Human Resources Admin. v. Smart

OATH Index No. 1325/16 (May 6, 2016)

Respondent, an associate job opportunity specialist, acted unprofessionally when she continued to talk on her cell phone while a client was waiting, committed insubordination when she refused to set up her voicemail, and engaged in disrespectful conduct when she burned the edges of disciplinary memorandum. Petitioner did not prove additional charge of misconduct. Penalty of 15 days' suspension without pay recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
HUMAN RESOURCES ADMINISTRATION
Petitioner
- against -
AVERYL SMART
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner, the Human Resources Administration ("HRA"), brought this disciplinary proceeding against respondent, associate job opportunity specialist Averyl Smart, under section 75 of the Civil Service Law. The charges allege that respondent engaged in misconduct when she: continued to talk on her cell phone after a supervisor asked her to service a client; refused to set up her voicemail and provide her passcode to a supervisor; spoke to a supervisor in an angry, loud, and disrespectful tone; and burned the corners of a disciplinary memorandum (ALJ Ex. 1). Respondent conceded that she did not promptly update her voicemail message and she may have been abrupt with a supervisor who interrupted her when she was talking with a colleague about a client's case. But she denied committing misconduct.

At trial on April 13, 2016, petitioner relied on documentary evidence and testimony from five supervisors. Respondent testified in her own behalf and presented testimony from a co-worker. After receipt of additional documentary evidence, the record was closed on April 15, 2016.

For the reasons that follow, petitioner proved three of the four specifications and I recommend a penalty of 15 days' suspension without pay.

ANALYSIS

Respondent works at petitioner's East River Job Center in Long Island City. She interviews clients to ensure that they are receiving appropriate benefits. The charges allege that respondent engaged in acts of unprofessional or insubordinate conduct from December 2013 to April 2015. Respondent denied the allegations. Because petitioner's witnesses were generally more credible than respondent, most of the charges should be sustained.

Talking on cell phone and failing to serve client (Specification I)

Petitioner alleged that on the morning of December 23, 2013, supervisor Sharon Jean saw respondent talking on her cell phone when she should have been serving a client. When Jean approached to say that a client was waiting, respondent allegedly moved a chair towards her cubicle's entrance, wrestled the chair away from Ms. Jean when she tried to return it, and made the client wait elsewhere while she continued to talk on her cell phone (ALJ Ex. 1). This specification should be sustained.

Ms. Jean, a long-time supervisor, testified that she saw respondent talking on a cell phone while a client was waiting (Tr. 12-13, 49). When Ms. Jean approached, respondent moved a chair from beside her desk and tried to use it to block the entrance to her cubicle (Tr. 13, 44, 62). There was a brief "tussle" with the chair as Ms. Jean tried to move it into the cubicle and respondent tried to push it out (Tr. 13, 45-46, 51). Respondent did not say anything and she eventually put her cell phone down (Tr. 43, 48-49). To avoid causing a disruption, Ms. Jean walked away (Tr. 14, 46).

In a memorandum written later that day, Ms. Jean noted that she told respondent, who was on her cell phone, that there was a client waiting. Respondent moved a chair from her cubicle to a nearby cubicle and told the client to wait there. Ms. Jean tried to move the chair back to respondent's cubicle. After wrestling the chair away from Ms. Jean, respondent told the client to wait at a co-worker's desk (Pet. Ex. 1). Ms. Jean testified and stated in her

memorandum that she had repeatedly warned respondent about speaking on her cell phone while clients were waiting (Tr. 16, 35; Pet. Ex. 1).

Respondent testified that she often needs to scan documents for proof of citizenship and residency (Tr. 214, 216-17). Clients are also sent to another floor for finger imaging (Tr. 217-18). Respondent insisted that she was working even when clients were not at her desk (Tr. 218).

According to respondent, on the morning of the incident, she was at her desk with her cell phone in her hand, but she did not talk on the phone for five minutes (Tr. 219). Respondent testified that she did not normally have her phone out; if it was in her hand, it was there "for a reason" (Tr. 219). Ms. Jean approached with a client and a chair, which "startled" respondent (Tr. 219, 239-40). According to respondent, she told Ms. Jean that she was serving a client who was at finger imaging and, when she finished seeing that client, she would see the new client (Tr. 219-20, 241). Ms. Jean insisted that the client stay there, but respondent told the client, "I really can't see you now" (Tr. 220).

Respondent did not recall "tussling" over a chair, but she may have moved the extra chair (Tr. 221, 239-40). She testified that, when the new client started to walk away, she told him to sit in the cubicle across from her (Tr. 220). After respondent's client returned, she finished helping him and then interviewed the client who had been waiting (Tr. 220, 222).

The evidence established that respondent engaged in unprofessional conduct and neglected her duties. Because of the passage of time, Ms. Jean did not recall the exact words that were uttered (Tr. 38-39, 43). Yet the essence of her testimony was clear, consistent, and corroborated – respondent was on her cell phone while a client was waiting. When Ms. Jean attempted to intervene, respondent sought to move a chair out of her cubicle and briefly struggled with Ms. Jean over the chair. Ms. Jean had no apparent motive to lie and her recollection of the incident was supported by her contemporaneous memorandum. Her testimony was also confirmed, in part, by respondent's concession that she was on her cell phone, that a client was waiting, and there was some movement of a chair. Instead of serving her client, respondent was on her cell phone and engaged in a petty dispute with her supervisor.

I did not credit respondent's claim that Ms. Jean brought an extra chair to respondent's cubicle. There would have been no need for Ms. Jean to do that. It was more likely that respondent tried to move her chair out of her own cubicle. That would be consistent with the

evidence that respondent was on her cell phone, did not want to be interrupted, and tried to move the chair either to block Ms. Jean or to make the client wait elsewhere.

I also did not credit respondent's claim that she was serving another client. In her testimony and memorandum, Ms. Jean credibly maintained that respondent never said that she was serving another client (Pet. Ex. 1; Tr. 68). Moreover, respondent's credibility was undercut by her claim that she never received a copy of Ms. Jean's memorandum on the day of the incident (Tr. 223). Petitioner presented evidence that the memorandum was attached to an e-mail that Ms. Jean sent to respondent that day (Pet. Ex. 14).

Refusal to update voicemail and provide passcode to supervisor (Specification II)

Petitioner alleged that respondent refused to set up her voicemail and refused to provide the passcode for her voicemail to her supervisor, Ms. Jean, as required in June and July 2014 (ALJ Ex. 1). This specification should be sustained.

The material facts are undisputed. Petitioner required all staff to set up their voicemail with a uniform message for clients based on a script provided by the Agency (Jean: Tr. 23). Each employee was also required to provide their supervisor with a passcode to permit access to the voicemail and assist clients in the employee's absence (Tr. 23, 25). Petitioner periodically audited compliance with the voicemail policy (Tr. 25). After a routine audit in June 2014, respondent was one of five employees at the work site who had not set up their voicemail or provided a passcode (Jean: Tr. 21; Deputy Director Ella Caynes: Tr. 179). Ms. Caynes asked Ms. Jean to follow up and, by the next day, respondent was the only employee who did not comply with the voicemail policy (Jean: Tr. 21; Caynes: Tr. 179-80).

On June 16, via e-mail, Ms. Jean directed respondent to set up her voicemail as soon as she arrived for work that day (Tr. 21; Pet. Ex. 2). In another e-mail, sent on June 26, Ms. Jean noted that respondent had said that she was having problems with her voicemail (Pet. Ex. 2). Ms. Jean told respondent that, if they could not resolve the issue, Yolande Fraser, assistant to the site director, could assist (Pet. Ex. 2).

Mr. Fraser spoke with respondent on June 27, gave her a copy of the voicemail policy, and told her to update her voicemail and provide her passcode to Ms. Jean (Fraser: Tr. 81, 90-91; Respondent: 225; Pet. Ex. 5). Respondent said that she already had a copy of the policy and she

asked why Ms. Jean needed to have her passcode (Fraser: Tr. 81, 83; Respondent: Tr. 237). Despite memoranda sent to respondent on July 1 and 2, with warnings that her continued failure to follow the voicemail policy would result in insubordination charges, she did not comply with the policy until after July 9 (Fraser: Tr. 90; Respondent: Tr. 236; Pet. Exs. 7, 8).

At trial, respondent conceded that Ms. Jean told her that she had failed the audit and that she needed to set up her voicemail (Tr. 223-24). According to respondent, she told Ms. Jean, "I'm going to get to it" but it took her awhile to set up her voicemail message because "it was a very hectic place" and she did not realize that it was of "dire importance" (Tr. 226-27). Respondent also testified that she did not want Ms. Jean to have her passcode (Tr. 225). According to respondent, she had problems with not receiving messages in the past (Tr. 225). She suspected that the problems were caused by Ms. Jean, who may have improperly accessed respondent's voicemail (Tr. 225-26).

The evidence proved that respondent violated petitioner's voicemail policy and disobeyed direct orders by refusing to set up her voicemail and failing to provide her passcode. Contrary to respondent's suggestion, she was not merely tardy; she was insubordinate. Despite multiple requests, delivered in person and via e-mail, respondent repeatedly refused to comply with a clear order. She was told to set up her voicemail as soon as she arrived for work on June 16. Inexplicably, respondent failed to obey that request. Though she may have been busy, respondent had no legitimate reason to ignore a direct order for more than three weeks.

Respondent also had no valid basis for refusing to provide her passcode to supervisors. There was no credible evidence to support respondent's speculation that Ms. Jean had tampered with her voicemail in the past. If respondent had such suspicions, she should have brought them to the attention of another supervisor. It was not permissible for respondent to ignore petitioner's passcode policy based on her unreported and unsupported fears. *See Ferreri v. NYS Thruway Auth.*, 62 N.Y.2d 855 (1984) (Based on the principle "obey now, grieve later," an employee must obey the lawful order of a supervisor and, if necessary, grieve it later through appropriate channels). Likewise, respondent's eventual compliance with the voicemail policy did not excuse her three-week refusal to do so. *See Dep't of Homeless Services v. Chappelle*, OATH Index No. 1918/07 at 4-5 (Aug. 30, 2007) (despite brief lapse between initial refusal and ultimate

compliance, insubordination found where employee obeyed only after a higher-level supervisor told him he had to comply with lower-level supervisor's order).

Loud and disrespectful comments to supervisor (Specification III)

Petitioner alleged that respondent became "angry, hostile, and responded in a loud and disrespectful tone" on March 31, 2015, when a supervisor, Mr. Obianyo, asked her whether a client was at her desk (ALJ Ex. 1). The charge should be dismissed because the evidence failed to prove that respondent committed misconduct.

Mr. Obianyo, a supervisor who usually worked on the third floor, testified that he was temporarily re-assigned to the fifth floor on March 31, 2015 (Tr. 123, 160). Late that day, there were clients waiting (Tr. 125). According to Mr. Obianyo, he approached one or two employees, including Mr. Loye and respondent, and said, "Can we please – we have clients outside, it's almost 6:00 p.m." (Tr. 125, 142). Mr. Obianyo testified that respondent turned around "and started using profanity to me saying stop this nonsense, go back to your floor" (Tr. 125-26, 146). Mr. Obianyo claimed that he replied, "What do you mean by that? We have clients outside, we got children there. Some of them have been here for hours" (Tr. 126). Then he turned to Mr. Loye and told him to break it up (Tr. 126). Mr. Obianyo recalled that Mr. Loye said that he could "handle this" (Tr. 128). They resumed work and finished after 8:00 p.m. (Tr. 131).

In a memorandum written the next day, Mr. Obianyo wrote that there were ten clients waiting to be served, he asked respondent if she had a client at her desk, and respondent "started using obscene words and tirades," and said, "You do not have to come here with your nonsense. You should go back to your floor" (Pet. Ex. 10; Tr. 147).

Respondent testified that she was discussing a client-related matter with Mr. Loye when Mr. Obianyo approached "in a disgruntled manner" (Tr. 228). In a "bellowing voice" he said, "You need to get to your clients" and "You're wasting time" (Tr. 229). According to respondent, Mr. Obianyo was "nasty" (Tr. 244). She told him that he was "rude," that they did not need "that sort of behavior," and "You need to go back downstairs with this nonsense" (Tr. 229). Mr. Loye said "It's okay" and defused the situation (Tr. 229).

Mr. Loye, a supervisor called by petitioner as a witness, generally supported respondent's version of events. He recalled that respondent was assisting with a client (Tr. 100-01).

According to Mr. Loye, Mr. Obianyo approached without asking any questions, assumed that they were not discussing work, and said, in an "abrupt" and "direct" tone, "Start interviewing clients" and "Stop wasting time" (Tr. 100-02, 111-12). According to Mr. Loye, respondent took offense and asked Mr. Obianyo why he was interrupting (Tr. 102). She said something like, "Why are you on the floor?" or "Why are you interrupting me?" and "We are doing the best we can" (Tr. 103-04). Mr. Loye did not recall what, if anything, Mr. Obianyo said in reply (Tr. 105). After Mr. Loye spoke, they resumed working without incident (Tr. 102, 113).

In a memorandum written two days after the incident, Mr. Loye noted that, while he was discussing a case with respondent, Mr. Obianyo approached and told her to call a client. Respondent told him not to interrupt, and she said, "We don't need you up here, go back downstairs." Respondent also said that Mr. Obianyo had been rude. Mr. Loye told respondent to stop and the way she had reacted was not the proper way to address the manner (Pet. Ex. 9).

At trial, Mr. Loye recalled that respondent had been diligently assisting clients that day (Tr. 116). Respondent's tone was "direct" (Tr. 117). But she was not loud (Tr. 104).

Not all workplace disagreements are misconduct. *See Transit Auth. v. Victor*, OATH Index No. 799/11 at 4 (Mar. 3, 2011), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-52-A (Aug. 9, 2011); *Dep't of Correction v. Aiken*, OATH Index No. 797/95 at 6 (Mar. 8, 1995) ("a loud disagreement between a subordinate and a supervisor does not constitute per se misconduct and absent the use of any threats, insolence or profanity or any showing that the office was disrupted by the argument, the speech is not sanctionable"); *see also Dep't of Sanitation v. Quinones*, OATH Index No. 1974/05 at 14 (Oct. 14, 2005) ("[n]ot every expression of disagreement with a supervisor is misconduct, even when voices are raised and emotions are vented"). Relevant factors include the context, substance, tone, and duration of the remarks. *Compare Human Resources Admin. v. Levitant*, OATH Index No. 397/04 at 18 (Sept. 7, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-59 (May 2, 2006) (misconduct found where employee approached supervisor and said, "You don't know who you are messing with. I will hurt you"); *with Transit Auth. v. Fedey*, OATH Index No. 633/97 at 7 (Mar. 14, 1997), *modified on penalty*, Auth. Dec. (Apr. 21, 1997), *aff'd*, NYC Civ. Serv. Comm'n Item No. 98-102-SA (Sept. 28, 1998) (employee's complaint about doing someone else's work not misconduct where neither tone nor volume were insubordinate or disrespectful).

Here, petitioner failed to prove that respondent committed misconduct. To begin with, I did not fully credit the testimony of Mr. Obianyo. On cross-examination, he repeatedly refused to give straightforward answers to counsel's questions and instead offered many non-responsive replies (Tr. 143-150). He also tended to exaggerate. For example, in his memorandum and testimony, he insisted that respondent used profanity or obscenity (Tr. 126-27, 146-47; Pet. Ex. 10). When pressed, however, he eventually acknowledged that respondent did not use any profane or obscene words (Tr. 126-27). Similarly, he claimed that respondent was "loud" or "very aggressive" and he denied that he accused her of "wasting" time (Tr. 129, 145). Those claims were refuted by the credible testimony of Mr. Loye, another supervisor, who insisted that respondent was not loud and that Mr. Obianyo had initiated the exchange by falsely accusing respondent and others of "wasting time" (Tr. 102, 111-12). I gave greater credence to Mr. Loye's account because he testified in a detached, neutral, and straightforward manner.

Based on the evidence presented, petitioner failed to show that respondent was loud, profane, or obscene. Moreover, the verbal exchange between respondent and Mr. Obianyo was brief. It ended quickly and all of the parties continued working.

The only remaining question is whether respondent was insolent. It appeared that Mr. Obianyo approached respondent and, without asking any questions, abruptly accused her of wasting time. Respondent, who was discussing a client-related matter, took offense at Mr. Obianyo's accusation and replied in kind. She said that he was rude to interrupt and "We don't need you up here, go back downstairs" or "You need to go back downstairs with this nonsense."

Of course, respondent's choice of words could have been better. Her comments appeared to be a reflexive response to an unfounded claim that she was "wasting time." Viewed in context, respondent's fleeting remarks were a proportionate response to a false allegation. Many conscientious employees, when falsely accused of wasting time by a supervisor who lacked the courtesy to say "excuse me" or ask any questions, might say something like "leave me alone," "go away," or "that's nonsense." That is what happened here. Such comments should be avoided. However, given their brevity, the provocation, and the absence of aggravating factors – such as vulgarity, continued argument, raised voices, or yelling – respondent did not commit employee misconduct when she spoke to Mr. Obianyo on March 31, 2015.

Burning the corners of a disciplinary memorandum (Specification IV)

Petitioner alleged that, on April 2, 2015, Mr. Obianyo handed respondent a disciplinary memorandum regarding the incident described in Specification III, respondent returned about 30 minutes later, and threw the memorandum, which had visible burns on each corner, on to Mr. Obianyo's desk (ALJ Ex. 1). Respondent conceded that she returned the memorandum to Mr. Obianyo by putting it on his desk, but denied that she had burned the edges. Because petitioner's evidence was more credible than respondent's evidence, this charge should be sustained.

Mr. Obianyo testified that he wrote a disciplinary memorandum regarding the March 31 incident and put it in an envelope that he handed to respondent on April 2, while she was interviewing a client (Tr. 132, 150). He testified that one-half hour later, respondent went to the third floor, dropped something on his desk, and left (Tr. 133, 152, 156). Mr. Obianyo went to his desk and saw the memorandum that he had handed to respondent. The edges of the memorandum's corners had been burned (Tr. 133). Mr. Obianyo immediately notified the deputy director, Ms. Caynes (Tr. 133, 136-37, 154). At trial, Mr. Obianyo testified that he considered the memorandum with the burnt edges to be disrespectful and a threat (Tr. 136).

Ms. Caynes testified that, after she saw respondent walking down the hallway, Mr. Obianyo asked her to come to his cubicle (Tr. 182-84). According to Ms. Caynes, she saw the memorandum on Mr. Obianyo's desk and noticed that the four corners were burnt (Tr. 183-84). Ms. Caynes conferred with petitioner's disciplinary unit and then met with respondent and her union representative (Tr. 185).

At trial, Ms. Caynes testified that respondent "pled the fifth" or stated, "I have nothing to say" when asked about the burnt memorandum (Tr. 185-86, 190-91). In a memorandum issued to respondent on April 2, Ms. Caynes noted that respondent's representative, Mr. Dore, reported that, when Mr. Obianyo issued the disciplinary memorandum to respondent, he did so in a disrespectful manner and threw the memorandum on her desk (Tr. 188-90; Pet. Ex. 13).

Respondent testified that she did not burn the memorandum (Tr. 233). She recalled that Mr. Obianyo delivered the memorandum by interrupting her while she was interviewing a client. He threw an envelope containing the memorandum on her desk (Tr. 230). After finishing the interview, respondent read the memo and went downstairs to the third floor to give it back to Mr.

Obianyo (Tr. 230). Respondent, who was annoyed that Mr. Obianyo had accused her of being obscene during the March 31 incident, left the memorandum on his desk (Tr. 230, 244).

According to respondent, Ms. Caynes questioned her about the burnt memorandum later that day (Tr. 231). Respondent told her that she did not burn the memorandum and she did not know anything about it (Tr. 232). When Ms. Caynes kept asking about it, respondent said that she had nothing more to say (Tr. 232-33). Respondent's union representative, Terry Dore, testified that he was present at the meeting with respondent, Ms. Caynes, and Mr. Obianyo (Tr. 211-12). He confirmed that respondent denied burning the memorandum and that Ms. Caynes continued to question her until respondent said that she had nothing more to say (Tr. 211, 213).

I credited petitioner's evidence. Mr. Obianyo's testimony was confirmed by Ms. Caynes. She credibly testified that she saw respondent on the third floor and that Mr. Obianyo promptly reported the incident. Based on this evidence, it appears that respondent burned the corners of the memorandum before she returned it to Mr. Obianyo's desk.

Respondent's testimony partly supported petitioner's evidence. As respondent conceded, she was upset by the allegations in the memorandum and by the manner in which it was delivered to her. It appears that she angrily went from the building's fifth floor to the third floor to return the memorandum.

There were some minor discrepancies in petitioner's evidence, but they did not detract from the overall strength of petitioner's case. For example, petitioner's witnesses offered conflicting testimony concerning the date that Mr. Obianyo handed respondent the memorandum. They initially testified that Mr. Obianyo gave respondent the memorandum on April 1; then they said that he handed it to respondent on April 2 (Tr. 156, 182). The confusion may be due to the fact that the memorandum was dated April 1 and Mr. Obianyo may not have handed it to respondent until the next day (Pet. Exs. 11, 12, 13). However, it was an immaterial error because respondent and petitioner's witnesses agreed that she put the memorandum back on Mr. Obianyo's desk approximately 30 minutes after receiving it.

There were also some differences between the memorandum with the burned corners and the memorandum that Mr. Obianyo e-mailed to respondent and others (Pet. Exs. 10, 11). Mr. Obianyo credibly explained that, after handing respondent a copy of the memorandum, he realized that it was on old letterhead (Tr. 172). Before e-mailing the memorandum, he updated

the letterhead to reflect the Agency's new address (Tr. 172-73). There were no substantive differences between the hand-delivered and e-mailed memoranda (Pet. Exs. 10, 11).

There was no credible evidence to support respondent's suggestion that Mr. Obianyo had burned the corners of the memorandum. First, it is unclear from the sequence of events that he had enough time to do that, without detection. Second, he had no reason to go to such trouble. Mr. Obianyo had already accused respondent of misconduct and had stated his reasons for doing so in the memorandum. In contrast, respondent was so upset about the charges and the manner of service that she felt it necessary to make a point by promptly returning the memorandum to him. It appears that she wanted to emphasize her point by defacing the memorandum.

In short, petitioner's evidence proved that respondent burned the corners of the memorandum and put it on Mr. Obianyo's desk. Petitioner alleged that such conduct was disrespectful, unprofessional, and intimidating. Though I was not persuaded that anyone felt particularly threatened, respondent's actions were quite disrespectful and unprofessional. *See Human Resources Admin. v. Lovell*, OATH Index No. 2477/14 at 9, 13 (Feb. 13, 2015), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2015-1442 (Apr. 12, 2016) (misconduct proved where, in the presence of co-workers, employee ripped up an assignment and placed it in a garbage bin).

FINDINGS AND CONCLUSIONS

1. Petitioner proved that respondent talked on her cell phone and tried to move a chair away from her cubicle when she should have been serving a client, as alleged in Specification I.

2. Petitioner proved that respondent disobeyed orders to comply with HRA's voicemail policy, as alleged in Specification II.

3. Petitioner proved that respondent burned the corners of a memorandum and put it on a supervisor's desk, as alleged in Specification IV.

4. Petitioner failed to prove that respondent was "angry," "hostile," "loud," or "disrespectful" when she spoke to a supervisor, as alleged in Specification III.

RECOMMENDATION

After making the above findings, I requested and reviewed respondent's personnel history. Petitioner hired respondent in 2010. She has no prior disciplinary record and there were no completed performance evaluations on file. Though respondent has not received any formal awards or commendations, petitioner noted, without further detail, that she recently received an "e-card of appreciation" from her direct supervisor.

At trial, petitioner requested a penalty of 20 days' suspension without pay (Tr. 260). That is excessive. Petitioner's penalty request was based on the assumption that it had proved all of the charges. Because one of the four charges was not proved, a lesser penalty is appropriate.

Penalties for insubordinate or unprofessional conduct range from five days' suspension to termination of employment depending on the severity of the misconduct and the employee's disciplinary record. *See, e.g.*, *Human Resources Admin. v. Traylor*, OATH Index No. 168/07 at 7 (Jan. 31, 2007) (five-day suspension recommended for clerical associate who refused to obey an order to provide a written statement regarding failure to complete an assigned task); *Human Resources Admin. v. Wong*, OATH Index No. 316/15 (Dec. 1, 2014), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2015-0836 (Nov. 4, 2015) (ten-day suspension imposed where employee rudely confronted a deputy commissioner about a promotion and relied on information that had been improperly obtained); *Human Resources Admin. v. Small*, OATH Index No. 241/01 (May 10, 2001), *modified on penalty*, Comm'r Dec. (June 11, 2001), *aff'd*, 299 A.D.2d 238 (1st Dep't 2002) (40-day suspension upheld where supervisor threatened to strike a client, engaged in insubordination, and repeatedly had shouting matches with clients); *Lovell*, OATH No. 2477/14 at 16 (60-calendar day suspension recommended where caseworker, whose disciplinary record included a recent 45-day suspension, sent an insulting notice to a client and, on another occasion, failed to complete an assigned task by ripping up a document in protest); *Human Resources Admin. v. Perez*, OATH Index No. 2319/14 (July 17, 2014) (termination of employment recommended where employee, who had received three prior suspensions for misconduct, was absent without leave, stole a bicycle and stored it in an HRA office, disrupted the workplace for 30 minutes while he was unable to use a time scanner, and performed almost no work for three days).

Here, the proven charges establish that respondent engaged in inappropriate and unprofessional conduct on three occasions in two years. First, she stayed on her cell phone while a client was waiting and she had a brief tussle over a chair. Second, she repeatedly failed to comply with petitioner's voicemail policy. Finally, she defaced a disciplinary memorandum that had been issued to her. In respondent's favor, she has no prior disciplinary record and the separate acts of misconduct appear to be caused by brief lapses in judgment. On the other hand, respondent's conduct showed a tendency to disrespect supervisors. A substantial penalty would be consistent with principles of progressive discipline while making clear that respondent's conduct falls short of the professionalism that petitioner expects from its employees.

Accordingly, I recommend a five-day suspension for each proven charge of misconduct, for a total penalty of 15 days' suspension without pay.

Kevin F. Casey
Administrative Law Judge

May 6, 2016

SUBMITTED TO:

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Commissioner

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