

Dep't of Housing Preservation & Development v. Allen

OATH Index No. 1767/17 (Dec. 20, 2017)

Respondent, a housing inspector, was found guilty of unlawfully converting the cellar in his residence into single rooming units in violation of petitioner's Code of Conduct. ALJ recommended termination of respondent's employment.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT
Petitioner
-against-
DERRICK ALLEN
Respondent

REPORT AND RECOMMENDATION

JOYCELYN McGEACHY-KULS, *Administrative Law Judge*

This disciplinary proceeding was commenced by petitioner, Department of Housing Preservation and Development ("HPD" or "Department"), under section 75 of the Civil Service Law against respondent Derrick Allen, who is employed as a housing inspector. Petitioner alleges that respondent unlawfully converted the cellar in his home into single rooming units and unlawfully installed a kitchen and plumbing fixtures in his cellar. Petitioner further alleges that respondent engaged in activity that constitutes a conflict of interest in when respondent failed to notify petitioner of his ownership of his residence. Petitioner also alleges that respondent failed to remove accumulated rubbish and failed to maintain a clean condition in his rear yard. Based on this conduct, petitioner charges respondent with failing to conduct himself in a manner prejudicial to good order and discipline and that respondent engaged in illegal, immoral, unethical or disruptive conduct that interfered with activities of the Department or the City of New York.

At a three-day trial before me, petitioner relied on documentary evidence and the testimony of two witnesses. Respondent called one witness and testified on his own behalf.¹

¹ At the end of the first day of trial, respondent stipulated to the admission of two of petitioner's exhibits. Those exhibits were a New York Daily News article describing respondent's arrest on charges related to the above

Based upon the record of the proceeding, I find that petitioner proved several of the charges against respondent. Given the seriousness of the proved misconduct, I recommend that respondent's employment with petitioner be terminated.

BACKGROUND

Respondent has worked for HPD since 1993 as a housing inspector. In this role, respondent inspects private and multiple dwellings for safety and has inspected dwellings for illegal conversions in cellars many times (Tr. 95). Respondent testified that he received good performance evaluations and that he trains new investigators (Tr. 150). At the time that these charges were filed, respondent resided at the subject premises,² a legal two-family residence that he owned in Queens, New York (Tr. 106). He denied using his house as a rooming house or single room occupancy dwelling ("SRO") and denied having tenants in the cellar. He testified that his only tenants are in the upstairs unit of his two-family house (Tr. 152).

Respondent testified that he was arrested on September 6, 2016 (Tr. 150). He was charged with Reckless Endangerment in the Second Degree (NY Penal Law 120.20), and Immediately Hazardous Code Violation (New York Administrative Code 28-203.1). The charges are related to the conditions and violations found in respondent's home by housing investigator Mark Lukovsky (Tr. 158; Pet. Ex. 9). At the time of this trial, the criminal matter against respondent had not been resolved. Petitioner called respondent as a witness and asked if he had been arrested for violations at the subject premises. Respondent declined to answer invoking his Fifth Amendment right not to provide information that might be incriminating. Petitioner asked that I draw an adverse inference from the respondent's refusal to answer questions. Respondent then stipulated to the admission of the criminal complaint filed against respondent citing violations at the subject premises (Tr. 157; Pet. Ex. 9). Under the circumstances, I find it unnecessary to draw an adverse inference.

Inspector Lukovsky testified on behalf of HPD, where he has worked as a housing inspector for eight years. In that capacity, Inspector Lukovsky's duties include inspecting one-

referenced conduct and the deed to respondent's residence showing the transfer of property from the seller to respondent. These documents were initially marked as Petitioner's Exhibits 5 and 6 respectively. Due to duplicative exhibit numbers these exhibits are now in evidence as Petitioner's Exhibits 10 and 11.

² The location of the converted cellar is respondent's private residence. In order to preserve respondent's privacy, the address of the premises will not be included in this recommendation. All references to respondent's home correspond to the address that was the subject of the HPD investigation.

and two-family homes for illegal conversion to multiple dwellings; performing inspections based on complaints of lack of water, insufficient heat, or damaged interiors such as holes in walls, floors or ceilings; preparing reports of inspections; and drawing floor diagrams for the official records of HPD. He received training on conversions of cellars to multiple dwelling units, performing inspections on lower levels of buildings, one- and two-family and multi-unit dwellings and other types of buildings (Tr. 8, 9, 13, 14, 15; Pet. Ex. 5). He testified that he has performed thousands of inspections on residential premises over the course of his employment at HPD (Tr. 55).

On August 15, 2016, HPD received a 311 complaint from a woman stating that she lived at respondent's residence and that there was no water supply in her unit. She also stated that there was a problem with walls, ceilings, appliances, doors, and windows, and that there were problems with the kitchen and bathroom (Tr. 16, 17). On August 20, 2016, Inspector Lukovsky reported to respondent's home with an order to inspect the condition of the complainant's residence (Pet. Ex. 1). Upon his arrival, Inspector Lukovsky spoke with Ms. R. Davis who told him that she was a tenant in a cellar unit in respondent's home and that she called 311. Ms. Davis told Inspector Lukovsky that the bathroom was not in the proper working order, and that the toilet kept clogging. She also complained that there was no running water in the kitchen sink (Tr. 19, 20).

As Ms. Davis led Inspector Lukovsky to an entrance at the back of the house, he observed a man removing a disconnected toilet from the backyard. Inspector Lukovsky also noticed some debris in the backyard, but testified that he was more focused on inspection of the premises than the condition of the yard (Tr. 48). Once inside the house, Inspector Lukovsky noted the area was a cellar because more than 50 percent of the height of the area (floor to ceiling) was below ground level (Tr. 21). He also observed a long hallway, a sink, a refrigerator, and a stove in the kitchen area, and a sink, a bathtub and a water and waste line for a toilet in the bathroom (Tr. 22, 23). He also noted five smaller rooms. The doors to three of the rooms remained closed and Inspector Lukovsky did not enter those rooms. He was able to enter two of the five rooms in the cellar because tenants were present. In those two rooms he observed beds, televisions, radios, clothing, and pictures on the walls (Tr. 29).

Inspector Lukovsky testified that housing inspectors do not ask tenants on the premises for identification or proof that they reside in the inspected units (Tr. 63). Although he observed a sink, stove, and refrigerator in the kitchen, and a sink, bathtub, and waste lines in the bathroom,

he is not required to check for operability of fixtures or appliances in building units. According to Inspector Lukovsky, the presence of these appliances and fixtures is sufficient to establish the purpose of the rooms (Tr. 67). During the inspection, Inspector Lukovsky drafted a floor plan detailing the layout of the cellar (Pet. Ex. 2).

While in the cellar, Inspector Lukovsky observed three windows measuring approximately 24 x 18 inches that slid open from the side. He stated that these windows were small, and high off the ground, and not big enough for an adult to pass through (Tr. 29, 30). Inspector Lukovsky also saw two exits, each on the same end of a hallway. He explained that exits on the same end of the hallway are considered a single method of egress (Tr. 38, 39; Pet. Ex. 3). Inspector Lukovsky stated that a fire in the cellar would present immediate danger to human life because there were not sufficient exits from the cellar. Inspector Lukovsky referenced sections 170 and 171 of the New York State Multiple Dwelling Law (“MDL”), stating that cellars shall not be used for any purpose other than household storage and mechanical equipment or appliances, and the cellar ceiling shall be fire retarded (ALJ Ex. 5). Inspector Lukovsky also testified that there could be no permit on file for the conversion of the cellar to rooming units (Tr. 45). He testified that this conclusion is based on his understanding that there are no legal circumstances where tenants can live in a cellar. He stated that since there is no way to legally convert a cellar into a dwelling unit, there are no permits issued for this kind of alteration. According to Inspector Lukovsky, cellars are not designed for residential use and the conditions of cellars create a hazard to human life (Tr. 50, 51).

Inspector Lukovsky testified that Ms. Davis told him that the house was owned by a housing inspector named Derrick Allen. Inspector Lukovsky was not familiar with respondent, but noted respondent’s name on the inspection order (Pet. Ex. 1; Tr. 40). Inspector Lukovsky further testified that he was surprised to know that he was inspecting the home of another housing inspector and that made him uncomfortable because housing inspectors are supposed to respect the law and provide comfort to tenants (Tr. 50).

At the conclusion of the inspection, Inspector Lukovsky completed the inspection order noting a “C” for “closed” next to the violations (Pet. Ex. 1). Inspector Lukovsky explained that since he was recommending that a vacate order be issued, there would be no need to follow up to see if necessary repairs were made so he marked the violations closed (Tr. 37, 79, 80; Pet. Exs. 3, 4). Vacate orders are issued to insure safety of occupants. These orders allow the petitioner to

remove people from illegal or dangerous conditions that exist in buildings.³ He explained further that HPD only issues violations on legal dwellings for conditions that can be repaired. HPD cannot issue violations on illegal dwellings or illegal occupations (Tr. 79).

Before tenants could be removed from respondent's cellar, Inspector Lukovsky submitted his vacate order recommendation to his supervisors for review. Associate Inspector R. Nigra visited respondent's home on August 21, 2016, and agreed with Inspector Lukovsky's findings. On August 25, 2016, Deputy Chief Inspector Robert DeRosa visited respondent's home and also concurred with the findings of Inspector Lukovsky (Tr. 37, 38; Pet. Ex. 3).

HPD Assistant Commissioner Melissa Hester testified that she oversees all of human resources functions for petitioner, including recruitment and onboarding of staff, and handles civil service actions and labor relations issues (Tr. 111). She routinely reviews personnel records of HPD employees (Tr. 116). Assistant Commissioner Hester testified that all HPD employees are required to complete and submit an employee disclosure form when they are hired at HPD and at the time when they purchase property.⁴ Assistant Commissioner Hester stated that employees are reminded of this obligation at least once a year and the agency conducts required conflicts of interest training every two years for all HPD employees (Tr. 115).

Assistant Commissioner Hester reviewed respondent's personnel file and found two employee disclosure forms. In the first form dated June 16, 1997, respondent disclosed that he owned a private house on 196th Street in Queens, New York (Pet. Ex. 6). Respondent again stated that his home address was on 196th Street in Queens in the form dated December 21, 1998 (Pet. Ex. 7). Petitioner submitted an affidavit from Assistant Commissioner Hester in which she stated that respondent's personnel file did not contain an employee disclosure form indicating that he owned the home that was the subject of the inspection (Pet. Ex. 8).

Respondent testified that he completed employee disclosure forms in 1997 and 1998 for a home that he owned on 196th Street in Queens, New York, to indicate that this residence was his

³ Section 27-2139 of the New York City Housing Maintenance Code ("HMC") provides that any dwelling or part thereof, which, because of a structural or fire safety hazard, defects in plumbing, sewage, drainage, or cleanliness, or any other violation of this code or any other applicable law, constitutes a danger to the life, health, or safety of its occupants, shall be deemed unfit for human habitation. The department may order or cause any dwelling or part there of which is unfit for human habitation to be vacated. Admin. Code § 27-2139.

⁴ The Employee Disclosure Form asks in relevant part whether the employee or spouse "own operate, manage, hold a mortgage on or have any other interest, financial or otherwise in real estate situated in New York City." If the answer is yes, the employee must give the address(es) of building(s) in which employee or spouse have an interest. By signing the form the employee certifies that the answers are correct and acknowledges his or her obligation to inform human resources of any change in the form in within 30 days. See Code of Conduct § III (5).

home address. Respondent acknowledged that he did not complete the disclosure form for his current home when he purchased it in 2005. Instead, he merely updated his home address with HPD to reflect his change of address ten or eleven years ago (Tr. 102, 152). He stated that he receives all of his mail from HPD at that address, including his income form W-2 and the disciplinary charges from this proceeding.

Respondent's girlfriend, Ms. S. Kelly, testified that she stayed with respondent at his home four or five nights per week in 2016 and 2017 (Tr. 121). The location is a two-family house and she stays on the first floor with respondent and his family. She has never been to the second floor because that is separate unit occupied by a tenant (Tr. 123, 124). Ms. Kelly testified that she went to the cellar regularly to do laundry and that she accessed the cellar from the first floor. There is also a refrigerator in the cellar that respondent uses when his refrigerator on the first floor is full (Tr. 126). Although Ms. Kelly went to the cellar weekly, she never saw anyone in the cellar and never saw anyone enter the cellar from outside (Tr. 127). Ms. Kelly disputed the accuracy of Inspector Lukovsky's floor plan, stating that she has never seen a bathroom or stove in the cellar and that the laundry area is located in a room designated as "John Doe E/S" on the floor plan (Tr. 135; Pet. Ex. 2). She described the cellar as a wide-open space with no doors or rooms (Tr. 137, 140). Ms. Kelly stated that the refrigerator is located as depicted on the floor plan, but there is no sink or stove in that area or elsewhere in the cellar. She has not seen any furniture or anyone living in the cellar. Ms. Kelly testified that the windows in the cellar area open from the side and that because they are small she could not fit through those windows (Tr. 148). Ms. Kelly testified that she cares about respondent and knows that he could lose his job if he is unsuccessful at trial (Tr. 131, 144).

ANALYSIS

In this disciplinary proceeding the petitioner "has the burden of proving its case by a fair preponderance of the credible evidence." *Dep't of Correction v. Hall*, OATH Index No. 400/08 at 2 (Oct. 18, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 08-33-A (May 30, 2008). Preponderance has been defined as "the burden of persuading the trier of fact that the existence of a fact is more probable than its non-existence. . ." Prince, *Richardson on Evidence* § 3-206 (Lexis 2008); *Rinaldi & Sons, Inc. v. Wells Fargo Alarm Service, Inc.*, 39 N.Y.2d 191, 196 (1976).

Unlawful Conversion of Cellar

Petitioner alleges that respondent's unlawful conversion of his cellar to five rooming units and the installation of a kitchen and plumbing fixtures in violation of provisions of New York City Housing Maintenance Code ("HMC") and the MDL are violations of section III, Paragraph 1 of Petitioner's Code of Conduct which provides that employees are not to conduct themselves in a manner prejudicial to good order and discipline.⁵

In Charge 2, Specifications 2 and 5, petitioner charges respondent with conduct prejudicial to good order and discipline based on respondent's violation of section 27-2077 of the HMC and violation of sections 9, 170, and 171 of MDL in that respondent is alleged to have unlawfully converted cellar space in his home into five single rooming units for the purposes of occupation by roomers, boarders, or lodgers.

In Charge 2, Specifications 3 and 4, petitioner charges that respondent engaged in conduct prejudicial to good order and discipline based on respondent's violation of sections 27-2073 and section 27-2087 of the HMC for his unlawful installation of a kitchen and plumbing fixtures in the cellar of his home.

Regarding these specifications, the parties produced witnesses who offered contradictory testimony regarding the contents, configuration, and usage of the cellar. Inspector Lukovsky's testimony recounted his observations during his inspection of respondent's cellar. He testified that he saw a refrigerator, stove, and sink in a kitchen area, and a waste line (for a toilet), a sink, and a bathtub in a bathroom area. His testimony was corroborated by his detailed floor plan drafted during the inspection that outlined the location of rooms, windows, fixtures and the names of the tenants on the premises. Inspector Lukovsky's findings and testimony were further corroborated by Associate Inspector Nigra and Deputy Chief Inspector DeRosa who visited the respondent's home to confirm the conditions in respondent's cellar and approved the vacate order.

By comparison, respondent's girlfriend, Ms. Kelly, testified that she has never seen any doors, walls or rooms in the cellar and that the cellar is a wide open space. Ms. Kelly stated that she goes to the cellar regularly to do laundry or to get food from the refrigerator but has never seen anyone in the cellar.

⁵ Conduct that is prejudicial to good order and discipline includes commission of a crime or offense which relates to their office or employment; or which involves violence, dishonesty, deceit or indecency; or which bears upon their fitness or ability to perform their duties or responsibilities. Code of Conduct § V.

Given that descriptions of the cellar from by Inspector Lukovsky and Ms. Kelly cannot both be accurate, it is necessary to assess the credibility of the witnesses to determine the reliability of their respective descriptions. When analyzing witness credibility, this tribunal may consider such factors as witness demeanor, consistency of witness' testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness' testimony comports with common sense and human experience. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 4, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998); *see also Admin. for Children's Services v. Yu*, OATH Index No. 269/13 at 4 (Apr. 4, 2013).

As previously noted, Ms. Kelly is respondent's girlfriend. She testified that she cares about respondent and was aware that respondent might face significant consequences if allegations against him were sustained. She then described the cellar as a wide open space with no rooms or doors. Given her clear personal interest in the outcome of this matter, I found Ms. Kelly to be a biased witness offering uncorroborated testimony that was not credible.

In contrast, Inspector Lukovsky has worked for HPD for eight years and has extensive experience in inspecting private and multiple dwellings. He conducted a lengthy inspection of the cellar of respondent's home. He completed required forms and reports and drafted a detailed floor plan that corroborated his observations and his testimony. His observations were also supported by two supervisors who visited the premises after his inspection. Inspector Lukovsky followed an established protocol and did so without knowing that the owner of the premises was his colleague. Inspector Lukovsky was a credible witness; he testified in a direct and straightforward manner and without any apparent bias or interest in the outcome of this matter. I credit his testimony regarding the condition and usage of the cellar.

Specifications 3 and 4 should be sustained.

Specifications 2 and 5 should also be sustained regarding the conversion of the cellar space into rooming units. However, the number of rooming units is in dispute. The petitioner charged that there were five rooming units, but testimony at trial established that there were only two rooming units.

While petitioner did not establish that the cellar contained five single rooming units as charged in petitioner's pleadings, the pleading gave notice that conversion of the cellar space for rooming units in any number violated petitioner's Code of Conduct as stated in the pleadings.

Inspector Lukovsky's testimony and the floor plan that he drafted pursuant to his inspection indicate that only two rooms in the cellar were identified as rooms inhabited by tenants. Although the floor plan indicated that there were five rooms in the cellar, Inspector Lukovsky was only able to enter two of the five rooms to confirm their content and usage. He testified that he met tenants living in those two rooms and those rooms contained personal belongings and furniture that indicated the rooms were used as living quarters. Inspector Lukovsky was not able to enter the remaining three rooms and he did not testify or speculate about the use of those rooms.

Petitioner offered no explanation regarding the discrepancy between number of rooms stated in the petitioner's pleading and evidence adduced at trial. However, this is not fatal to petitioner's claim since the function of administrative pleadings is to provide notice, which the petition does. *See McGinagle v. Greenburgh*, 48 N.Y.2d 949, 951 (1979) (municipal employee who was charged with either committing arson or permitting arson to occur through gross negligence was provided notice of charges against him; termination affirmed upon finding substantial evidence to sustain either conclusion); *Dep't of Buildings v. Owner, Occupants and Mortgagees of 31 West 11th Street, Apartments 6A and 6B, New York*, OATH Index No. 990/94 (Aug. 26, 1994), *aff'd*, BSA No. 165-94-A, reprinted in 80 Bulletin of Bd. of Stds. and Apps. 193 (May 4, 1995), *aff'd* sub nom. *Hiesiger v. City of New York*, NYLJ, Nov. 6, 1996, at 26, col. 1 (Sup. Ct. N.Y. Co.); 48 RCNY § 1-22 ("The petition must include a short and plain statement of the matters to be adjudicated, and, where appropriate, specifically allege the incident, activity or behavior at issue as well as the date, time, and place of occurrence. The petition must also identify the law, rule, regulation, contract provision, or policy that was allegedly violated and provide a statement of the relief requested"); *Miles v. City of New York*, 251 A.D. 2d 667 (2d Dept. 1998) (pleadings may be amended to conform to the proof at any time, provided that no prejudice is shown).

Accordingly, Specifications 2 and 5 should be sustained.

Failure to Notify Petitioner of Ownership of Residence

In Charge 1, Specification 1, petitioner alleges that respondent's failure to notify petitioner of his ownership of his home is a conflict of interest as defined in Chapter 68 of the New York City Charter or the Commissioner's Order on Conflicts of Interest and is a violation

of Section III, Paragraph 17 of Petitioner's Code of Conduct ("the Code") which prohibits employees from engaging in activities that constitute a conflict of interest.

Chapter 68 of the New York City Charter section 2604 (b)(2) provides that "no public servant shall engage in any business, transaction or private employment, or have any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties." Commissioner's Order 2006-1 provides that "employees shall not own an interest in real property or a business entity which would interfere and/or conflict with the performance of the employees' official duties."

It was not disputed that respondent failed to notify petitioner of his ownership of his home. However, this failure does not fall within the prohibited conduct outlined in either of the referenced conflict of interest provisions. Furthermore, petitioner has not offered any evidence to establish that failure to notify the HPD of property ownership represents a conflict of interest. Petitioner has not charged respondent with conduct that is violative of either Chapter 68 of the New York City Charter or the Commissioner's Order on Conflicts of Interest.

Petitioner did not prove that respondent's failure to notify petitioner of the ownership of his residence was a conflict of interest. This charge should be dismissed.

Petitioner alleges in Charge 2, Specification 8, that respondent conducted himself in a manner prejudicial to good order and discipline when he failed to notify petitioner of his ownership of his residence.

At trial, petitioner did not offer any evidence through witness testimony or otherwise, to demonstrate that respondent's failure to notify petitioner of ownership of his residence was prejudicial to good order and discipline or that respondent's non-compliance reflected poorly on the Department.

Petitioner did not prove that respondent's failure to notify petitioner of the ownership of his residence was a conflict of interest. This charge should be dismissed.

Failure to Maintain a Clean Yard

In Charge 2, Specification 1, petitioner alleges that respondent failed to conduct himself in a manner prejudicial to good order and discipline by failing to remove accumulated rubbish and maintain a clean condition in his rear yard in violation of sections 27-2010, 2011, 2012 of the HMC.

With respect to this specification, the extent of the evidence is Inspector Lukovsky's testimony that he observed a man removing a disconnected toilet from the rear yard of respondent's residence and that he noticed some debris in the rear yard. Inspector Lukovsky did not offer any further detail or testimony about or description of the condition of the rear yard and conceded that he was more focused on the cellar.

Petitioner's evidence is insufficient to sustain the allegation that respondent failed to maintain a clean condition in or remove accumulated rubbish in the rear year.

Petitioner did not prove this charge. This charge should be dismissed.

Failure to File Plans for Conversion of Cellar

In Charge 2, Specification 6, petitioner charged respondent with violation of sections 300, 301, and 302 of the MDL in that he failed to file plans and or application to obtain a certificate of occupancy to legalize the conversion from a private dwelling to multiple dwelling use before he converted the cellar space at in his residence into five single rooming units.

At trial, the only evidence petitioner presented in support of this charge was Inspector Lukovsky's conclusion that there could be no permit filed for the alterations to respondent's cellar space because the conversion would be illegal. Although this conclusion is based on his experience and might well be accurate, this speculation alone is not sufficient to sustain this charge. This tribunal has held that mere suspicion and speculation are insufficient bases from which to conclude by a preponderance of the evidence that respondent engaged in misconduct. *Dep't of Buildings v. Phillips*, OATH Index No. 1690/11 at 7 (May 19, 2011), *modified on penalty*, Comm'r Dec. (June 2, 2011) (petitioner needed credible evidence, not inferences and speculation, to show that respondent knowingly or negligently signed and sealed a false report); *Health and Hospitals Corp. (Elmhurst Hospital) v. Smalls*, OATH Index Nos. 692/01 & 693/01 at 4-5 (Feb. 22, 2001) (evidence that raised suspicion as to respondents' participation in an ambulance chasing scheme fell short of standard needed to prove misconduct); *Dep't of Parks v. Raphael*, OATH Index No. 204/91 at 6 (Oct. 9, 1990) (proof that respondent was repeatedly seen at his mother's address in New Jersey, while suspicious, did not prove that respondent was in violation of the New York City residency requirements).

Inexplicably, petitioner did not produce any records from Department of Buildings to establish that there were no applications for permits filed for respondent's residence for this

conversion. Petitioner did not offer any witnesses to testify that there were no applications for permits filed for respondent's residence for this conversion.

Petitioner did not prove this charge. This charge should be dismissed.

Arrest on Related Charges

In Specification 7, petitioner charged respondent with failing to conduct himself in a manner prejudicial to good order and discipline in violation of Section III, Paragraph 1 of the Code of Conduct based on respondent having been arrested and charged with Reckless Endangerment in the Second Degree (NY Penal Law §120.20), and Immediately Hazardous Code Violation (New York Administrative Code §28-203.1) as a result of respondent's violation of Sections 27-2010, 27-2011, 27-2012, 27-2077, 27-2073 of the HMC, and Sections 9, 170, 171, 300, 301, and 302 of the MDL.

This tribunal has held that being arrested and charged with a crime is not misconduct independent from the acts that underlie the arrest. *Dep't of Environmental Protection v. Torres*, OATH Index No. 194/01 at 5 (Sept. 27, 2000). "It is well settled that an arrest, standing alone, is not punishable as misconduct, particularly where the actions which lead to the arrest are separately charged." *Health & Hospitals Corp. (Lincoln Medical & Mental Health Ctr.) v. Jiminez*, OATH Index No. 1381/07 at 2 (June 21, 2007). Specifications relating to respondent being arrested and charged with violations of the Penal Law must be dismissed. *Dep't of Correction v. Johnson*, OATH Index No. 1177/99 at 2 (July 16, 1999).

As arrests are not punishable as misconduct, this charge should be dismissed.

Illegal, immoral, unethical, or disruptive conduct

Petitioner charges respondent with violation of Section III, Paragraph 10 of its Code of Conduct in that respondent engaged in illegal, immoral, unethical, or disruptive conduct that interfered with activities of the Department or City as evidenced by respondent's alleged conduct in Specifications contained in Charges I and II.

Since the remaining charge repeated the factual allegations addressed in previous charges and specifications, the charge is cumulative. This charge is sustained in part and dismissed in part consistent with the analysis of the charges and specifications in this section. Where the charges are sustained, there would be no additional penalty. See *Savello v. Frank*, 48 A.D.2d 699 (2d Dep't 1975) (petitioner should not receive two punishments for one offense when the

two departmental rules cited covered identical conduct and were duplicative); *Human Resources Admin. v. Mays*, OATH Index No. 1299/11 at 2 n.1 (Mar. 16, 2011), *modified on penalty*, Comm'r Dec. (Apr. 19, 2011), *rev'd*, NYC Civ. Serv. Comm'n Item No. CD 12-8-R (Jan. 31, 2012) ("This tribunal has held that if the same conduct violates multiple provisions of petitioner's executive order, such conduct will only exact a single penalty"), *Fire Dep't v. Feret*, OATH Index No. 885/00 at 37 (Mar. 10, 2000).

FINDINGS AND CONCLUSIONS

1. Petitioner did not prove that respondent's failure to notify petitioner of ownership of his residence was a violation of Section III, Paragraph 17 of Petitioner's Code of Conduct as set forth in Charge 1.
2. Petitioner did not prove that respondent failed to remove accumulated rubbish and maintain a clean condition in his rear yard and therefore did not prove that respondent with violated Section III, Paragraph 1 of Petitioner's Code of Conduct as set forth in Charge 2, Specification 1.
3. Petitioner proved that respondent with violated Section III, Paragraph 1 of Petitioner's Code of Conduct which states that employees are expected to conduct themselves in a manner that will reflect favorably upon them, upon the Department, and upon the City by unlawfully converting his cellar space into rooming units as set forth in Charge 2, Specifications 2 and 5.
4. Petitioner proved that respondent with violated Section III, Paragraph 1 of Petitioner's Code of Conduct by unlawfully installing a kitchen and plumbing fixtures in his cellar space as set forth in Charge 2, Specifications 3 and 4.
5. Petitioner did not prove that respondent with violated Section III, Paragraph 1 of Petitioner's Code of Conduct based on respondent's failure to file plans and application to obtain a certificate of occupancy before he converted the cellar space to rooming units as set forth in Charge 2, Specification 6.
6. Petitioner did not prove that respondent with violated Section III, Paragraph 1 of Petitioner's Code of Conduct when respondent was arrested and charged with reckless endangerment and other criminal conduct related to the unlawful conversion of his cellar space as set forth in Charge 2, Specification 7.

7. Petitioner did not prove that respondent's failure to notify petitioner of ownership of his residence was a violation of Section III, Paragraph 17 of Petitioner's Code of Conduct as set forth in Charge 2, Specification 8.
8. Charge 3 is a cumulative charge. This charge is sustained in part and dismissed in part consistent with the analysis of the charges and specifications in the previous section.

RECOMMENDATION

This tribunal has found that petitioner proved that respondent violated Section III, Paragraph 1 of petitioner's Code of Conduct for his unlawful conversion of the cellar space in his home into individual rooming units and his unlawful installation of a kitchen and plumbing fixtures in the cellar space. Having made the above findings, I requested and reviewed a summary of respondent's personnel record. Respondent began his employment with HPD on April 4, 1994, and this is his first instance of misconduct.

Petitioner has requested that respondent be terminated from his employment for his misconduct. After consideration of the evidence presented at trial and the seriousness of respondent's misconduct, I find that termination of employment is the appropriate penalty regardless of respondent's tenure or employment record.

One of the functions of HPD is to enforce housing quality standards within New York City's housing units. As a housing inspector, respondent is entrusted by the City of New York to inspect premises to ensure safe housing for city tenants. As a housing inspector, respondent would also be acutely aware of the dangers that illegal living spaces pose to tenants and communities. Respondent testified that his job was to protect tenants. In addition, he stated that he has inspected multiple dwelling units where they have been illegal conversions in the cellars. Notwithstanding his experience, training, and duty to protect tenants, respondent illegally converted his cellar to unsafe rooming units that were occupied by tenants. The evidence at trial established that there was only one method of egress from respondent's cellar. The three windows in respondent's cellar were too small for an adult to pass through in the event of fire or other emergency. These conditions rendered the cellar unsafe and a hazard to human life.

By converting his cellar to rooming units, respondent demonstrated an utter disregard for the housing and safety standards that he was responsible for enforcing. Respondent violated the public trust and the trust that the agency placed in him. Because he is a housing inspector,

respondent's actions are even more egregious and damage the credibility and reputation of the agency charged with ensuring safe housing for New York City tenants. HPD, which seeks to ensure safe housing standards, cannot employ a housing inspector or any individual that would recklessly provide illegal or unsafe housing to tenants. *See Admin. For Children's Services v. Solomon*, OATH Index No. 304/06 (May 15, 2006) (ALJ found employee's acts of domestic violence harmed reputation of agency that handles complaints of domestic violence; ALJ recommended termination of employment), *See Dep't of Finance v. Sirleaf*, OATH Index No.1264/05 (Mar. 22, 2005) (ALJ found that a tax enforcement officer's solicitation and acceptance of a bribe violated the public trust and was so fundamentally antithetical to his duties and to his basic obligations as a City employee, that the only appropriate penalty regardless of his tenure or employment record, is termination of employment).

Based on the foregoing, termination from employment would not be so disproportionate to the sustained misconduct as to be shocking to one's sense of fairness. *See Pell v. Bd. of Education*, 34 N.Y.2d 222 (1974). Accordingly, I recommend that respondent be terminated from his employment.

Joycelyn McGeachy-Kuls
Administrative Law Judge

December 20, 2017

SUBMITTED TO:

MARIA TORRES-SPRINGER
Commissioner

APPEARANCES:

SIHEEM ROSEBOROUGH, ESQ.
Attorney for Petitioner

HOLDEN THORNHILL, ESQ.
Attorney for Respondent