Human Resources Admin. v. Carrington

OATH Index No. 2307/17 (Aug. 15, 2017), *aff'd*,
NYC Civ. Serv. Comm'n Case No. 2017-1085 (Feb. 6, 2018), **appended**

Petitioner established that respondent stormed into the director's office in an irate manner, refused to leave when instructed to do so, and used inappropriate language. Petitioner further established that respondent failed to follow her supervisor's instructions on multiple occasions. Such behavior violated petitioner's Code of Conduct. ALJ recommends that respondent be suspended for 20 days without pay.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
HUMAN RESOURCES ADMINISTRATION
Petitioner
-against-
JOAN CARRINGTON
Respondent

REPORT AND RECOMMENDATION

INGRID M. ADDISON, *Administrative Law Judge*

The Human Resources Administration ("HRA" or "petitioner") brought this disciplinary proceeding under section 75 of the Civil Service Law, charging that respondent Joan Carrington, a job opportunity specialist ("JOS"), engaged in disrespectful and intimidating behavior when she loudly and angrily confronted Lydia Fruster, director of petitioner's Rider Avenue Job Center in the Bronx ("Rider Center" or "Center"), to complain about her supervisor, used inappropriate and offensive language, paced back and forth and refused to leave the director's office when instructed to do so. Petitioner also charged respondent with failing to comply with her supervisor's instructions to: complete a client interview; adjust the status line of another client as well as misrepresenting the latter client's alien status; failing to timely call a client for an interview; and snatching a document from her supervisor's hand and yelling at the supervisor. Petitioner alleges that respondent's conduct violated HRA's Code of Conduct which requires employees to: desist from conduct that would undermine agency-participant relationship; obey their supervisors' orders and later file a grievance if necessary; be courteous and considerate in

their contact with fellow employees; carry out their work assignments as accurately and efficiently as possible; and prohibits threatening or intimidating behavior and the use of inappropriate language towards a fellow employee or supervisor, and conduct detrimental to the Agency (ALJ Ex. 1). *See* Executive Order No. 726, sections I, II(B) and III, paragraphs 1, 21, 22, 24, 34 and 37.

At a trial on July 26, 2017, petitioner relied on the testimony of Ms. Fruster, HRA employee Yomyra Mullarkey and respondent's supervisor Tonita Walker, as well as documentary evidence. Respondent testified on her own behalf, called HRA employee Angel Vazquez, and presented documentary evidence.

For the reasons below, I find the charges have been sustained and recommend that respondent be suspended for 20 days without pay.

ANALYSIS

At the Rider Center, a JOS interviews clients, about 75 percent of whom have emergency needs for cash assistance, Medicaid and foodstamps. JOS workers receive training upon being hired (Tr. 47-48). Respondent, who was hired in November 2015, received a 15-week training in eligibility requirements for cash benefits, Medicaid and foodstamps, how to interview and conduct an assessment of needs, how to process a case and how to use the computer system (Fruster: Tr. 11-12; Walker: Tr. 48; Resp.: Tr. 96-98). Respondent, a JOS, is supervised by Tonita Walker, a level I JOS, who is outranked by Jeannine Carter, a level II JOS, Laurie Moore, the deputy director, and Lydia Fruster, the director (Tr. 9-13, 22). Ms. Walker has worked for HRA for 32 years. In 2015, she became a level I JOS and was assigned to the Rider Center from around August of the same year. At the Center, she directly supervised respondent until December 2016, as well as four other JOS workers. According to Ms. Walker, when clients come to the Center they are given tickets based on their needs and are routed to the respective floor for interviews and the processing of documents. Interviews last between one to one and a half hours and the Center tries to limit to a half hour, the time that a client must wait for an interview (Tr. 44-47).

While Ms. Walker was her supervisor, respondent's duties included interviewing clients and processing cases. Ms. Walker expressed, however, that respondent's interviews were

excessively long because she would not seek Ms. Walker's assistance and would "shoo" Ms. Walker away and turn her back towards Ms. Walker, who described respondent's overall attitude as "rude" and "confrontational" (Tr. 45, 48-49). On the other hand, respondent claimed that Ms. Walked dismissed her each time she approached Ms. Walker for assistance (Tr. 124-25).

Specification V – Respondent Failed to Follow Supervisor's Instructions on September 22, 2016.

MONIQ is petitioner's computerized system which tracks a client's time at the Center (Tr. 54-55). Petitioner also has a paperless office system ("POS") through which cases assigned to a JOS may be monitored by a supervisor from assignment to resolution (Fruster: Tr. 12; Walker: Tr. 55, 64). The assigned cases sit in a JOS's queue (Tr. 54-56). Petitioner charged that at or around 11:58 a.m. on September 22, 2016, respondent was instructed to call her first interview of the day but did not do so until around 12:31 p.m., even though she had indicated in MONIQ that she had seen the client. Petitioner further charged that respondent ignored her supervisor when the subject was raised.

Ms. Walker testified that on September 22, 2016, she observed that client Brianna A.[1] was in respondent's queue[2] for more than one hour so she instructed respondent to call the client. Respondent did not acknowledge her so Ms. Walker walked over to respondent's desk. Respondent adjusted her computer so Ms. Walker could not view what she was working on and told Ms. Walker she could not be in respondent's space and needed to move. However, Ms. Walker could see that respondent was preparing a transit delay verification. Ms. Walker directed respondent for a second time to call the client but watched as respondent walked away. She noted the time that respondent left and when she returned to her desk and stated that respondent eventually called the client (Tr. 53-57). In a memo to respondent dated September 29, 2016, regarding the September 22 incident, Ms. Walker included the timeline of events (Pet. Ex. 3). She asked respondent to call the client at 11:58 a.m. and again at 12:14 p.m. Respondent was away from her desk from 12:16 through 12:29 p.m. but had placed the client in "answer" status

[1] At petitioner's request and pursuant to OATH Rule of Practice 1-49(d), the clients' full names throughout this report have not been disclosed. *See* 48 RCNY § 1-49 (d) (Lexis 2017) ("On the motion of a party, or *sua sponte*, the administrative law judge may determine that publication of certain information will violate privacy rights set forth in applicable law or rules and may take appropriate steps to ensure that such information is not published.")

[2] Ms. Walker explained that once at work, a JOS calls the reception desk which would then assign her a case to interview. The case would then show up on the JOS's computer queue (Tr. 55-56).

in MONIQ, even though the client was still in the waiting area. Respondent returned to her desk at 12:31 p.m. without the client. Ms. Walker again asked respondent if she had called the client but was ignored. In the memo, Ms. Walker also noted that when she initially instructed respondent to call the client, respondent was requesting train delay information, which she told respondent to put aside.

Respondent did not deny that on September 22, 2016, Ms. Walker instructed her to call Brianna A., or that at the time she was working on train delay information. Nor was she apologetic. In a September 30, 2016 e-mail to Ms. Walker, respondent expressed that she was concerned about getting paid (Resp. Ex. H). Yet, she stated at trial and in her e-mail that when she places a client in call status and the person is not at her desk, she is actually prepping the case by reviewing the person's history with the agency (Tr. 118, 122-23). Ms. Walker testified that to reduce a client's wait time, workers may prep the client while the client is at their desk (Tr. 81).

An employee must obey a supervisor's order when given and subsequently challenge it through formal grievance procedures if there are any substantive or procedural objections. *Ferreri v. NYS State Thruway Auth.*, 62 N.Y.2d 855, 856 (1984); *Dep't of Transportation v. Hines*, OATH Index No. 790/07 at 3 (Feb. 9, 2007). The only exceptions to the "obey now, grieve later" principle are: if the order endangers the health or safety of the employee or others, is illegal, or is obviously beyond the power of management. *Ferreri*, 62 N.Y.2d at 856-857; *Strokes v. City of Albany*, 101 A.D.2d 944 (3d Dep't 1984); *Dep't of Probation v. James*, OATH Index No. 535/90 at 10 (Feb. 6, 1990). When asked about her failure to immediately comply with her supervisor's directives, respondent denied awareness of the concept of "obey now, grieve later" (Tr. 124). I found that to be incredible because the principle is incorporated into petitioner's Code of Conduct with which respondent did not claim to be unfamiliar.[3] *See* Executive Order No. 726, section III, paragraph 21. In fact, some of her later testimony convinced me that she was even familiar with the exceptions to the principle.

[3] Employees are charged with notice of an employer's rules if those rules are communicated in a manner that is reasonably calculated to provide notice. *Quinn v. Brooklyn Heights Railroad Co.*, 91 A.D. 489, 492-93 (2nd Dep't 1904). Rules that are properly published or posted provide such notice. *Dep't of Correction v. Hodges*, OATH Index No. 222/82 at 15 (June 30, 1983) (constructive notice requirements are satisfied if the employer posts or publishes the rule in a manner reasonably calculated to provide the employee with notice).

Respondent's claim that she was prepping the case in advance of calling the client was also incredible. In determining credibility, this tribunal has considered "witness demeanor, consistency of a 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). Respondent, who presented as aloof and arrogant, and appeared to be full of disdain towards her supervisor, offered no evidence to establish what prepping she was actually doing. Instead, her own testimony established that respondent was taking care of her personal needs to ensure that she received a paycheck while the client was waiting to be serviced. In other words, respondent's needs trumped the client's.

Respondent's eventual compliance does not exculpate her. This tribunal has held that an employee's refusal to comply with a supervisor's directive is misconduct even if the employee later changes his/her mind and complies. *See Health & Hospitals Corp. (Coler-Goldwater Specialty Hospital) v. Ramsey*, OATH Index No. 724/04 at 5 (Apr. 16, 2004) (insubordination found where respondent initially refused an assignment even though he ultimately completed it); *Dep't of Buildings v. Cortes*, OATH Index No. 577/90 at 5 (Feb. 9, 1990) ("Although the respondent's insubordination was substantially mitigated by his quick change of heart and ultimate obedience to the reassignment order, his initial prospective refusal of that order was nonetheless misconduct.").

In sum, the charge that on September 22, 2016, respondent failed to immediately comply with her supervisor's directive to call a client should be sustained.

Specifications III, IV – Failure to Follow Supervisor's Instructions on September 28, 2016; Snatching Document from Supervisor and Pointing Finger in Supervisor's Face and Yelling.

Petitioner charged respondent with failing to: follow her supervisor's instructions to adjust in the POS, the status of a particular line for client Labeet R.; forward the case to her supervisor's queue; and efficiently review and process the case on September 28, 2016, as

instructed. Petitioner also charged that on September 29, 2016, respondent snatched a document from her supervisor's hand, pointed her finger in the supervisor's face and yelled at her.

Ms. Walker testified that client Labeet R. wanted her mother to be added to her case. She stated that the client's mother was already added to the case but was in "application" status. The client wanted the mother to be active because the family was in a shelter and the mother needed medical attention. This meant that respondent would have to activate Line 5 in the POS, a process that should take no longer than 15 to 20 minutes (Tr. 62-63). In an e-mail on September 27, 2016, Ms. Walker requested that respondent activate Line 5 by the close of business that day. She testified that she printed a screenshot from the Welfare Management System ("WMS"), highlighted the line that respondent needed to adjust, and took it over to respondent who put it aside (Tr. 65). Ms. Walker repeated her request by e-mail on September 28 at around 1:00 p.m. She copied Ms. Carter on both e-mails. Respondent replied that it was the Rider Center's practice to assign an issue with an existing case to the original case worker. She also wrote that the case was a multi-suffix case and that the person associated with Line 5 was not a citizen. In response, Ms. Carter e-mailed respondent that she must follow her supervisor's directive. Within minutes, respondent e-mailed Ms. Carter and deputy director Ms. Moore, claiming that the case was a multi-suffix case and that she was never trained to process such a case. Ms. Walker was not copied on that e-mail and only learned of respondent's claim from Ms. Carter (Tr. 66-67, 84-85; Resp. Exs F, G).

Ms. Walker reviewed the case and discovered that the applicant was a United States citizen but her mother was an "alien." She testified that persons who apply for public assistance have to establish that they are documented. An applicant who has an alien registration card for more than five years may receive cash, medical benefits and food stamps. Otherwise, the applicant is only eligible for cash and medical benefits. Such was the case with client Labeet R.'s mother. Ms. Walker explained that the status of an applicant can affect the federal funding for the case. When she opened up the case file, Ms. Walker found that client Labeet R.'s mother was a documented alien of just less than five years so to comply with her instructions, respondent would have had to split the case. But respondent had not asked her for assistance (Tr. 68-71). At 4:41 p.m. on September 28, 2016, Ms. Walker e-mailed respondent that the case was not a multi-suffix case and informed respondent that the applicant and her family were residing

in a family shelter and the family members needed to be on the same case. She then reiterated her request for respondent to take action on Line 5. Ms. Walker explained that failing to change the client's mother's status could have resulted in the family's ejection from the shelter (Tr. 72).

At 11:43 a.m. on September 29, 2016, respondent e-mailed Ms. Walker that she could not process the case because of action on the case and that the case was closed. At around lunch time that day, Ms. Walker again directed respondent to activate the line. At 2:11 p.m., respondent e-mailed a reply to Ms. Carter's previous day's e-mail instructing her to follow her supervisor's directive. She stated that she was concerned about fraud and did not want to issue benefits to clients who were ineligible. In her e-mail, respondent claimed that Line 5, which she was expected to adjust, related to a person who was not a citizen (Resp. Exs. F, G). According to Ms. Walker, around 3:00 p.m. on the same day, respondent reported that she had activated the line when she had not done so (Tr. 66).

Ms. Walker issued respondent a memorandum dated September 29, 2016, notifying her that her failure to follow her supervisor's instructions violated the agency's Code of Conduct. The memo also indicated that while Ms. Walker was showing respondent the applicant's status, respondent snatched paperwork from Ms. Walker's hand and indicated that she, respondent, needed to talk to someone else about it. She then walked over to Ms. Walker's desk, pointed her finger in Ms. Walker's face and yelled at her (Pet. Ex. 4). Ms. Walker testified that this occurred after she had taken the WMS screenshot to respondent's desk. But there was no testimony regarding the portion of the allegation that respondent pointed her hand in Ms. Walker's face and yelled at her. Ms. Walker testified that she eventually reassigned the case to another worker (Tr. 67-68).

Respondent, who described her relationship with Ms. Walker as "hostile and confrontational," recited a litany of complaints against Ms. Walker claiming, among other things, that Ms. Walker always dismissed her requests for assistance and that Ms. Walker's e-mail to activate Line 5 were not accompanied by instructions on how to do so (Tr. 99, 125-27). Respondent's only defense for her failure to adjust Line 5 of Labeet R.'s case was a reiteration of what she had stated in her September 26, 2016 e-mail to Ms. Carter that she was concerned about fraud because client Labeet R.'s mother was not a United States citizen and that documented

aliens who have been residents for less than five years are not entitled to federal funding which would include food stamps (Tr. 113-14; Resp. Ex. G).

As previously noted, an employee must obey a supervisor's order when given and subsequently challenge it through formal grievance procedures if there are any substantive or procedural objections. *Ferreri*, 62 N.Y.2d at 856. Respondent, who has been with HRA for less than two years, provided no evidence to substantiate her claim that Ms. Walker's directions to her were unlawful. To the contrary, Ms. Walker, who has worked for petitioner for 32 years and is unquestionably experienced in handling any issue that arose with the types of cases that the Rider Center handles, testified credibly as to what steps respondent should have taken.

I was not persuaded by respondent's claim that Ms. Walker regularly dismissed her request for assistance or that Ms. Walker's e-mail lacked instructions on how to activate Line 5. Respondent received 15 weeks of training before assuming her job as a JOS. If she did not know how to comply with Ms. Walker's directive, she should have requested assistance from Ms. Walker. At trial, she conveyed a sense that she resented having Ms. Walker as her supervisor and was even more disturbed that she should have to take instructions from Ms. Walker. I therefore found credible, Ms. Walker's testimony that respondent never asked her for and in fact rejected her assistance. Besides that, not only did I find respondent's entire demeanor on the witness stand to be combative, but she was condescending to petitioner's counsel when asked about the length of time it took before she responded to Ms. Walker's initial e-mail, replying "No, dear. I do talk to her. She sits right in close proximity . . ." (Tr. 126).

Accordingly, I find that respondent failed to comply with her supervisor's instructions on September 27, 28 and 29, 2016, to activate Line 5 of Labeet R.'s case. With respect to the allegation that respondent snatched a document from and pointed her finger and yelled at her supervisor, I find Ms. Walker's contemporaneous memorandum of respondent's behavior sufficient to sustain the allegation. *See People v. Brown*, 80 N.Y.2d 729, 733 (1993) ("a statement describing an event when or immediately after it occurs is reliable because the contemporaneity of the event observed and the hearsay statement describing it leaves no time for reflection. Thus, the likelihood of deliberate misrepresentation or faulty recollection is eliminated.") (citations omitted)); *Dep't of Correction v. Boyce*, OATH Index No. 789/97 at 14

(July 9, 1997), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 99-75-SA (July 19, 1999) ("Contemporaneousness usually evinces reliability.").

Specifications I, II – Failure to Comply with Supervisor's Instructions on November 7, 2016 to Complete a Client Interview; Displaying Aggressive Behavior and Using Inappropriate Language in Director's Office.

Petitioner charged that on November 7, 2016, respondent disregarded her supervisor's instructions to evaluate a client for needs and to issue expedited foodstamps benefits if the client were eligible. The charges further allege that respondent went to the director's office to complain, at which time she became aggressive and disrespectful and used inappropriate and offensive language.

Ms. Walker testified that cases may be assigned to workers up to one hour before their shift ends. This would give them sufficient time to complete an interview (Tr. 77). At around 6:08 p.m. on November 7, 2016, Ms. Walker assigned a case to respondent whose shift was scheduled to end at 7:00 p.m. (Fruster: Tr. 25; Walker: Tr. 59, 74, 86-87; Resp.: Tr. 99). She testified that respondent walked away from her desk so she waited for respondent to return and then asked her to call the client. By 6:30 p.m., when respondent had not yet called the client, Ms. Walker went to the waiting area, got the client and brought her to respondent's desk. Respondent did not acknowledge Ms. Walker and was then advised by another supervisor to register the case, issue benefits and have the client return the following day to complete the interview. The client did not speak English, had two young children to feed and did not have food at home. Ms. Walker testified that typically, if a client does not speak English, the JOS should call the telephone language bank for a translator. She stated that respondent never explained to the client that her case would be registered immediately so that she would be able to receive food stamps the following day so the client came to Ms. Walker in tears and a co-worker acted as translator (Tr. 74-77). Meanwhile, respondent left at her scheduled time, around 7:00 p.m. and went to Ms. Fruster's office while Ms. Walker interviewed the client, which took about 30 minutes (Walker: Tr. 77-78; Fruster: Tr. 14; Resp.: Tr. 130).

Ms. Fruster has worked for petitioner for 35 years and has been a director for 13 years. Ms. Fruster became the director of the Rider Center in 2004 and is responsible for its day to day

operations. Ms. Fruster's office is located on the fourth floor of the building and respondent works on the third floor. Ms. Fruster supervises about 150 persons throughout the building and has had little interaction with respondent with whom she maintains a professional relationship. She testified that on November 7, 2016, she was in her office at around 7:00 p.m. when respondent barged in without knocking and without closing the door, and loudly stated, "I'm sick of you people, I can't take this shit no more" (Tr. 9-14). In her rage, respondent communicated that she was given a client whom she did not think she would be able to see because she wanted to complete a Con Edison payment. Ms. Fruster inquired whether respondent had followed the proper chain of command but expressed that "no matter what [she] was trying to say [respondent] wasn't hearing it." So she asked respondent, who kept looking over her shoulder as if expecting someone, to leave her office. One of Ms. Fruster's assistants, Ms. Mullarkey, whose cubicle is located outside Ms. Fruster's office and closer to a window approximately four feet away, came into the office and also asked respondent to leave, which respondent eventually did (Tr. 15-17). Their interaction lasted between five and ten minutes (Fruster: Tr. 16, 27; Mullarkey: Tr. 37; Vazquez: Tr. 94; Resp: Tr. 129). Ms. Fruster was upset at the manner in which respondent came into her office and characterized respondent's behavior as very rude and disrespectful. She testified that she also felt a bit intimidated because respondent moved forcefully and aggressively back and forth in her office. Ms. Fruster later stated that respondent came aggressively towards her in her office but she did not call security because another worker, Ms. Mullarkey, stepped in (Tr. 19-20, 26-27).

Ms. Walker wrote respondent a memo on November 7, 2016, in which she noted that at 6:08 p.m., she instructed respondent to complete an interview and brought the client to respondent's desk, but respondent failed to complete the interview and instructed the client to return on another date (Pet. Ex. 5). In the memo, Ms. Walker notified respondent that her failure to complete the client interview was a violation of the agency's Code of Conduct.

Ms. Fruster also issued respondent a memo two days later, in which she recited what had occurred in her office on November 7, 2016. She described respondent as "aggressive and disrespectful" and "inappropriate" while "using offensive language to express [her] refusal to follow [her supervisor's] directive" (Pet. Ex. 1). Contrary to Ms. Walker's testimony that respondent had been assigned the case at 6:08 p.m., Ms. Fruster's memo and her testimony at

trial suggested that respondent had actually been assigned the case at 4:28 p.m., and was given a directive by her supervisor at 6:35 p.m. (Tr. 25). She maintained that a worker may be given notice or assigned a case not later than one to two hours before their departure time. Ms. Fruster did not recall respondent claiming that the time at which Ms. Walker assigned her the case would have compelled her to work overtime. Ms. Fruster insisted that respondent was obligated to interview and assess the client's needs (Tr. 23-25).

Yomyra Mullarkey started working as a JOS at HRA in 2008, and was promoted twice since that time, becoming a level 2 JOS in either 2014 or 2015. From August 2016 through February 2017, she worked at the Rider Center where because of logistics she was directly accountable to Director Fruster, and not the deputy director, because they both worked on the fourth floor (Tr. 29-32).

Ms. Mullarkey corroborated Ms. Fruster's testimony regarding respondent's conduct on November 7, 2016. She testified that around 7:00 p.m., she was processing work in the office when she saw respondent storm onto the floor, enter Ms. Fruster's office and loudly state that she was tired, had informed Ms. Walker that she could not conduct the interview and that she wanted to process the Con Edison payment. She overheard Ms. Fruster inquire whether respondent had followed the chain of command and inform respondent that she was supposed to service the client, to which respondent loudly replied "you're not listening" and continued that "I'm sick of this shit" (Tr. 32-33). Ms. Mullarkey entered Ms. Fruster's office as Ms. Fruster was directing respondent to leave her office. Ms. Mullarkey also told respondent to leave Ms. Fruster's office but respondent paced back and forth and was not listening, but she eventually left (Tr. 33-34). Ms. Mullarkey also saw respondent's co-worker, Mr. Vazquez, in the vicinity. She could not estimate with precision, his distance from Ms. Fruster's office (Tr. 34-36).

Ms. Mullarkey's recollection matched an e-mail which she wrote approximately two weeks after the incident to Marilyn Thomas, whose title she could not recall (Tr. 37-38; Pet. Ex. 2). She testified that up until that time, she had never observed anyone disrespect a superior or manager. Thus, by her e-mail, she wanted the "downtown" personnel to know that the behavior that she observed was unacceptable (Tr. 39). During cross-examination, Ms. Mullarkey admitted that until she was contacted by Ms. Thomas by phone for a statement, she had not reported the incident to anyone (Tr. 41).

Respondent recalled that on November 7, 2016, the client whom she was asked to service was Suazo K. She denied that she was assigned the case at 4:28 p.m. as Ms. Fruster contended. Instead, she stated that the case was assigned to her at 6:34 p.m. A screenshot of the POS log for the client showed that the client's application intake process commenced at 4:29 p.m. At 4:35 p.m., the case appeared to be assigned to Dominique Thorpe, but respondent testified that that is the person who assigns cases to the JOS workers. The POS log further showed that the case was assigned to respondent at 6:34 p.m. (Tr. 102-03; Resp. Ex. B). Respondent insisted that she saw the client that day, registered the case and instructed the client to return so she could complete the client's application. She maintained that she did exactly as she was instructed (Tr. 107, 129). She produced a printout of what she claimed to be a WMS screenshot to support that client Suazo K. was issued foodstamps on November 7, 2016 (Tr. 107-09; Resp. Ex. D). But, the screenshot did not display a name and contrary to respondent's testimony, the case number did not match that on the POS screenshot in respondent's exhibit B. Respondent testified that the client returned two days later, on November 9, 2016, and the POS screenshot and a form which respondent identified as Form 2921 which both respondent and the client signed supported that testimony (Tr. 109-12; Resp. Exs. B, E). When asked whether Ms. Walker had completed client Suazo K's interview, respondent replied that she was unsure because she left at 7:00 p.m. and the client returned on November 9, 2016 as respondent had instructed her to (Tr. 130).

To support her angst on the day in question, respondent provided a copy of petitioner's Center Director Memorandum Number 10-40, dated December 30, 2010, on involuntary overtime requests. The memo directs that non-managerial employees be given at least 30 minutes of advance written notice for involuntary overtime (Tr. 105-06; Resp. Ex. C). Respondent claimed that she was neither given sufficient notice nor was the notice given in writing (Tr. 106-07). She admitted that she went to Ms. Fruster's office to complain and that she was very angry and frustrated but denied that she used the word "shit" or any inappropriate language (Tr. 112-13, 128). Respondent further admitted that she did not immediately leave Ms. Fruster's office when asked to do so because she "wanted to get [her] point across" (Tr. 128). She continued:

> I had to state my cause. I had to compl -, I have to - - I have to express myself. If I do not express myself, that means I'm accepting whatever is done to me as normal (Tr. 129).

Angel Vazquez, who started working at HRA around the same time as respondent and was in training with her, works on the fourth floor at the Rider Center. Mr. Vazquez testified that on November 7, 2016, he was about to leave work when he saw respondent come to the fourth floor looking very distraught and upset. After telling him that she had been assigned a case less than 30 minutes before her shift ended, she went to Ms. Fruster's office where he heard her complain that she had to leave and that this was not the first time that she had been given a case so late. Ms. Fruster told respondent that she could not barge into her (Ms. Fruster's) office and be disrespectful, and Mr. Vazquez heard respondent reply that talking about leaving at her scheduled time was not being disrespectful. But he claimed not to have heard respondent use the word "shit" at any time (Tr. 90-94).

Respondent submitted a copy of a statement dated November 21, 2016, which Mr. Vazquez wrote, indicating that on the day in question at around 7:00 p.m., he overheard a heated argument between Ms. Fruster and respondent and that no profanity was used. A notary public stamped and signed the statement. A few spaces above the notary's signature were the following handwritten words "Sworn to before me on 3/13/17." Mr. Vazquez testified that that was the date on which he signed the statement (Tr. 92; Resp. Ex. A).

I accorded little to no value to Mr. Vazquez's testimony and his written statement which I found to be unreliable given the significant time lapse between the purported date of its creation and the handwritten "sworn to" date that was attributed to the notary. It was also clear that Mr. Vazquez felt a certain bond with respondent who was in the same training class as he. Moreover, he provided insufficient detail about the interaction which he observed between Ms. Fruster and respondent for me to conclude that he was close enough to hear what was being said.

On the other hand, I found the testimony of Ms. Furster and Ms. Mullarkey to be very credible. Neither had much interaction with respondent on a day-to-day basis or otherwise as they both worked on a different floor from her. Further, I could perceive no motive for them to fabricate their testimony against her. It was undisputed that respondent was incensed when she entered Ms. Fruster's office because she perceived that Ms. Walker had assigned her a client so late that it would affect her departure time. She was also irate because she felt it to be a recurring pattern. Notably, respondent did not deny Ms. Fruster's and Ms. Mullarkey's claim that she was loud. Nor did she dispute that she refused to immediately leave Ms. Fruster's office

when asked to do so. She only denied that she used profanity. Given the lack of control that she demonstrated at trial, I found it entirely plausible that respondent expressed to Ms. Fruster that she could not take "this shit" anymore.

This tribunal has held that not every critical comment by a public employee against a supervisor amounts to discourtesy, disrespect, or insubordination that would subject the employee to disciplinary action, even when voices are raised and emotions are displayed and vented. *See Health & Hospitals Corp. (North Central Bronx Hospital) v. McCree,* OATH Index No. 1120/12 at 6 (Aug. 9, 2012); *Dep't of Sanitation v. Quinones*, OATH Index No. 1974/05 at 14 (Oct. 14, 2005); *Health & Hospitals Corp. (Lincoln Medical & Mental Health Ctr.) v. Thomas,* OATH Index No. 531/04 at 6 (May 4, 2004); *Transit Auth. v. Nixon,* OATH Index No. 2131/96 at 16-17 (Mar. 31, 1997), *modified on penalty*, Auth. Dec. (May 16, 1997); *Dep't of Correction v. Martin,* OATH Index No. 431/95 at 14 (Jan. 17, 1995). The elements of behavior that would comprise misconduct include the use of threats, insolence, profanity, or a showing that the office was disrupted by the employee's behavior. *Health & Hospitals Corp. (Kings Co. Hospital Ctr.) v. Anatua-Bichotte,* OATH Index No. 1947/11 at 6 (Oct. 13, 2011); *Health & Hospitals Corp. (Kings Co. Hospital Ctr.) v. Gathers,* OATH Index No. 236/08 at 5-6 (Oct. 22, 2007); *Human Resosurces Admin. v. Bichai,* OATH Index No. 211/90 at 15 (Nov. 21, 1989), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 90-54 (June 15, 1990).

Here, the manner in which respondent burst into Ms. Fruster's office, her tone and her inappropriate language were not only disrespectful, but were disruptive to the office since at least two persons witnessed her behavior, thereby warranting disciplinary action. However, I am hard-pressed to find that Ms. Fruster was intimidated, especially since her contemporaneous memo on November 9, 2016, made no mention that she felt intimidated at the time and respondent was not charged with intimidating her supervisor.

To find that an employee engaged in intimidation, this tribunal has applied an objective standard. *See Dep't of Citywide Admin. Services v. Phillip,* OATH Index No. 114/10 at 10 (Sept. 10, 2009) (finding that vague statements by respondent did not establish a threat as they were "not obviously intended as a threat to do physical harm"); *Dep't of Transportation v. McLean-Nur*, OATH Index No. 316/92 at 11 (Apr. 10, 1992) (finding that an employee's subjective impression that the respondent's actions were threatening was insufficient to establish

misconduct as "[t]he test for determining whether actions rose to a level of sanctionable misconduct must be an objective one rather than a subjective one."). But we have found that an employee's actions may be inappropriate and intimidating even absent verbal threats. *See Health & Hospitals Corp. (Kings Co. Hosp. Ctr.) v. Bobbitt*, OATH Index No. 850/07 at 4 (Feb. 2, 2007) (respondent intimidated her supervisor when she remained in her supervisor's doorway, despite requests to leave, pointing and yelling at the supervisor); *Dep't of Transportation v. Davis*, OATH Index No. 1042/02 at 13 (July 9, 2002) ("if one… stood in front of the door, the only means of egress, and refused to move aside, it is reasonable to believe that the behavior could be perceived as somewhat threatening, or, at a minimum intimidating"); *Admin. for Children's Services v. Lin*, OATH Index No. 414/00 at 8 (Sept. 5, 2000) (in an argument with supervisor regarding a work related matter, respondent committed disciplinable misconduct by standing so close to the supervisor as to be intimidating).

While respondent did not immediately leave Ms. Fruster's office when directed to do so, there was no indication that she approached Ms. Fruster or that Ms. Fruster herself attempted to leave and was prevented from doing so by respondent. Nor was there any indication that respondent intended to intimidate Ms. Fruster. *See Law Dep't v. Lawrence,* OATH Index No. 1312/10 at 7-9 (Mar. 30, 2010) (respondent intended to intimidate his supervisor when he refused to leave her office after being asked to do so on three occasions, stood in front of her door which was very close to her desk, and told her that it was not her personal space). Notably, respondent was not charged with intimidating her director. Thus, Ms. Fruster's claim at trial of feeling intimidated appeared to be more of an embellishment.

With respect to the charge that respondent failed to follow Ms. Walker's instructions to interview client Suazo K., there is some disparity in the time that Ms. Walker claimed to have assigned the case to respondent and respondent's proof of when the case was actually assigned to her in the computer. That leaves open the possibility that Ms. Walker had given respondent verbal instructions. Nevertheless, whether the case was assigned at 6:08 p.m. as Ms. Walker testified or at 6:34 p.m. as the POS sheet established, respondent was still obligated to comply with her supervisor's instructions.

To establish insubordination, petitioner must prove by a preponderance of the credible evidence that respondent was given a clear and unambiguous order which she willfully refused to

obey. *See Reisig v. Kirby*, 62 Misc.2d 632, 635 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008 (2d Dep't 1969) ("Misconduct and insubordination on the part of a civil service employee implies intentional and willful disobedience"); *see also Transit Auth. v. Wong,* OATH Index No. 1866/08 at 16 (Aug. 28, 2008); *Dep't of Sanitation v. Dobie*, OATH Index No. 2092/07, 2093/07, 2094/07, & 2095/07 at 8 (May 2, 2008); *Dep't of Sanitation v. Nieves,* OATH Index No. 1683/07 at 10 (Sep. 19, 2007) (quoting *Dep't of Environmental Protection v. Schnell*, OATH Index No. 2262/00 at 6 (Oct. 25, 2000)); *Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Muniz*, OATH Index No. 1666/05 at 8 (Oct. 17, 2005).

Ms. Walker did not testify as to the specific instructions she issued to respondent on November 7, 2016. Rather, she stated that another supervisor instructed respondent to register the case, issue benefits and have the client return the following day to complete the interview, which respondent did not dispute. Instead, she testified that she complied with the instructions that were given by registering the client and having the client return on November 9, 2016. While respondent produced documentation that the client returned two days later, she did not establish that she issued the client with immediate benefits on November 7, 2016, as instructed. And that was no accident. Respondent was so propelled by her anger at the late assignment that she left the client and went to Ms. Fruster's office to express her rage. I found credible, Ms. Walker's testimony that the client was crying because she had no food for her young children and that Ms. Walker therefore completed the interview and issued foodstamps to the client. The client's return to the Center on November 9, 2016 did not convince me that she did so for the interview to be completed. It appeared more likely than not that her return was solely to sign paperwork for the issuance of cash benefits since Ms. Walker's interview had already deemed her eligible for benefits.

I find that respondent registered the client on November 7, 2016, but that she failed to issue foodstamps benefits to the client as instructed, and that that failure was deliberate and intentional, and therefore, insubordinate. *See 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); *Dep't of Sanitation v. Banton*, OATH Index No. 336/07 at 3 (Dec. 1, 2006); *Dep't of Correction v. Messina*, OATH Index No. 738/92 at 10 (July 9, 1992).

In sum, specifications I and II have been sustained.

FINDINGS AND CONCLUSIONS

1. Petitioner established that on September 22, 2016, respondent failed to immediately comply with her supervisor's directive to call a client, in violation of petitioner's Code of Conduct.

2. Petitioner established that respondent failed to comply with multiple directives from her supervisor on September 27, 28 and 29, 2016, to activate a particular line in a client's computer file, in violation of petitioner's Code of Conduct.

3. Petitioner further established that on September 29, 2016, respondent snatched a document from her supervisor's hand and yelled at the supervisor, in violation of petitioner's Code of Conduct.

4. Petitioner established that on November 7, 2016, respondent failed to comply with supervisory instructions to issue benefits to a client after registering the client, in violation of petitioner's Code of Conduct.

5. Petitioner established that respondent unexpectedly stormed into the director's office in an aggressive manner, became loud and disruptive, used inappropriate language, and refused to immediately leave after being directed to do so, in violation of petitioner's Code of Conduct.

RECOMMENDATION

Upon making the above findings, I obtained and reviewed an abstract of respondent's personnel record in order to make an appropriate penalty recommendation. Respondent started working with the agency on November 2, 2015, and has no prior discipline.

Petitioner established that respondent: failed to comply with her supervisor's directives on three occasions – September 22, 2016; September 27, 28 and 29, 2016 (counted as one instance because it was the same directive with which respondent refused to comply); and November 7, 2016. Petitioner also established that respondent snatched a document from her supervisor's hand and yelled at the supervisor; stormed into the director's office unannounced, where she was aggressive, loud and disruptive, and used inappropriate language; and refused to leave the director's office when asked to do so.

For the proven misconduct, petitioner seeks to suspend respondent for 35 days, which I find to be excessive.

This tribunal has generally applied the principles of progressive discipline, which aims to achieve employee behavior modification through increasing penalties for repeated or similar misconduct. *See Dep't of Transportation v. Jackson*, OATH Index No. 299/90 at 12 (Feb. 6, 1990) ("It is a well-established principle in employment law that employees should have the benefit of progressive discipline wherever appropriate, to ensure that they have the opportunity to be apprised of the seriousness with which their employer views their misconduct and to give them a chance to correct it."); *Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Ford*, OATH Index No. 2383/09 at 11 (July 10, 2009) ("The theory of progressive discipline is to modify employee behavior through increasing penalties for the same or similar misconduct, and to give employees full notice that if they do not modify their conduct, they risk termination."); *Dep't of Sanitation v. Parker,* OATH Index No. 1049/04 at 9 (Aug. 3, 2004) ("[T]he theory of progressive discipline assumes that, once an employee is disciplined for *particular* behavior, that behavior should subsequently be corrected." (emphasis added)).

Thus, a fair penalty must consider the particular circumstances of the incident(s) and individual mitigating factors, where appropriate. *Dep't of Correction v. Phoenix,* OATH Index No. 1543/08 at 10 (Apr. 14, 2008), *adopted*, Comm'r Dec. (June 6, 2008), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 08-55 SA (Oct. 30, 2008); *Transit Auth. v. Madsen*, OATH Index No. 121/98 at 7 (Sept. 5, 1997), *modified on penalty*, Auth. Dec. (Sept. 30, 1997); s*ee also Admin. for Children's Services v. Goodman*, OATH Index Nos. 986/05, 1082/05 at 15 (Aug. 12, 2005) (respondent's lack of a prior disciplinary record is a mitigating factor); *Dep't of Correction v. Winniczek,* OATH Index No. 890/04 at 3-4 (May 7, 2004), *adopted,* Comm'r Dec. (Oct. 8, 2004) (misconduct mitigated by respondent's personnel record and evidence that it was caused by stress related to a death in the family).

For a failure to comply with supervisory directives, we have recommended penalties of five days' suspension and beyond depending on whether or not there were aggravating factors. *See Human Resources Admin. v. Traylor,* OATH Index No. 2162/11 (July 1, 2011) (10-day suspension for failing to comply with supervisor's directives); *Human Resources Admin. v. Traylor,* OATH Index No. 168/07 (Jan. 31, 2007) (five-day penalty for one occasion of failing to

follow supervisor's instruction); *Human Resources Admin. v. St. Louis,* OATH Index No. 895/05 (May 26, 2005), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 07-03-SA (Feb. 9, 2007) (10-day suspension for insubordination); *Human Resources Admin. v. Royal*, OATH Index No. 1087/04 (July 2, 2004), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 05-59-SA (Aug. 26, 2005) (20-day suspension for insubordination).

Here, while respondent's lack of prior discipline may, in other circumstances be mitigating, I find that not to be the case her because she has been with the agency less than two years. Her combative demeanor on the witness stand, her refusal to acknowledge any wrongdoing or express remorse, and her condescending tone towards petitioner's attorney did not inure to her benefit. Moreover, her abject refusal to comply with her supervisor's directives affected the livelihood of individuals who sounded to be in despair and were relying on the benefits that the JOS could authorize, as a lifesaver. This was an aggravating factor. Therefore, I find that a five-day suspension without pay for each of the three instances of respondent's refusal to comply with her supervisor's directives to be appropriate.

Even though I sustained the portion of the charge which alleged that respondent snatched a document from, and yelled at her supervisor, the supervisor did not testify as to the effect of respondent's conduct on the office, whether there were workers around to overhear, and whether or not respondent's behavior was disruptive to the office. Hence, I decline to recommend a separate penalty for this behavior.

The type of misconduct that respondent demonstrated in the director's office has garnered penalty recommendations ranging from one to ten days without pay. *See Health & Hospitals Corp. (Kings Co. Hospital Ctr.) v. Bobbitt*, OATH Index No. 850/07 (Feb. 2, 2007) (10-day suspension without pay for worker with prior discipline, who became loud and disrespectful and pointed her finger in supervisor's face, refused requests to leave the supervisor's office, and refused to acknowledge wrongdoing); *Health & Hospitals Corp. (Woodhull Medical and Mental Health Ctr.) v. McMillian*, OATH Index No. 1402/06 (July 24, 2006) (five-day suspension without pay for worker who engaged in loud and disrespectful confrontation with supervisor during which respondent pointed her finger close to supervisor's face and had to be restrained by hospital police); *See Human Resources Admin. v. Andrews*, OATH Index No. 583/04 at 13-14 (July 28, 2004) (five-day suspension for use of mild profanity and failure to report to supervisor).

Here, I find that the five to ten minutes that respondent chose to vociferously express her anger warrant a penalty of five days suspension without pay.

In sum, I recommend that respondent be suspended for 15 days without pay for her failure to comply with her supervisor's directives, and for five days without pay for her loud and disrespectful behavior in the director's office, for a total of 20 suspension days without pay.

Ingrid M. Addison
Administrative Law Judge

August 15, 2017

SUBMITTED TO:

STEVEN BANKS
Commissioner

APPEARANCES:

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CIVIL SERVICE COMMISSION

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NOTICE OF CITY CIVIL SERVICE COMMISSION ACTION

Jill Mendelberg, Esq.
Appellant Attorney
(via email only)

Date:	02/06/2018
Case No.:	2017-1085
Appeal Type:	76 Disciplinary
Appellant:	Joan Carrington
Position/Title:	Job Opportunity Specialist
Agency:	HRA
Final Decision:	Affirm

The Civil Service Commission has made a final decision in connection with your appeal. A copy of the decision is attached.

Please consult with your attorney or union representative to determine whether any further appeal is available to you.

NEW YORK CITY CIVIL SERVICE COMMISSION

c: Joan Carrington
Appellant
(via email only)

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THE CITY OF NEW YORK
CITY CIVIL SERVICE COMMISSION

In the Matter of the Appeal of

JOAN CARRINGTON
Appellant

-against-

HUMAN RESOURCES ADMINISTRATION
Respondent

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

CSC Index No: 2017-1085

DECISION

JOAN CARRINGTON ("Appellant") appealed from a determination of the Human Resources Administration ("HRA") finding Appellant guilty of incompetency and/or misconduct and imposing a penalty of suspension following disciplinary proceedings conducted pursuant to Civil Service Law Section 75.

The Civil Service Commission ("Commission") heard arguments from the parties on January 25, 2018.

The Commission has considered the arguments presented on this appeal, and reviewed the record of the disciplinary proceeding. Based on this review, the Commission concludes that there is sufficient evidence in the record to support the findings of fact and the conclusions of law, and that the penalty is appropriate.

(intentionally left blank)

Therefore, the final decision and penalty imposed are hereby affirmed.

[redacted]

Nancy G. Chaffetz, Commissioner
Chair

[redacted]

Rudy Washington, Commissioner
Vice Chair

[redacted]

Allen P. Cappelli, Commissioner

[redacted]

Larry Dais, Commissioner

*Commissioner Charles D. McFaul took no part in this decision.

Dated: 02/06/2018.