-09-SA (Mar. 18, 2009), a 10-year agency attorney who approached another attorney outside a courtroom, placed his hand on her arm, and asked her for a kiss was suspended for 30 days. In *Dep't of Education v. Rubinstein*, OATH Index No. 1264/07 (Sept. 21, 2007), a 27-year attorney who assisted with the preparation of a false job advertisement for another employee was suspended for 30 days. In *Human Resources Admin. v. Dippell*, OATH Index No. 1142/94 (July 28, 1994), a 20-year agency attorney who repeatedly refused to report to a new work assignment was demoted.

It seems unlikely that respondent's disclosures in this case, if presented to the disciplinary committee for the state courts, would result in a suspension or disbarment. According to the 2013 Annual Report of Departmental Disciplinary Committee of the First Department, suspensions are reserved for those cases in which an attorney is found guilty of a "serious crime." Examples include wrongful conversion of client funds, *Matter of Ogihara*, 111 A.D.3d 186 (1st Dep't 2013), repeated neglect of client's legal matters and failure to cooperate with an investigation, *Matter of Anyikwa*, 109 A.D.3d 76 (1st Dep't 2013), and falsifying bank records submitted to the Disciplinary Committee. *Matter of Jackson*, 103 A.D.3d 10 (1st Dep't 2013). The disclosures in this case would be more likely to result in public censure or reprimand.

Petitioner also cites an attorney disciplinary case, *Matter of Fernandez*, 66 A.D.3d 208 (2d Dep't 2009), in which an assistant district attorney was disbarred after being convicted of the felony of filing a false instrument. Petitioner's attorney refers to facts not contained in the court opinion to contend that the attorney was disbarred in part for divulging confidential records, a violation comparable to that of respondent. The disbarment decision in *Fernandez*, however, mentions the attorney's prior felony conviction of filing a false instrument, not her disclosure of confidential information or documents, as the basis for disbarment.

Two of the cases relied upon by petitioner in support of termination are inapposite in that they involve officers found to have divulged confidential information while engaged in undue familiarity with an inmate, a more serious violation directly impacting facility security. *See Dep't of Correction v. Merced,* OATH Index No. 1608/14 (Aug. 19, 2014) (officer terminated for undue familiarity in having two telephone conversations with a City inmate during which she revealed that she and another officer had recently had surgery); *Dep't of Correction v. Pearson*,

OATH Index No. 391/14 (Dec. 18, 2013), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2014-0252 (July 10, 2014) (officer terminated for on-going relationship with an inmate, speaking with the inmate on post on her cell phone, and telling the inmate the work location of a deputy warden whose spouse had been allegedly murdered by the inmate).

Ultimately, the evidence in this case showed respondent to be motivated by a misguided zeal directed toward punishing officers who wrongfully assaulted an inmate. Luckily his actions had limited negative repercussions. One of the confidential records which he disclosed would have inevitably been given to Ms. Conti-Cook as part of the federal litigation and, in fact, became public only a few weeks later when it was entered into evidence during the trial at OATH. The stray details concerning Mr. Hinton's incarceration in March 2014, provided to only Mr. Hinton's attorney, were more a technical rather than a substantive violation of the confidentiality rules. Respondent credibly testified that the February 21, 2014 e-mail with the police complaint and the e-mail thread, the most egregious violation respondent committed, was inadvertent in that he forwarded an e-mail without fully reviewing its contents. This type of error, while not unusual in the course of ordinary e-mail correspondence by modern professionals, suggests a dismaying degree of negligence when committed by an attorney representing the City in litigation. It should not, however, mandate termination for an employee like respondent, who has served the City capably for almost three decades and, from all appearances, will never make such a mistake again. While it may be that respondent's actions will render him unsuitable for continuing to prosecute use-of-force cases against uniformed correction staff, there are any number of other legal positions at DOC where an attorney with his experience and skills could be put to productive use.

Accordingly, I recommend that respondent be suspended for 45 days, with credit for the 30-day suspension already served, for the misconduct found to have occurred in this case.

John B. Spooner
Administrative Law Judge

March 13, 2015

SUBMITTED TO:

JOSEPH PONTE
Commissioner

APPEARANCES:

JOSE NIEVES, ESQ.
ALAN ALVAREZ, ESQ.
Attorneys for Petitioner

THOMAS CIANTRA, ESQ.
Attorney for Respondent

Commissioner's Decision

The instant matter was sent for my review after the report and recommendation issued by Administrative Law Judge John B. Spooner (hereinafter "ALJ Spooner") of the Office of Administrative Trials and Hearings (hereinafter OATH).

ALJ Spooner presided over the fact finding hearing in the instant matter on January 22nd, 23rd, and 26th 2015. On March 13, 2015, ALJ Spooner issued a report and recommendation finding Respondent guilty of the following charged specifications:

1) *Specification I should be sustained in that, on January 8, 2014, respondent sent an e-mail to a private attorney attaching the confidential interview transcript of Department employees, in violation of Department rules 3.55.60, 4.30.030, and 8.05.050, Civil Rights Law section 50-a, the NY State Rules of Professional Conduct Part 1200, rules 1.6(a)(2) and 1.1 (a) and City Charter section 2604(b)(4);*

2) *Specification 1 should be sustained in that, on February 21, 2014, respondent sent an e-mail to a* private *attorney attaching a police report with confidential contact information and an email thread with confidential personal, security, and medical information concerning a Deportment employee, in violation of Department rules 3.55.060, 4.30.30, and 8.05.050, Civil Rights Law section 50-a, the NY State Rules of Professional Conduct Part 1200, rules 1.6(a)(2) and 1.1(a), and City Charter Section 2604(b)(4);*

3) *Specifications 3, 4, and 5 should be sustained in that on March 17, March 19, and March 21, 2014, respondent sent e-mails to a private attorney containing confidential Departmental business concerning an inmate's security classification, his involvement in another use of force, and the scheduling of an upcoming interview by investigation staff, in violation of Department rules 3.55.060, 4.30.030, and 8 05.050, Civil Rights Law section 50-a, the NY State Rules of Professional Conduct Part 1200, rules 1.6(a)(2) and 1.1 (a) and City Charter section 2604(b)(4).*

OATH Index No. 15-0984.

Based on my review of the aforementioned factual information, including but not limited to, the Report and Recommendation from OATH, the information provided by the Trials and Litigation Division and the Fogel letter dated March 26, 2015, submitted on Respondent's behalf by counsel, I adopt ALJ Spooner's factual findings and reject the recommended penalty. Respondent's intentional disclosure of confidential Department records relating to the official business of the Department to a private attorney without permission or authority constitutes an egregious breach of the attorney-client privilege and renders Respondent a security risk to the Department.

Respondent compromised his integrity and breached the security and core legal obligations he owed to the Department. The Respondent's misconduct jeopardized the Department's ability to effect discipline in the disciplinary matter of *Department of Correction v. Behari, et alia,* OATH Index Nos. 781-786/2014 and resulted in a sanction against the Department by Administrative Law Judge Tynia Richards for the violation of Civil Rights Law 50a. The Department can no longer trust Respondent to fulfill the primary responsibility of his position.

Based on the trial record and the evidence presented, I reject ALJ Spooner's penalty recommendation and determine that termination of employment is the appropriate penalty in this disciplinary matter.

Joseph Ponte, Commissioner
Apr. 2, 2015

DECISION

DAVID KLOPMAN ("Appellant") appealed from a determination of the Department of Correction ("DOC" or "the Department") finding him guilty of incompetence and misconduct and imposing a penalty of termination following disciplinary proceedings conducted pursuant to Civil Service Law Section 75. The Civil Service Commission ("Commission") conducted a hearing on May 14, 2015.

The Commission has carefully reviewed the record in this case including the testimony adduced at the hearing before the Office of Administrative Trials and Hearings ("OATH"). The OATH Administrative Law Judge ("ALJ") found Appellant guilty of all charges brought against him by DOC and recommended a penalty of a 45-day suspension, with consideration for 30 days already served. The DOC Commissioner accepted the ALJ' s findings, but terminated Appellant's employment because he believed that Appellant "compromised his [own] integrity and breached the security and core legal obligations he owed to the Department," rendering him unqualified for his position as a legal representative of the DOC.

Although Appellant has had a long and unblemished career as a DOC attorney, we agree with the DOC Commissioner that he can no longer serve effectively as an attorney for the DOC, and that his ongoing employment would undermine the reputation of the Department. Appellant admits to having violated a core legal obligation not to disclose confidential information, and his reckless and irresponsible decision to do so had serious, predictable consequences for the disposition of an active case and might have unwittingly endangered the safety of correction officers. The DOC has a valid interest in maintaining the highest level of integrity in the Department's disciplinary program, and this interest outweighs any mitigation provided by Appellant's otherwise untarnished career.

The Commission therefore finds no reversible error and affirms the decision and penalty imposed by the DOC.

NANCY G. CHAFFETZ, COMMISSIONER
CHAIR

RUDY WASHINGTON, COMMISSIONER
VICE CHAIR

CHARLES D. MCFAUL
COMMISSIONER

Date: June 17, 2015