Dep't of Environmental Protection v. Saint Louis

OATH Index No. 195/16 (Dec. 21, 2015), *adopted*, Comm'r Dec. (Mar. 4, 2016), **appended**

Petitioner failed to demonstrate that auditor was unable to satisfactorily perform his job. Dismissal of charges recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Petitioner
- against -
PIERRE SAINT LOUIS
Respondent

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORGNIOTTI, *Administrative Law Judge*

This employee incompetency proceeding was referred by petitioner, the Department of Environmental Protection ("DEP"), pursuant to section 75 of the Civil Service Law. Respondent Pierre Saint Louis, a city research scientist level three, is charged with failing to satisfactorily perform the duties of his job (ALJ Ex. 1; Tr. 6). Petitioner seeks respondent's termination from employment (Tr. 325). Respondent denied the allegations and argued that accusations of his incompetency were fabricated two months after he filed an internal Equal Employment Opportunity ("EEO") complaint against his supervisor, Mr. McCoy (Tr. 9-10).

A trial was conducted on October 26 and 30, 2015. Petitioner presented documentary evidence and the testimony of Mr. McCoy and Mr. Olton, respondent's current supervisors. Respondent testified on his own behalf, and presented documentary evidence and the testimony of his former supervisors, Mr. Goyette and Ms. Wickham, who also observed respondent perform some of the disputed work during the relevant period.

The charges should be dismissed because petitioner failed to provide objective proof supported by reliable documentary evidence that respondent is unable to meet the minimally acceptable threshold requirements of the duties of his title.

BACKGROUND

Respondent has been employed by DEP since 2005 and works in the Office of Environmental, Health and Safety ("OEHS"). Mr. McCoy is an assistant commissioner and the head of OEHS. Mr. McCoy reports to Persis Luke, an assistant commissioner who oversees a larger unit that encompasses OEHS. Since 2011 Mr. McCoy has been respondent's supervisor.

Respondent was hired by Mr. McCoy and began in the title of industrial hygienist concentrating on worker health and safety under the Occupational Health and Safety Administration ("OSHA") requirements (Tr. 284). Between 2005 and 2008 Ms. Wickham, now the director for environmental health and safety, was respondent's supervisor.

In 2008 respondent started working as a city research scientist level three (Pet. Ex. 14), which is known in DEP as an Environmental, Health and Safety ("EHS") auditor (Tr. 170). EHS auditors review worker health and safety as well as DEP's compliance with environmental regulations. EHS auditors conduct research and analyses in physical, biological, environmental, or social sciences areas and must have a specialized doctorate or master's degree in these fields or equivalent work experience (Pet. Ex. 14). Respondent has a Bachelor's degree in Chemical Engineering, a Master of Engineering in Chemical Engineering, and a second Master of Engineering in Industrial Engineering (Tr. 17-171).

Between 2008 and 2011 Mr. Goyette, now a compliance specialist, was respondent's supervisor. Mr. Goyette testified that he designated respondent as a lead auditor because of his experience and writing skills. Mr. Goyette stated that respondent did "an excellent job" on his first audit as a team leader and that his subsequent audits were accurate. Mr. Goyette had a "high opinion" of respondent's work (Tr. 263-71). Respondent's performance evaluations from Ms. Wickham and Mr. Goyette were either "good" or "very good" (Resp. Ex. A).

OEHS was established in 2001 after DEP signed a federal plea agreement related to various environmental regulations, including the Clean Water Act, that had been violated by DEP's Bureau of Water and Sewer Operations ("BWSO"). As a condition of the agreement, DEP had to develop protocols to ensure that these violations did not recur and to establish an office that would oversee them. Mr. McCoy was hired in 2001 to accomplish these tasks. After the protocols were developed, DEP started auditing BWSO to monitor and improve its compliance. Eventually the audit program was expanded to include over 535 facilities that are

divided into three risk categories: high, medium, and low. The designation is based on the number of employees at the site and the risk associated with its operations. The high, medium, and low sites are audited every two, five, and seven years, respectively (Tr. 18-19, 136-37).

Initially, EHS auditors went to a facility with a checklist to identify what was out of compliance and developed a time frame for achieving compliance. This type of checklist audit, with modifications, was conducted between 2003 and 2010. After it was determined that the checklist method was not reaching the root problems concerning the compliance requirements, the audit protocol was changed in 2011 to an analytical review of the factors that caused the noncompliance (Tr. 20-23). Instead of visiting the DEP facilities with a checklist, EHS auditors reviewed the facilities' operations and record keeping. They prepared written reports that detailed their findings and any corrective action plans necessary to bring a facility into compliance with federal, state, and local regulations regarding worker safety and the environment (Tr. 16-18).

Between 2010 and 2014, OEHS conducted six training sessions for the EHS auditors, including respondent, to learn the new audit protocol (Tr. 23-25; Pet. Ex. 1). On February 1, 2014, OEHS issued a manual on how to conduct these audits, including the pre-assessment, on-site assessment, and the post-assessment phases (Pet. Ex. 2). An all-day training was conducted on June 27, 2014, to review how to write up the findings and corrective action plans (Tr. 25-28).

In or around 2011, Mr. Olton was promoted from an EHS auditor to Audit Program Manager. He reports to Mr. McCoy. While Mr. Olton does not directly supervise the EHS auditors, he sets their work schedules, assigns them to be either the lead auditor, who writes the report, or a member, who assists the leader. He also provides them guidance in the performance of their job duties. OEHS tries to pair auditors with different expertise, such as worker safety and environmental compliance. Both Mr. McCoy and Mr. Olton are involved in the auditors' work from the beginning through the end of each audit. They meet regularly with the auditors to make sure that everything is moving forward properly, they sometimes accompany them on site visits, and they review the final reports before they are issued (Tr. 90, 95-97, 129, 138-39).

Each EHS auditor is assigned seven to ten audits a year (Tr. 139). The time to complete audits has been progressively shorter as auditors become more experienced and information is

more accessible due to technological improvements. Currently, audits can be completed in four weeks, down from four months (Tr. 134-36).

Respondent's 2011 and 2012 performance evaluations from McCoy were "very good" and "good" respectively. In the 2012 evaluation, Mr. McCoy noted that respondent is always professional and is carrying out the duties and tasks of the new audit protocols but needs to improve his project management and report-writing skills (Resp. Ex. A).

Respondent's poor job performance started being documented by Mr. McCoy in 2014 and included: a performance evaluation for 2013; a June 2014 warning memorandum; a performance evaluation for 2014; and a 2015 Performance Improvement Plan ("PIP") that respondent purportedly failed, precipitating the filing of these incompetency charges (Pet. Exs. 3, 5, 7-13).

Mr. McCoy's assessment of respondent's work in 2013

Petitioner acknowledged that respondent's work performance in 2013 is outside the 18-month statute of limitations. Civ. Serv. Law § 75(4) (Lexis 2015). Petitioner asserted that it was offered to show that respondent was on notice to improve his performance (Tr. 12-13).

In an undated performance evaluation for 2013, Mr. McCoy gave respondent an overall rating of unsatisfactory (Pet. Ex. 3). He provided extensive comments regarding respondent's inability to execute the new audit protocols including his failure: to develop accurate and concise findings; to identify the root causes for noncompliance; and to write analytically (Tr. 36).

On May 5, 2014, respondent filed a rebuttal with Ms. Luke. Respondent stated that, even though he was open to improving his performance, it was his belief that the unsatisfactory rating was based in part on his filing of an EEO complaint in January against Mr. McCoy for speaking to him in a disrespectful manner in front of his peers (Pet. Ex. 4; Tr. 198).

Ms. Luke did not modify Mr. McCoy's evaluation (Tr. 38). This initiated an appeal and the evaluation and rebuttal were forwarded for review to a panel of managers in DEP who also interviewed respondent and Mr. McCoy (Tr. 40-41).

On October 1, 2014, the appeal panel issued a decision finding that while the evaluation "identifies deficiencies in [respondent's] performance," his overall rating should be upgraded to "conditional" because "the anecdotal evidence is not sufficient to warrant an 'unsatisfactory'

evaluation." The panel also recommended that Mr. McCoy and respondent agree on a reasonable improvement plan and that OEHS redistribute the auditing standards to all EHS auditors to clarify expectations (Pet. Ex. 6).

Based on the panel's finding that respondent's 2013 work performance was not unsatisfactory and petitioner's acknowledgment that the performance evaluation is limited to the issue of notice, it has minimal value in assessing respondent's current work performance.

Mr. McCoy's assessment of respondent's work in 2014

On June 19, 2014, Mr. McCoy issued a warning memorandum to respondent alleging that he neglected certain tasks relating to the Mayflower Pumping Station ("Mayflower") audit. Mr. McCoy stated that in the pre-assessment phase respondent failed: to notice why the information form that Mayflower returned to OEHS had been revised to omit relevant information; to schedule a planning meeting with his team member; and to schedule a timely briefing meeting with Mr. Olton. Mr. McCoy also alleged that during the on-site assessment phase, respondent identified two nonconforming conditions relating to the Lock-Out/Tag-Out ("LOTO") procedures but failed to interview the stationary electrical engineers ("SEE") and evaluate the relevant documents (Pet. Ex. 5). There is no evidence that Mr. McCoy was present for the site visit and it is unclear what sources he used to reach these conclusions.

On March 3, 2015, Mr. McCoy issued respondent's performance evaluation for 2014 with an overall rating of "unsatisfactory" (Pet. Ex. 7). Attached to the evaluation was a 10-page single spaced set of comments relating to respondent's inability to follow proper procedures relating to the scheduling of meetings, his inability to engage in critical thinking and analytical writing, and his poor attitude. Mr. McCoy also referred to the June 19, 2014, warning memo and added respondent insisted that it was not his responsibility to evaluate conditions that should have been included in the previous Mayflower audit (Pet. Ex. 7 at 8). Mr. McCoy also discussed deficiencies with at least four other audits that respondent conducted in 2014 but again did not identify the sources used to make these determinations.

Mr. McCoy wrote that for the audit of Grand Gorge, respondent wanted to remove a preliminary finding concerning protective gloves worn by SEEs working with high voltage equipment. When Mr. McCoy asked respondent to tell him the applicable OSHA requirements,

respondent was silent and Mr. McCoy had to explain them to respondent. According to Mr. McCoy, this showed respondent's "lack of planning, lack of technical ability or the ability to research the appropriate regulation to develop a cogent finding" (Pet. Ex. 7 at 3). Mr. McCoy also testified that respondent kept getting different answers from Grand Gorge personnel about the gloves. Rather than assess which answer was more accurate, respondent proposed removing the finding entirely. Mr. McCoy said no to respondent's proposal (Tr. 109-11).

Mr. McCoy also criticized respondent's failure to determine whether Grand Gorge had instituted an operations and maintenance procedure for the storage of propane tanks in consultation with the tank manufacturer's manual since there were no applicable state or federal regulations. During the audit, respondent provided three different checklists from the facility but could not explain why the lists had not been merged, why implementation of a procedure had been delayed, and the discrepancies between the lists and what he had been told by facility personnel. After several weeks, Mr. McCoy got involved and resolved the issue by speaking to the chief of all of the BWSO plants (Pet. Ex. 7 at 5).

With regard to the BWSO audit, Mr. McCoy wrote that respondent kept insisting employees needed to be trained on how to accept chemical storage tank deliveries and the need to install eyewash stations near the tanks even though the site in question was not in operation. Mr. Olton had previously told respondent that training and eyewash stations were unnecessary since no chemicals were present. Mr. McCoy alleged respondent's insistence about the eyewash stations was a "deliberate misinterpretation of the site conditions and regulatory requirements" and that he "undermined the authority of [Mr. Olton] by disregarding his instruction" (Pet. Ex. 7 at 4). Mr. McCoy acknowledged that the tanks might be used in an emergency but maintained that in such an event portable eyewash stations could be used (Tr. 112-15).

Mr. McCoy also alleged that, when he told respondent to assess the Facilities Management and Construction ("FMC") locations to make sure the documentation for asbestos projects was complete, respondent asked whether this was related to OEHS. Mr. McCoy was distressed that respondent did not know the asbestos policy was something that needs to be audited (Pet. Ex. 7 at 6). Mr. McCoy also claimed that respondent failed to note that FMC had not conducted a review of the respiratory protection program. This was only identified and developed through extensive coaching from Mr. Olton. According to Mr. McCoy, this inability

to identify and communicate with FMC about this issue created a lot of tension between OEHS and FMC (Pet. Ex. 7 at 6-7).

Mr. McCoy noted that for the Eltingville audit, respondent was to review the LOTO program but only reviewed a few locks that he saw during his site visit. He failed to speak with appropriate personnel and verify that the program met regulatory standards (Pet. Ex. 7 at 7).

Mr. McCoy also wrote that respondent had not drafted one original finding for any of the ten assessments he worked on in 2014. He could only write a finding with a high degree of coaching and input from Mr. McCoy and Mr. Olton (Pet. Ex. 7 at 9). Mr. McCoy recommended that respondent be placed on a PIP to improve his performance (Tr. 47-48).

The 2015 PIP and respondent's supervisors' assessment of his current work performance

On March 4, 2015, Mr. McCoy sent respondent the PIP (Pet. Ex. 8) that took a month to develop in consultation with DEP's human resources and disciplinary units (Tr. 49-50).

The PIP consisted of a two-page memorandum stating the reasons for the performance improvement plan, that it would be in effect for 90 days and that it consisted of four tasks to be completed, that during this period respondent would be responsible for his regular duties, and that he would have the guidance of Mr. McCoy and Mr. Olton. The memo also stated that the PIP was intended to give respondent an opportunity to improve and that if he failed he would be subject to demotion or termination from employment. Attached to the memo was: a two-page schedule stating the dates and the agenda for his weekly meetings with Mr. McCoy and Mr. Olton; a three-page PIP form that was signed by respondent: a schedule for when each task was to be submitted: a four-page scenario that was supposed to be assessed; and a one-page summary of the tasks to be completed with regard to the scenario (Pet. Ex. 8). Mr. McCoy testified that the scenario was created from a compilation of audits and was intended to simulate a real audit using the information and conditions described in the scenario.

Mr. McCoy testified that the weekly meetings took place and that in attendance were Mr. McCoy, Mr. Olton, respondent and/or Mr. Baranczak, DEP's EEO representative, and Ms. Johann, DEP's training director. Notes from the seven meetings held were admitted into evidence (Pet. Ex. 10). During the meetings the upcoming task was discussed, including how it should be approached and the format to be used (Tr. 69).

On March 20, 2015, respondent submitted his first task (Pet. Ex. 11) that was worth 25% of the PIP. The response consisted of a three-page document with each page dedicated to one of the three topics discussed. Respondent provided a summary of each topic and listed the applicable regulations (Tr. 69; Pet. Ex. 8).

Mr. McCoy, in consultation with Mr. Olton, had prepared an answer sheet (Pet. Ex. 9) identifying the key elements that needed to be covered including the government agency involved, the relevant regulatory citations, the relevant text to be discussed, and the sentences in the scenario that corresponded to the identified regulations (Tr. 52-57). Mr. McCoy reviewed respondent's submission and found it unsatisfactory. On the first item, respondent only identified one general regulation, not all of the applicable regulations contained in the answer key. While the second item was more detailed concerning the applicable regulations, respondent failed to identify how the facility was not in compliance. Mr. McCoy explained that identifying a regulation and discussing how the existing condition does not comply is a foundation block for conducting an assessment. When Mr. McCoy asked respondent about this deficiency, respondent said he did not understand that this was what was expected. Mr. McCoy told respondent that he was surprised since this had been reviewed in the weekly meetings (Tr. 70-77; Pet. Ex. 10).

Mr. McCoy testified that during the meetings preceding respondent's submission on the second task that was weighted at 50% of the PIP, he made sure that respondent understood what was required. The second task built on the first and required respondent to develop a preliminary assessment and identify additional information needed to move onto the remaining tasks of drafting a corrective action plan and assessing the overall compliance at the facility (Tr. 77-78; Pet. Ex. 8).

Respondent submitted his second task on an agreed upon adjourned date (Tr. 78-80). According to Mr. McCoy, respondent included the applicable regulatory sections and a discussion of the areas of nonconformance required in the first task but there were numerous omissions relating to the second task. Mr. McCoy and Mr. Olton each provided extensive written comments to respondent's submission (Pet. Exs. 12, 13).

Mr. McCoy determined that respondent's submission "was a fail" (Tr. 84). Since respondent had already failed 75% of the PIP there was no point continuing and it was

terminated in May (Tr. 88-90). The instant incompetency charges were issued on July 6, 2015 (ALJ Ex. 1).

Mr. McCoy testified that since May 2015 respondent has been auditing lower risk facilities but more recently because of scheduling and personnel issues, he has been given higher risk facilities. Mr. McCoy testified that in his opinion respondent cannot execute the required protocols despite training and coaching. Moreover, other employees have expressed difficulty working with respondent. While all the EHS auditors had difficulty in the beginning with the new audit methods, all improved except for respondent (Tr. 90-94).

Similarly, Mr. Olton opined that respondent is unable to be an effective EHS auditor. Mr. Olton found that respondent struggled to understand the requirements of the PIP and that he is weak in all areas of proficiency for an auditor including: foundational, functional, and technical skills. Specifically, respondent lacks analytical abilities, computer skills, and an understanding of the applicable regulations (Tr. 131-33). Mr. Olton testified that in some audits respondent made no findings or made findings that had to be redrafted. In one audit respondent failed to identify critical issues. Mr. Olton also alleged that respondent made inappropriate statements about the lead auditor at Newtown Creek and that he and Mr. McCoy had to take control of the audit (Tr. 141-46).

Respondent's rebuttal

Respondent testified that he filed an EEO complaint against Mr. McCoy in January 2014 on the basis of race and ethnicity. Respondent alleged that Mr. McCoy was disrespectful, would scream at him in front of colleagues and Ms. Luke, and that he never did this to anyone else. When Mr. McCoy told him to "shut-up" during a meeting about the Newtown Creek audit, he decided to file the complaint. Respondent asserted that after the EEO complaint was filed, Mr. McCoy refused to speak to him for two weeks and that, shortly thereafter, he received the 2013 evaluation alleging his work was unsatisfactory (Tr. 198-203). Respondent testified that since filing the EEO complaint, he has been treated unfairly by Mr. McCoy, Mr. Olton, and Ms. Luke, who summoned respondent to her office and accused him of being "disloyal" and "against the office policy" (Tr. 199-200).

With regard to the Mayflower audit, respondent testified that he was the lead auditor and that his team member was Konstantin (Tr. 179, 183). Respondent e-mailed the pre-assessment information form to Mayflower and Mayflower responded on Friday, May 9, 2014, and copied a number of people including Mr. Olton (Resp. Ex. C). Respondent was on approved leave that day (Resp. Ex. B) and was unable to access the attachment from home (Tr. 181-82). Mr. Olton forwarded the e-mail to Konstantin and copied respondent. Konstantin sent an e-mail to respondent and Mr. Olton stating that the form submitted by Mayflower was modified and was missing information. When respondent returned to work on Monday he e-mailed Mayflower about the missing information, and provided a new form to be filled out. Respondent also spoke to Mayflower on the phone. Mayflower apologized "about the mix-up" and e-mailed the requested information on May 14, 2014 (Resp. Ex. C; Tr. 179-85).

Respondent also testified that he had a pre-assessment planning meeting with Konstantin but that it was not formally calendared. Respondent could not remember the exact date but stated that he went to his team member's cubicle for the meeting before May 12 and that they had additional meetings prior to the site visit. During these meetings they reviewed the preliminary information available in the database, such as notices of violations and the previous audit report (Tr. 185-87). Respondent testified that he also had a briefing meeting with Mr. Olton on May 12 that was more than the required three business days before the May 20 site visit (Tr. 189).

With regard to Mr. McCoy's allegation that he failed to interview the SEE at Mayflower, respondent stated the supervisor was out sick but that he interviewed a subordinate who was knowledgeable about the issues and answered all of his questions. Respondent testified that he also reviewed all documents concerning the LOTO nonconforming conditions that were available but that Mayflower did not have documents going back to 2008 (Tr. 189-90). In support, respondent submitted the final audit report that he drafted as the team leader. The report stated that the only document available and reviewed during the site visit included the "2013 Annual Review of Lockout/Tagout Procedures" (Resp. Ex. D; Tr. 193-94). Respondent also testified that he had previously reviewed the 2009 audit report drafted by Mr. Olton and since the LOTO condition was not identified there he did not think it necessary to cover the 2008 and 2009 period (Tr. 228-30).

With regard to the Grand Gorge audit, respondent asserted that he spoke to the deputy chief about the need to test the gloves, even though they were new, as required by OSHA. Respondent explained this to Mr. McCoy and claimed that he answered all of his questions but that Mr. McCoy kept repeating the same questions. Respondent denied telling Mr. McCoy that he wanted to remove his finding from the audit and included that the gloves be tested every six months, that supervisors be instructed on their maintenance, and that an inventory be kept to make sure they are tested in his final audit report (Resp. Ex. E at 12; Tr. 203-07).

Respondent also testified that during the Grand Gorge visit he requested the propane tank checklist and the manufacturer's manual and was told that the manual was not on site but in the main office. The facility had two draft checklists not three as alleged by Mr. McCoy. One checklist followed the manual and the other corresponded to a visual checklist that was being done weekly. Respondent testified that he went on-line, printed a copy of the manual, and compared it to the draft checklists. He explained to Mr. McCoy what was going on and that the delay in finalizing the checklist procedure was because the facility was waiting for OEHS's approval (Tr. 211-19).

With regard to the BWSO audit and the eyewash issue, respondent testified that even though the tanks were not in operation, they could be activated at any time if there is a failure in the water system. It was his recommendation that eyewash stations be in place (Tr. 209-11). Mr. Goyette testified that he accompanied respondent on the audit and agreed that eyewash stations be installed because the operation was only temporarily closed and could be operational in an emergency. He also agreed that personnel be trained on handling the chemical storage tanks (Tr. 274-78).

Respondent denied Mr. McCoy's allegation that for the FMC audit he did not know asbestos was a concern for OEHS. He testified that he was asking Mr. McCoy about the software used to track this information (Tr. 220). Respondent also testified that during the site visit he spoke to Ms. Wickham, who works at FMC, about the respirator protection program. She explained all the steps taken to review it annually. When respondent asked for the back-up documentation, Ms. Wickham said that there was no formal documentation and that DEP does not have a policy requiring it. Respondent was able to verify this statement. When respondent conveyed this to his supervisors they said that Ms. Wickham should know better. Respondent

made findings in his audit report that a record be maintained and what should be included (Tr. 221-25; Resp. Ex. E at 12).

Ms. Wickham testified that she was present when respondent came to FMC and that he was professional, showed a high level of understanding about what he was doing, and was complimented by FMC directors at the closing meeting with Ms. Luke and Mr. Olton (Tr. 290-91). Ms. Wickham was also involved in the discussions with respondent, Mr. Olton, and Mr. McCoy regarding documentation for the respiratory program and testified that FMC did not agree with OEHS's position. Since Ms. Wickham and her supervisor did not feel that they were getting anywhere, she contacted Ms. Luke in an effort to clarify what was needed under the regulations. Ms. Wickham testified that when she went to speak with Ms. Luke on October 7, 2014, she was surprised that the meeting was not a discussion about the respiratory program documentation but rather about respondent. Ms. Luke focused on whether respondent had conveyed derogatory comments made by Mr. McCoy about Ms. Wickham to her. Ms. Wickham denied that respondent conveyed such comments. According to Ms. Wickham, during the meeting, Ms. Luke also said that she wanted to "fire" respondent (Tr. 291-95).

Mr. Goyette testified he accompanied respondent on the FMC audit and that except for some initial scheduling issues because FMC is a very busy facility, respondent was able to "take the bull by the horns" and handled the audit well from the start. Mr. Goyette observed respondent at the various facility meetings and respondent did most of the talking (Tr. 271-74). Mr. Goyette also testified that in 2015 he accompanied respondent to a new pump station and that respondent had everything ready for the audit (Tr. 278).

With regard to the Eltingville audit, respondent testified that during the on-site visit he walked with the SEE and the deputy chief for collection and observed and checked the tags for the locked equipment. The SEE went through the emergency control procedure for each piece of equipment. When he returned to OEHS, his supervisors asked him about the maintenance engineer. Respondent told them that there was no maintenance engineer and that the SEE was responsible for the LOTO program.

Respondent also denied Mr. McCoy's and Mr. Olton's allegations that he either did not draft audit findings or that his finding needed considerable revisions. He testified that he drafted independent findings for the glove issue at Mayflower, for the personal protective equipment at

Grand Gorge and Tannersville, and for the respirator protection finding at FMC. Respondent also testified that his findings were often removed, like the eyewash station finding and that in 2015 his five findings for Tallman Island were also removed (Tr. 231-34).

With regard to the PIP, respondent testified that he did not have enough time to work on it because he was performing his regular job duties and was visiting other facilities on audits. Respondent also testified that the PIP did not accurately reflect a real audit where the auditor visits the site, walks around the facility, and interviews the people (Tr. 237-38). Respondent also testified that Mr. Baranczak is a lawyer and that he had no idea why he was present for the PIP meetings (Tr. 208-09) and that he signed the PIP without really understanding it and without union representation (Tr. 254, 261). With regard to his PIP answers being different from the answers created by Mr. Olton and Mr. McCoy, respondent testified that it is not unusual for auditors to have different observations and conclusions (Tr. 241-42). Ms. Wickham agreed with this statement (Tr. 298).

ANALYSIS

Incompetency has been defined as the inability to perform one's job, as well as the persistent unwillingness and failure to do so. *Law Dep't v. Stanley*, OATH Index No. 1540/05 at 4 (June 15, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-08-SA (Jan. 9, 2006); *see also Office of Management & Budget v. Perdum*, OATH Index No. 998/91 at 24 (June 17, 1991), (employee found incompetent, not because he was incapable of doing his job, but because he failed and neglected to do so).

A determination of incompetency is judged by an objective standard. Petitioner must prove by fair preponderance of the credible evidence that respondent is unable to meet the minimally acceptable threshold requirements of the duties of his title. *Taxi & Limousine Comm'n v. Kowal,* OATH Index No. 1614/10 at 7 (Mar. 16, 2010), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-26-A (May 4, 2011); *see also Employers Retirement System v. Myrick*, OATH Index No. 505/95 at 20 (Apr. 11, 1995), *aff'd,* 2002 U.S. Dist. Lexis 8032 (S.D.N.Y. May 3, 2002) (a persistent unwillingness to perform as directed is incompetence).

Preponderance has been defined as "the burden of persuading the triers of fact that the existence of [a] fact is more probable than its non-existence." Prince, *Richardson on Evidence*, § 3-206 (11th ed. 2008); *see also Dep't of Sanitation v. Figueroa*, OATH Index No. 940/10 at 11 (Apr. 26, 2010). Where the evidence is equally balanced the charges must be dismissed. *Rinaldi & Sons, Inc. v. Wells Fargo Alarm Service, Inc*., 39 N.Y.2d 191, 194 (1976); *Health & Hospitals Corp. (Metropolitan Hospital Ctr.) v. McCaskey*, OATH Index No. 2195/08 at 9 (Sept. 29, 2008).

In attempting to meet this burden and demonstrate that respondent is unable to meet the minimally acceptable threshold requirements of the duties of an EHS auditor, petitioner relied on supervisors' largely subjective opinions that respondent is incompetent. The weight accorded these opinions, as discussed below, was reduced because the supervisors appeared partial to respondent and their opinions were unsupported by reliable documentary evidence.

Mr. McCoy's assertion that he was not bothered by respondent's EEO complaint, that was eventually dismissed, was not credible (Tr. 18, 98, 243). It seems likely that Mr. McCoy, who hired respondent and had praised him in the past, would feel betrayed by respondent's accusations. Indeed, Mr. McCoy gave respondent "very good" and "good" evaluations for his work under the new OEHS protocols in 2011 and 2012 and first documented his work "unsatisfactory" shortly after respondent filed an EEO complaint in January 2014. Mr. McCoy's explanation that 2011-2012 was considered a two-year grace period and that he told the EHS auditors that starting in 2013, if there was no improvement, their evaluations would be harsher (Tr. 28-29), was not credible. Respondent's 2011 and 2012 evaluations indicate that he was carrying out the new duties of his job, they do not identify any particular deficiencies in his work performance, and they contain only general recommendations that respondent needed to improve his project management and report writing skills and knowledge of environmental compliance requirements (Resp. Ex. A).

It also seems likely that Mr. McCoy and his supervisor, Ms. Luke, were annoyed that on October 1, 2014, their performance rating of respondent's work in 2013 was upgraded from "unsatisfactory" to "conditional" by an independent panel of their peers. Ms. Wickham credibly testified that the following week, during a management meeting to discuss the respiratory program, Ms. Luke wanted to discuss respondent. Ms. Luke wanted to know whether respondent

had conveyed derogatory comments about Ms. Wickham made by Mr. McCoy which Ms. Wickham denied. Moreover, Ms. Luke said that she wanted to fire respondent.

Given the unfavorable opinions about respondent that were expressed by Ms. Luke and Mr. McCoy, it seems likely that Mr. Olton felt pressured to follow the lead of his supervisors and find respondent's work unsatisfactory. When asked by petitioner on direct examination whether he had observed Mr. McCoy act unprofessionally towards respondent, Mr. Olton seemed visibly uncomfortable and gave the following evasive answer:

> I'd prefer to categorize that as [Mr. McCoy's] style, that he has a certain style and I may not necessarily have that style. I mean, everyone has a different way of managing, but I can I've necessarily seen something that would be egregious, but my style and his style might be, would be maybe different.

(Tr. 133). Under the circumstances, respondent's assertions that Ms. Luke, Mr. McCoy, and Mr. Olton were treating him unfairly were plausible.

On the other hand, while respondent had a motive to lie to avoid a finding of incompetency and his testimony was hard to follow at times, portions of his statements were corroborated by documentary evidence and the testimony of Ms. Wickham and Mr. Goyette, neither of whom had an apparent motive to lie for respondent and risk their jobs. Both witnesses supervised respondent prior to the changes in the audit protocols and viewed him as professional and competent in his current job duties.

Thus, to the extent Mr. McCoy's and Mr. Olton's subjective opinions about respondent's work performance did not comport with common sense and were not corroborated by reliable, independent evidence, they were insufficient to establish any of the disputed facts. *See Dep't of Education v. Brust*, OATH Index No. 2280/07 at 10 (Sept. 29, 2008), *adopted*, Chancellor's Dec. (Oct. 22, 2008) (if witness is found to have been false in one instance, trier-of-fact may reject all of the witness's testimony); *see also People v. Barrett*, 14 A.D.3d 369, 369 (1st Dep't 2005) (maxim *falsus in uno falsus in omnibus*, false in one thing, false in everything, may be applied to witness testimony).

Taking into consideration the applicable law, the witnesses' credibility, and the documentary evidence in the record, the following findings of fact are made regarding the

allegations of respondent's inability to perform his job duties as supported by the June 2014 warning memorandum, the 2014 performance evaluation, and the 2015 PIP.

<u>June 2014 warning memorandum regarding the Mayflower audit</u>

In the warning memorandum, Mr. McCoy alleged, without identifying the sources for these facts, that during the pre-assessment phase of the audit respondent failed: to notice that the pre-assessment information form had been revised by Mayflower to omit relevant information; to schedule a planning meeting with his team member; and to schedule a timely briefing meeting with Mr. Olton. Mr. McCoy also alleged that during the on-site assessment phase, respondent failed to interview the SEE and review relevant LOTO documents. There is nothing to corroborate these claims and, in fact, several seem to be untrue.

Respondent's credible testimony, as corroborated by e-mail documentation and his timesheet, demonstrates that Mayflower returned the modified form to OEHS on a day that he was out of the office and that in his absence his team member discovered the error. When respondent returned to work the following business day, he contacted Mayflower and had Mayflower resubmit the proper information.

Respondent also gave credible testimony that he had several planning meetings with his team member but that they were never formally calendared. Respondent also gave undisputed testimony that he had a briefing meeting with Mr. Olton and that it was timely. Mr. McCoy's assertion on cross-examination that he knew respondent had not met with the team member because he spoke to the team member and Mr. Olton (Tr. 102) was dubious. During the same line of questioning, Mr. McCoy acknowledged that the EHS handbook (Pet. Ex. 2 at 5) states the pre-assessment briefing meeting must be at least three business days before the on-site visit and that the meeting with Mr. Olton on May 12 for the May 20 visit was timely (Tr. 103-04).

With regard to Mr. McCoy's allegation that respondent failed to interview the SEE at Mayflower, respondent gave unrebutted credible testimony that the SEE was out sick on the day of the site visit but that he interviewed a subordinate who was knowledgeable about the issues and answered all of his questions. Petitioner failed to explain why speaking with a knowledgeable subordinate in the absence of the supervisor is incompetence. Respondent also gave credible testimony that was corroborated by the audit report that he reviewed the 2013

LOTO procedures. Petitioner failed to explain why respondent should have reviewed documents from 2008 and 2009 that were not on site and should have been covered in the 2009 audit.

2014 performance evaluation

Since respondent credibly rebutted the allegations in the warning memorandum, the reliability of Mr. McCoy's conclusory allegations in the subsequent 2014 performance evaluation are suspect. Moreover, this tribunal has held that while performance evaluations, when filled out accurately, are often good indicators of an employee's competence, they are only one of several factors to consider in determining incompetence. *Transit Auth. v. Wong*, OATH Index No. 1866/08 at 13 (Aug. 28, 2008) (incompetence found where computer specialist took five hours to complete task that should have taken 20 minutes, made frequent errors due to a lack of understanding of computer systems and where supervisors spent hours trying to explain his tasks to him to no avail and informed him that he was not performing at the requisite level).

A review of OATH's case law demonstrates that proof of incompetency involves more than mere opinions of supervisors; the opinions are corroborated by contemporaneous documentation demonstrating respondent's inability to perform his job duties. *See, e.g., Dep't of Education v. Thompson*, OATH Index No. 2135/15 (Oct. 7, 2015) (proof that quality assurance specialist unable to manage school bus routes supported by contemporaneous e-mails and memoranda); *Transit Auth. v. Kalligeros*, OATH Index No. 475/14 at 10 (Dec. 18, 2013) (proof that staff analyst made repeated mistakes in reviewing and processing budget requisitions supported by contemporaneous reports and requisitions); *Financial Information Services Agency v. Leung*, OATH Index No. 2115/13 (Apr. 9, 2014), *aff'd*, NYC Civ Serv. Comm'n Case No. 2014-0510 (Jan. 20, 2015) (proof that computer analyst was incapable of performing her job duties supported by weekly e-mails to respondent summarizing progress meetings); *Dep't of Consumer Affairs v. Yampolsky,* OATH Index No. 2269/10 (Aug. 12, 2010) (proof that clerical associate unable to perform duties of a timekeeper supported by contemporaneous e-mails and payroll records); *Dep't of Housing Preservation & Development v. Hand*, OATH Index No. 2594/10 (Sept. 2, 2010) (proof that clerical associate improperly processed 125 appointments supported by complaints, e-mails, and computer data); *Dep't of Education v. Cherry*, OATH Index No. 1236/09 (May 29, 2009) (proof that custodian engineer was guilty of commingling

funds, failing to document expenses, paying himself more than his salary, and failing to repay the Department more than $14,000 supported by bank records, checks, expenditure forms, and invoices).

Here, contemporaneous documentation demonstrating respondent's inability to perform his audits as set forth in the 2014 evaluation was completely lacking. For example, the evaluation alleged that respondent drafted audit reports that had no findings or findings that failed to identify critical issues. However, respondent submitted three of his reports from 2014 showing cogent findings. To the extent respondent's supervisors claimed that his findings needed considerable revisions, petitioner failed to submit any of respondent's original draft audits, written exchanges discussing respondent's errors, and the final audits issued so that a comparison could be made to verify this claim.

Turning to the remaining disputed audits, Mr. McCoy asserted that respondent made several errors at Grand Gorge which demonstrate his inability to research the appropriate regulations to develop a cogent finding. Specifically, Mr. McCoy asserted that respondent wanted to remove a finding about protective gloves worn by SEEs out of frustration and did not know the applicable OSHA requirements and that Mr. McCoy had to explain them to him. Mr. McCoy also alleged that respondent failed to adequately review the procedure for the storage of propane tanks, that respondent obtained three different checklists from the facility and could not explain discrepancies between them and what he was told at the facility, and that Mr. McCoy had to get involved and resolve the issue by speaking to the chief of all of the BWSO plants.

Respondent testified that the gloves were new and Grand Gorge did not realize that they had to be tested under OSHA. It seems unlikely that respondent would not know the OSHA requirements given his years of experience working successfully in the area of worker safety. Rather, it seems more likely that when Mr. McCoy started asking him questions with obvious answers that respondent remained silent in frustration. Respondent's assertion, that when he explained the issue to Mr. McCoy he kept repeating the same questions, was credible given respondent's assertion, as corroborated by Mr. Olton, that Mr. McCoy acted unprofessionally towards him. Moreover, respondent included three glove findings in his final audit report.

Moreover, petitioner failed to submit the three checklists that respondent allegedly received from Grand Gorge. Respondent's explanation that only two draft checklists for the

propone tanks had been developed at Grand Gorge and that the delay in finalizing them was because OEHS had not yet approved them was plausible. Since it seems unlikely that respondent would have authority to approve the checklists, this would explain why Mr. McCoy reached out to the chief of the BWSO plants to resolve this issue.

With regard to the BWSO audit, Mr. McCoy alleged that respondent deliberately misinterpreted the site conditions and regulatory requirements and undermined Mr. Olton's authority by insisting that employees be trained on chemical storage tank deliveries and that the facility install eyewash stations near the tanks even though the site was not in operation. Respondent and Mr. Goyette testified that training and eyewash stations were necessary because the site could be operational in an emergency. While it seems logical that BWSO personnel be trained on chemical storage tank deliveries in the event the site becomes activated in an emergency, it does not make sense to have eyewash stations installed because portable stations can be utilized in an emergency. However, this disagreement between respondent and Mr. McCoy does not rise to the level of incompetence.

Mr. McCoy also alleged that during the FMC audit, respondent did not know the asbestos policy needed to be audited and failed to note that FMC had not conducted a review of the respiratory protection program. Respondent's testimony that he knew the asbestos policy, another obvious worker safety issue, was a concern for OEHS and that he was asking Mr. McCoy about the software to track this information was credible. Moreover, respondent's testimony that he reviewed the respirator protection program with Ms. Wickham and that the delay in review concerned an on-going dispute between FMC and OEHS over what documentation was necessary was credible and corroborated by Ms. Wickham.

Finally, Mr. McCoy alleged that during the Eltingville audit, respondent only reviewed a few of the locks under the LOTO program, failed to speak with appropriate personnel, and failed to verify that the program met regulatory standards. Since there is no evidence that Mr. McCoy was present during the site visit or that he spoke with anyone who was there, it is unclear what he used to reach these conclusions. On the other hand, respondent credibly testified that he talked with the SEE and a deputy chief who went through procedures for each piece of equipment.

To the extent petitioner demonstrated that respondent made isolated errors, such as recommending the eyewash station, a charge of incompetency cannot be sustained. *Transit Auth.*

v. Victor, OATH Index No. 799/11 at 29 (Mar. 3, 2011), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD-11-52-A (Aug. 9, 2011); *Fire Dep't v. Hodge*, OATH Index No. 574/06 (May 18, 2006) (no incompetence found where respondent made five isolated errors).

2015 PIP and current job performance

Petitioner also relied on the 2015 PIP to demonstrate that respondent is currently unable to perform the duties of his job. While it appears that respondent's answers were deficient, the only evidence that the PIP was a proper measure of respondent's ability to perform his job duties was, once more, contained in the testimony of Mr. McCoy and Mr. Olton.

As the name suggests, a "performance improvement plan" is intended to identify an employee's weaknesses and find ways to help the employee improve. This was not what happened in this case. The PIP was a test. Mr. McCoy testified that respondent's first two submissions, worth 75%, were "a fail" and that as a result the PIP was terminated. Mr. McCoy spent a considerable amount of time drafting the PIP in consultation with Mr. Olton and DEP's personnel and disciplinary units. He also made representations that respondent would face termination from employment if he failed the PIP.

Whether the PIP replicated a real audit is questionable. Respondent did not have the benefit of reading prior audits for the hypothetical facility, reviewing the pre-audit assessment form, visiting the facility, and interacting with personnel from the facility. Moreover, respondent was required to perform his regular job while performing the PIP.

It is notable that the answer key for the first PIP task identified every possible relevant regulation that Mr. McCoy and Mr. Olton could identify together. In reviewing respondent's answer to the second PIP task, Mr. Olton and Mr. McCoy had different opinions about its deficiencies. For example in comment 13 relating to the second paragraph for scenario 2, Mr. McCoy noted that respondent failed to identify who should be interviewed and explain why a dust mask did not provide adequate protection to the workers (Pet. Ex. 12; Tr. 87-88). However, Mr. Olton had no comments regarding the same paragraph (Pet. Ex. 13). This suggests that reasonable minds can differ over what is a correct answer on the PIP and that Mr. McCoy was

seeking a perfect answer from respondent. However, respondent is not required to be a perfect EHS auditor. It was also unclear whether any EHS auditor could pass this test.

Under the circumstances it is reasonable to conclude that Mr. McCoy designed the PIP so that respondent would fail in order to justify the filing of disciplinary charges against him. As such respondent's poor performance on the PIP cannot form the basis for finding respondent incompetent. Moreover, since petitioner failed to provide any other proof regarding respondent's work performance in 2015 but instead relied on the general conclusory statements of Mr. McCoy and Mr. Olton, there is no basis for finding that respondent is currently unable to meet the minimally acceptable threshold requirements of the duties of an EHS auditor as charged.

FINDING AND CONCLUSION

Petitioner failed to demonstrate respondent's incompetency as alleged in the charges.

RECOMMENDATION

The petition should be dismissed. However, based on the demonstrated animosity and distrusts that exists in respondent's current work environment, DEP should consider transferring him to another facility or, if that is not feasible, to direct the principal parties to attend mediation.

Alessandra F. Zorgniotti
Administrative Law Judge

December 21, 2015

SUBMITTED TO:

EMILY LLOYD
Commissioner

APPEARANCES:

CARLA LOWENHEIM, ESQ.
Attorney for Petitioner

THOMAS COOKE, ESQ.
Attorney for Respondent

March 4, 2016
ODC Case #0060/15D
OATH Index No. 0195/16

Dear Mr. Saint Louis:

I have been made aware of the circumstances which gave rise to the recent disciplinary proceedings brought against you. Administrative Law Judge Alessandra F. Zorgniotti, having heard the case, recommended that the charges be dismissed. The ALJ further suggested that you be transferred to another agency position in a different Bureau.

Your work performance since 2013 has been determined by your supervisors to be unsatisfactory on a number of levels. While you did appeal one rating, the appeals panel raised the rating to Conditional from Unsatisfactory, reflecting their view that you needed additional time to improve your performance. The agency gave you numerous opportunities to improve your performance, including the implementation of a Performance Improvement Plan (PIP) by which you could be coached by your supervisors on how to properly approach an audit and what actions to take in examining the site, investigating violations, and preparing the reports. Your performance did not improve in spite of months of coaching.

The ALJ made short shrift of the Agency's efforts in this regard. The PIP was a joint project of OEHS, the Bureau to which you are assigned; and the Bureaus of Organizational Development & Human Resources and Labor Relations & Discipline. By totally attributing the PIP's design to Gerould McCoy, the ALJ also speculated, without any evidentiary basis, that Mr. McCoy designed the PIP so that you would fail and that it was unclear if *anyone* in your title could successfully complete the PIP. This speculation flies in the face of the careful effort by numerous Agency officials to define both the expectations of your position and the steps necessary to meet your performance goals.

While the ALJ's observation of the witnesses during their testimony and her determination as to their credibility is given great weight, ALJ Zorgniotti went beyond mere credibility determinations. The ALJ attributed improper motives to both Mr. McCoy and his supervisor, Assistant Commissioner Persis Luke, who did not even appear and testify in the proceeding. She speculated that "*it also seems likely* that [they] were annoyed . . ." when an "unsatisfactory" rating on a performance evaluation was upgraded, some nine months later, to "conditional" by the review committee. The ALJ also stated that "*[i]t seems likely* that Mr. McCoy . . . . would feel betrayed" by your filing of an EEO complaint. The ALJ also expressed, of your immediate supervisor, David Olton, that "*it seems likely* that [he] felt pressured to follow the lead of his supervisors and find [your] work unsatisfactory." The fact that these conclusions of the ALJ are prefaced with the phrase "*it seems likely*" underscores that there is no basis in the record for them.

Additionally, I note that the ALJ repeatedly rejected each example of your poor performance as being merely an anecdote, rather than as being evidence of that poor performance. Contrary to the ALJ, I find that these so-called anecdotes were direct proof of your unsatisfactory

performance, and more than justified the Agency's conclusion that you are incompetent to perform your current position.

Lastly, I find the ALJ's speculative conclusions about the motivations behind Ms. Luke's and Mr. McCoy's actions to have been made without full consideration of the fact that it is you, not they, who was "annoyed", and therefore had improper reasons to file complaints against them.

Due to evidentiary rules, the ALJ did not have before her, for consideration, your prior disciplinary history. In 2013, you were charged with misuse of an Agency BlackBerry. The case was settled in early 2014. Specifically, you admitted using the BlackBerry to send and receive messages from international phone numbers. You sent and received a total of 12,394 personal text messages, 6,286 of which were international text messages. In a settlement with both the Agency and COIB, you received a ten (10) day suspension for the record, served as the forfeiture of five (5) days of annual leave, and had to make restitution and reimburse the Agency for $3,089.87. The Agency was precluded from referring to this and presenting evidence that your attitude towards your work and your supervisors changed, in a negative way, after this event.

In spite of the ALJ's misconstruing the motives of the Agency's witnesses (and non-witnesses) and coming to erroneous conclusions in her consideration of the evidence, I will let stand her recommendation to dismiss the charges

For the reasons set forth above, I reluctantly, and with objection to many of the unsupported conclusions made by the ALJ, adopt the recommendations of the Administrative Law Judge.

<u>IT IS HEREBY DETERMINED AND ORDERED</u> that the charges referenced in the case numbers above be dismissed. You will be transferred to another position in the agency forthwith.

Very truly yours,

Emily Lloyd