

Fire Dep't v. Toner

OATH Index No. 2310/17 (Mar. 28, 2018)

Petitioner established that respondent disobeyed supervisors' instructions for filling out timesheets, improperly documented overtime availability, failed to report for an overtime assignment, and disobeyed orders to refrain from making non-work-related entries on work tracking forms. Penalty of suspension without pay for 45 days recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
FIRE DEPARTMENT
Petitioner
- against -
SHANE TONER
Respondent

REPORT AND RECOMMENDATION

JOYCELYN McGEACHY-KULS, *Administrative Law Judge*

Petitioner, the Fire Department ("Department"), brought this proceeding under section 75 of the Civil Service Law alleging that respondent, Shane Toner, failed to follow supervisors' instructions for filling out timesheets and related forms, did not properly document overtime availability, failed to report for an overtime assignment, and disobeyed orders to refrain from making non-work-related entries on work forms (ALJ Ex. 1).

At the four-day trial conducted on September 26, October 11, October 12, and November 17, 2017, petitioner relied on the testimony of D. Wallen, supervisor of mechanics, and documentary evidence. Respondent presented documentary evidence and relied on testimony from W. Lacey, Director of Civil Service for the Carpenters Union, and his direct supervisor R. O'Sullivan. Respondent also testified on his own behalf.

For the reasons below, I find that petitioner proved most of the charges and recommend a penalty of suspension without pay for 45 days.

BACKGROUND

Respondent has been a carpenter with the Department since 2010. He is responsible for carpentry work and repairs within firehouses throughout New York City (Tr. 20). He works from 7:30 a.m. to 3:00 p.m., Monday through Friday. At the start of his shift, respondent reports to the 58th Street trailer, where he calls his supervisor to get his daily assignment. After receiving his assignment, he uses a Department vehicle to drive to the work location. At the end of his shift, respondent reports back to the 58th Street trailer to sign out and return the Department vehicle. Respondent clocks in and out using the palm scanner at the trailer (Tr. 508-10).

Most of the charges in this matter relate to whether respondent completed two required Department forms in accordance with Department rules, policies, and procedures between June 12, 2016 and July 22, 2017. The Department further charged respondent with failing to comply with supervisors' instructions regarding the completion of these forms. Respondent contended that these requirements were changes in policies or procedures and that he was not aware of any revisions. Respondent is also charged with being absent without official leave when he failed to report for a previously scheduled overtime assignment.

ANALYSIS

The Fire Department employs mechanics who are responsible for the maintenance of 350 firehouses, EMS facilities, and training facilities throughout New York City. These mechanics, supervised by D. Wallen, include carpenters, electricians, plumbers, roofers, maintenance men, laborers, plasterers, and painters. Because the Department operates around the clock, there is often a need for carpenters to be available for emergency repairs in firehouses or facilities (Tr. 19-20). As a result, the Department has reporting policies to identify carpenters who are available to work overtime hours in addition to their scheduled shift (Tr. 30-32).

Carpenters are required to fill out two forms during the course of their duties to account for their hours worked, work assignments and location: the daily work order tracking form ("daily tracking form" or "DTF") and the weekly time report ("WTR"). The DTF provides a report on the progress of work assignments and details the amount of time a carpenter worked in a day by work order number, location, and description of work. The WTR is filled out on a daily basis by carpenters and submitted weekly. In addition to carpentry assignments, work locations,

and information contained in the DTF, the WTR records whether carpenters worked overtime, and whether they took annual or sick leave (Tr. 23, 34). According to Mr. Wallen, carpenters are supposed to document their day, “where they’ve been and what they were doing and the hours start and . . . when they get there and when they leave there whatever location they report to” (Tr. 132).

Overtime can be scheduled or unscheduled, depending on emergency assignments. Supervisors must be able to reliably identify who is available should emergency work become necessary. In these instances, the supervisor would call the carpenter who was listed as available on the overtime list. If the overtime was scheduled for an assignment, the supervisor would ask the carpenter on Friday afternoon if they were available for the weekend (Tr. 29). The process for distributing overtime is detailed in the Department’s Buildings Maintenance Division Policy and Procedure Handbook (“Red Book”) (ALJ Ex. 2 at 71-75; Tr. 30-31). Mr. Wallen testified that supervisors are required to maintain a grid sheet with the names of all employees supervised and the amount of overtime work offered for each employee. The supervisor is required to document in the grid sheet “[e]very instance in which overtime was offered to an employee, the length of the overtime work, hours and minutes, that the employee was offered, whether the employee accepted or declined the overtime work, and if the employee accepted overtime work, the location of the assignment” (ALJ Ex. 2 at 71; Tr. 170-71, 185-86). The grid sheet is used to ensure that overtime is distributed fairly (Tr. 171). Overtime work assignments are offered based on the number of overtime hours that an employee has refused or worked throughout the year and is offered to employees that have been offered the fewest overtime hours (Tr. 32-33).

Mr. Wallen testified that information on how to complete the DTF and the WTR is contained in the Red Book. Each employee is given a copy of the Red Book at the start of their employment with the Department and when the Red Book is updated. Employees must sign for receipt of the Red Book and any updates. Respondent received an updated Red Book in 2010 and 2014 and signed forms acknowledging receipt of each (Pet. Ex. 2; Tr. 24, 27, 58-59). The Red Book provides that “[t]he Weekly Time Report shall be completed on a daily basis, as assignments are completed and shall accurately reflect: the date of each authorized assignment, the odometer reading of the vehicle assigned to the employee upon arrival to the location of the work assignment, time of arrival and the time of departure, the Work Order reference number for each work assignment, a description of the employee’s work and for each workday, regular work

hours, overtime hours, sick leave or annual leave” (ALJ Ex. 2 at 76; Tr. 184-85). The Red Book also requires that supervisors return to an employee any time and leave records that are inaccurate or incomplete (ALJ Ex. 2 at 78; Tr. 179, 220).

The purpose of the WTR is to document where the mechanics worked, the time of work they performed, if they worked overtime, if they refused overtime, if they were unavailable for overtime, if they took sick leave or annual leave, and a description of the work performed (Tr. 34-35). Mr. Wallen acknowledged that neither the WTR nor DTF explicitly states that hours worked refers only to hours worked on a work order. However, since the employee has to list a work order, it is implied that the hours worked relate to a work assignment (Tr. 181).

Both the DTF and WTR contain columns titled “Description of Work” where the employee would describe the work assignment for the day. Mr. Wallen testified that only comments related to work assignments are appropriate to include on these forms. Ordinarily, Mr. Wallen submits the forms to the timekeeper who then enters the forms in the work order system to document the hours worked on a work order, or if the work order is complete (Tr. 86-87). When there are superfluous comments on the forms, the timekeeper does not understand whether the comment is work-related and has to go to a supervisor for explanation which “slows the process down” (Tr. 92).

Policies regarding the completion of forms were communicated directly to respondent several times, including during three separate supervisors conferences with respondent and his supervisors, Mr. Wallen, Mr. O’Sullivan and D. Rainis. Mr. Wallen explained that the supervisors conferences are not disciplinary in nature but they are meetings to advise the employee that he is not “doing something correctly” (Tr. 63-64). On June 26, 2014, respondent’s supervisors met with respondent to explain that he did not fill out his paperwork accurately and completely. They directed respondent to accurately record his availability for overtime on his WTR and to refrain from adding non-work-related comments on the DTF (Pet. Ex. 3; Tr. 64). On July 9, 2014, respondent’s supervisors conducted another supervisory conference with respondent due to his failure to document his availability for overtime on his WTR and to respond to supervisors phone calls offering overtime. Respondent was directed to accurately report his availability to work overtime (Pet. Ex. 4; Tr. 69-70). On July 17, 2014 they met with respondent to discuss non-work-related comments respondent wrote on the WTR and to direct respondent to use the 58th Street trailer phone to confirm overtime availability. They also

referenced the prior supervisor conferences (Pet. Ex. 5; Tr. 71). During these conferences, supervisors explained to respondent how to fill out the required forms correctly (Tr. 241, 293).

Failure to Accurately Document Availability for Overtime

Mr. Wallen testified that on 22 occasions from July 15, 2016 to July 22, 2017, respondent did not indicate his availability to work overtime on his WTR (Pet. Ex. 1). On six of those dates, October 31, November 1, November 2, December 22, and December 23, 2016 and July 21, 2017, respondent indicated that he was on either annual leave or sick leave. However, carpenters are required to complete the overtime column for the corresponding dates even when sick or annual leave is taken (Pet. Ex. 1; Tr. 93-99, 107-09). On two occasions, October 29 and October 30, 2016, respondent indicated that he was available for overtime but failed to contact his supervisor, Mr. Rainis, who had left a message to call him on both dates for the overtime assignments. Respondent was marked as refusing overtime assignments for those dates (Pet. Exs. 8, 9; Tr. 102, 104).

Mr. Wallen explained that when an employee is on sick leave, he is not available for overtime. However, the employee's unavailability should still be noted on his WTR (Tr. 193-94). Mr. Wallen acknowledged that there is no written instruction for completing the overtime column in the Red Book, he asserted that the Red Book requires that documents should be filled out accurately and correctly (Tr. 203-05). Further, he testified he had directed respondent to fill out his timesheets accurately and completely and that respondent's supervisors had spoken to respondent about the requirement to complete the overtime availability column when on sick or annual leave and had directed respondent to do so (Tr. 152-53).

Mr. O'Sullivan is a carpenter supervisor and has supervised respondent for seven years and testified that he reviews timesheets and other paperwork submitted by carpenters. He testified that when he received documents that were incorrect or incomplete, he would notify the carpenters and return the documents for correction (Tr. 437-38, 441-42). Mr. O'Sullivan stated that he had returned forms to respondent in the past with the direction to make necessary corrections and that respondent told him that he was not going to make the required corrections and that he was not going to follow Mr. O'Sullivan's directive (Tr. 462-63).

Mr. Lacey, Director of Civil Service for the NYC District Council of Carpenters, testified that he represents all carpenters that work for the city and represents carpenters in grievances,

disciplinary matters, and other matters. He offered general testimony regarding his familiarity with carpenters' work because he is a carpenter and does "full-time union work" and he knows what carpenters do "throughout the day in firehouses" (Tr. 335-36, 345). According to Mr. Lacey, carpenters are not required to notify supervisors in advance of their availability to work overtime when on sick or annual leave. The WTR is submitted at the end of the week and is therefore not an advance notification. The WTR instead serves as a confirmation of availability that is submitted to supervisors for the purpose of determining the distribution of overtime assignments (Tr. 307, 330)

Although the undisputed documentary evidence showed that respondent did not record his overtime availability on each of the specified dates, respondent claimed that he was never instructed on how to complete the WTR or how to fill out the column for sick leave or annual leave (Tr. 527). Contrary to Mr. O'Sullivan's testimony, respondent testified that when he left the overtime availability column blank, the WTRs were not returned to him so he concluded that they were acceptable (Tr. 551-53, 618-19). Respondent did acknowledge one instance when Mr. O'Sullivan did not actually return a WTR to him but called him to his office and asked that respondent fill out the overtime column correctly by placing a "yes" or "no" in the availability column. Respondent stated that he refused to make the change because he did not want "to put the wrong information down on a sheet that [he] was signing" (Tr. 584-85). He stated that this trial was the first time he had noticed that there was anything wrong with his forms (Tr. 574-75). He further testified that the first time he learned that he was not filling out the forms correctly was on July 27, 2017 when he was reprimanded (Tr. 620).

Respondent's testimony that he did not know that he was filling out Department forms incorrectly was impeached by evidence of a prior proceeding before this tribunal in February 2016, which resulted in a penalty imposed against respondent for failing to complete Department forms in accordance with Department procedure and his supervisors' directives. This information was directly relevant to respondent's testimony regarding notice of Department policies and was deemed admissible when respondent testified that he was unaware of the Department's policies at issue in this matter. This evidence was admitted solely for this purpose and not to prove whether respondent engaged in the charged misconduct. *See Health & Hospitals Corp. v. Ricketts*, OATH Index No. 2386/09 at 3 (June 22, 2009), *aff'd*, 88 A.D.3d 593 (1st Dep't 2011); *Dep't of Housing Preservation & Development v. Wilkins*, OATH Index No.

466/92 at 6 (Mar. 9, 1992); *People v. Molineaux*, 168 N.Y. 264, 292-93 (1901); J. Prince, Richardson on Evidence § 4-511 (Lexis 2009).

Respondent is charged with failing to comply with all applicable Department policies, procedures, rules and regulations for each occasion where he failed to accurately indicate his availability to work overtime. In addition to the credible testimony of Mr. Wallen, petitioner presented respondent's supervisors conference memoranda and a performance evaluation each referencing the requirement that respondent fill out the forms as directed by his supervisors. Respondent did not dispute receiving these documents nor did he offer a credible explanation to justify his refusal to comply with his supervisors' directives to complete the forms as instructed. Furthermore, respondent's assertions that he was never notified about this process were not true as evidenced by a prior trial before this tribunal where respondent was found to have engaged in similar conduct. These charges are sustained.

Respondent is also charged with failing to comply with supervisory instructions on each occasion where he failed to accurately indicate his availability to work overtime. These charges are sustained as a cumulative charge referencing on-going conduct.

Failure to Correctly Document the Hours and Location of the Start or End of Tour

During the time period referenced in the petition, the Department used the 58th Street trailer in Queens, New York, as a central reporting location. Inside the trailer there was a locker room, a small kitchen, an office, a white board, a fax machine, a palm scanner for electronic timekeeping, and an area where employees could complete and drop off paperwork. Carpenters had the option of reporting first to the 58th Street trailer to get their work assignments and pick up a Department vehicle to drive to their work assignment. At the end of their shifts, the carpenters would return to the trailer to sign out and return the Department vehicle. Alternatively, carpenters could take Department vehicles home on the night before an assignment and report directly to the assignment at the beginning of their shift the next morning (Tr. 110-11, 113). Respondent chose to report to the 58th Street trailer each morning (Tr. 142-43).

In June 2016, at Mr. Wallen's request, Mr. Rainis posted notices in the trailer reminding carpenters who started and ended their shifts at the 58th Street trailer to record the 58th Street trailer as the starting and ending work location on their WTRs (Tr. 118-19, 122). This notice

was posted on the white board in the trailer as well as in the window of the supervisor's office door in the trailer (Pet. Exs. 10, 11; Tr. 126-27). Mr. Wallen requested this notice because several employees were incorrectly listing their first field assignment location as their starting location and were not accurately documenting their start and end times (Tr. 119). On June 22, 2016, Mr. Rainis e-mailed Mr. Wallen informing him that despite having posted the notice in the trailer, respondent did not list 58th Street as the starting or ending location for the day. The e-mail noted that others that reported to the trailer were marking their sheets correctly (Pet. Ex. 12; Tr. 120).

Mr. Lacey testified that he participated in a union settlement involving the Department and carpenters who took Department vehicles home after their shifts. The resolution provided that carpenters who had Department vehicles would drive directly to their first assignment without coming to the 58th Street trailer and would record their first work assignment location as their starting location. Further, he stated that he was familiar with the Department's policies and practices regarding the WTRs and that for at least five years, carpenters who reported to the 58th Street trailer, reported their starting location as the location of their first work assignment (Tr. 342). However, on cross examination, Mr. Lacey testified that carpenters who did not drive Department vehicles would report to a central location and would then clock in at 7:30 a.m. (Tr. 399).

Mr. Lacey questioned the notice that the Department gave carpenters regarding completion of their WTRs. He offered that grease [white] boards are not normally used to communicate changes in policies and concluded it was not appropriate based on "common sense" because there are "other ways that are better to [give notice]" (Tr. 354-55, 403). Although Mr. Lacey opined that changes in work policies should be sent to the union or sent in writing to the workers affected, he acknowledged that the union did not file a grievance (Tr. 397).

According to Mr. Wallen, since respondent reported to the 58th Street trailer and his regular work hours were 7:30 a.m. to 3:00 p.m., his WTR should reflect 58th Street at 7:30 a.m. as the start location and time (Tr. 20, 143). The undisputed documentary evidence showed that respondent failed to record the 58th Street trailer as his starting location on each of the specified dates. Mr. Wallen testified that for each entry on respondent's WTRs submitted from June 12, to September 17, 2016, respondent listed his starting work location as the location of his first assignment and the starting time as the time that he arrived at the work site (Pet. Ex. 14; Tr. 138-

146, 149-151). In addition, respondent did not accurately report his hours worked on the WTR. The Department uses CityTime for payroll processing to record hours worked, overtime, and annual and sick leave for each employee (Tr. 135-36). At the 58th Street trailer, carpenters use a palm scanner to register the time that they report to work (Tr. 136). The sign-in times captured from the palm scanner for CityTime do not match the sign-in times that respondent reported on his WTRs. Respondent used the palm scanner to record his arrival at the 58th Street trailer, but then recorded the field assignment location and arrival time each day on his WTR. This resulted in two different reported start times and locations for each workday.

Respondent did not dispute that he reported to the 58th Street trailer at the beginning of each shift and that he did not reference the 58th Street location as his work location or his arrival at that location as his start time from June 12, through September 17, 2016 as alleged in the petition. He instead testified that he was never told how to complete this form properly and that when he was first hired seven years ago, Mr. O'Sullivan instructed him to put his work location as the first work location, rather than 58th Street. Respondent testified that he was not aware that he was not filling out the WTR correctly until these charges were filed against him. Respondent further testified that he did not receive any notices or instructions with his paycheck about how to fill out the WTR. Although reporting to the 58th Street trailer every day, respondent, rather incredibly, did not recall that there was a grease board in the trailer in June 2016. He then stated that if a white board was in the trailer, it was not used to post work-related notices (Tr. 572-75).

Respondent is charged with failing to comply with all applicable Department policies, procedures, rules and regulations for each occasion where he failed to accurately indicate his availability to work overtime. In addition to the credible testimony of Mr. Wallen, petitioner presented e-mails from respondent's supervisors documenting conferences with respondent where they advised him of the policies and directed respondent to comply. Petitioner posted a sign in the 58th Street trailer advising all employees reporting to the trailer of the policy regarding starting work times and locations. Despite the supervisors conferences, directives from supervisors, and posted notices, respondent refused to comply with this policy. It is not clear what kind of notice would be sufficient to motivate respondent's compliance with Department policies. Respondent's testimony that that he did not have notice of these policies or notice that his conduct violated Department rules was not credible. Therefore, charges related to this conduct are sustained.

Respondent is also charged with failing to comply with supervisory instructions for each occasion where he failed to accurately indicate his availability to work overtime. These charges are sustained as a cumulative charge referencing on-going conduct.

Writing Non-Work-Related Comments on Department Forms

In June 2014, Mr. Rainis conducted a previously referenced supervisors conference with respondent. Mr. Wallen and Mr. O'Sullivan were also present. During that conference, respondent was directed to "only provide information on the daily or weekly sheets that is authorized by a supervisor or as described in the Red Book" (Pet. Ex. 3). Mr. Wallen testified that he had several conversations with respondent and was aware that his supervisors also had conversations with respondent directing him not to write non-work-related comments on his WTR or DTF (Tr. 92, 98). Mr. Wallen also instructed respondent on what was appropriate and inappropriate information to include on these forms (Tr. 91). In addition, in respondent's 2016 performance evaluation, Mr. Rainis noted that respondent "has been asked numerous times to refrain from adding comments not related to the tasks of the day" (Resp. Ex. Q).

On July 4, 2016, Mr. Rainis sent an e-mail to Mr. O'Sullivan and Mr. Wallen attaching respondent's DTF for July 1, 2016 where respondent wrote "check OT list have to follow up" under "Description of Work" column. Mr. Rainis wrote that respondent has been told "numerous times not to put non-job related comments on his daily [DTF]" (Pet. Ex. 7). Mr. O'Sullivan testified that those comments were not a description of work or of any work assignment that he, Mr. Wallen, or Mr. Rainis gave respondent.

Respondent also submitted a WTR for the week ending August 6, 2016 where he wrote "overslept" under the "Description of Work" column. Respondent testified that he wrote "overslept" in the description of work column because that was what happened. Respondent acknowledged that he was not at work on July 31, 2016 and this description was an explanation of his failure to report to the overtime assignment. Respondent testified that the Department was "taking the description of work column out of context" and told petitioner to "draw your own conclusion" (Tr. 598-600). Respondent subsequently indicated that he was not going to answer any further questions about his non-work-related comment and stated that he was "okay" with whatever conclusion this tribunal would draw from his refusal to answer. At petitioner's request,

this tribunal has drawn an adverse inference against respondent for his refusal to answer this question (Tr. 600-01).

Respondent did not deny writing the comments at issue in the description of work columns. The credible testimony of Mr. Wallen established that the comments were not descriptions of work, rather descriptions of respondent's activities in lieu of working on an assigned job. Petitioner presented e-mails from respondent's supervisors documenting conferences with respondent where they advised him of the policy and directed respondent to comply. Respondent offered no explanation for his conduct and refused to answer further questions. Charges related to this conduct are sustained.

Failure to Report Any Absence to Their Supervisor/ Absence without Official Leave

Mr. Wallen testified that carpenters are required to record their availability to work overtime on the WTR. Carpenters are not disciplined for not accepting overtime (Tr. 33-34). Supervisors may contact carpenters while off duty to offer overtime and the individual is expected to return the phone call telling the supervisor whether he is available to work. Employees may not "intentionally avoid possible offers of overtime work by failing to respond to phone calls in a timely manner" (ALJ Ex. 2 at 74; Tr. 99-100).

On August 1, 2016, Mr. Rainis e-mailed Mr. Wallen to advise him that he called respondent on July 30 to offer respondent overtime for July 31. He spoke with respondent and gave him a 7:00 a.m. assignment for July 31, 2016. Mr. Rainis called respondent at 7:18 a.m. on July 31, because respondent had not reported to the work assignment. Mr. Rainis did not reach respondent but left a voicemail at that time. According to the e-mail, Mr. Rainis contacted another carpenter for the assignment at 7:59 a.m. Mr. Rainis reported that respondent called him at 8:55 a.m. advising him that he had overslept. Mr. Rainis told respondent that he had called another carpenter to take his place (Pet. Ex. 6; Tr. 76-77)

According to the time and leave manual, if a carpenter is unable to make a scheduled tour, the carpenter must notify the Department one hour prior to their start time that s/he is unable to come in on that day (ALJ Ex. 2, Time/Leave Manual at 15). Mr. Wallen testified that if a carpenter failed to make proper notification, they would be marked [absent without official leave] AWOL (Tr. 72-73). Mr. Wallen testified that although respondent did not notify his supervisor in advance of his absence, he was not charged with AWOL for July 31, 2016. He

explained that because July 31, 2016 was a weekend overtime assignment and not respondent's regular shift, his absence was not documented as AWOL (Tr. 76-78). It would be considered a non-chargeable AWOL. There was no AWOL notation on respondent's corresponding CityTime record (Resp. Ex. A; Tr. 160-161).

The charge related to respondent's failure to report his absence one hour before his scheduled start time is sustained. Mr. Rainis noted that respondent's absence before respondent contacted Mr. Rainis to explain his absence.

The charge related to respondent's absence without official leave is dismissed. Although it is undisputed that respondent did not report to his overtime job assignment on July 31, 2016, petitioner did not establish that this failure was in fact an absence without leave. Mr. Wallen testified that respondent was not considered AWOL and that respondent's failure to report to the assignment was not documented. Petitioner offered no evidence or further testimony to explain any distinction between AWOL, non-chargeable AWOL, and undocumented AWOL. Further, petitioner did not explain how respondent may be charged with non-chargeable, undocumented absence where petitioner's witness testified that such absence was not AWOL.

FINDINGS AND CONCLUSIONS

1. Petitioner proved that respondent committed misconduct when he failed to accurately report the time and starting location for his work assignments and when he failed to comply with supervisory instructions to do so, as alleged in Charges 1, 2, and 3.
2. Petitioner proved that respondent committed misconduct when he failed to record his availability for overtime and when he failed to comply with supervisory instructions to do so as alleged in Charges 1, 2, and 3.
3. Petitioner proved that respondent committed misconduct when he failed to comply with supervisory instructions to refrain from writing non-work-related comments on the weekly tracking report and the daily work order tracking forms, as alleged in Charges 1, 2, and 3.
4. Petitioner proved that respondent failed to report an absence to his supervisor, as alleged in Charge 4.

5. Petitioner did not prove that respondent was absent without official leave when he failed to report to an overtime assignment, as alleged in Charge 5.
6. Petitioner proved that respondent engaged in conduct prejudicial to the good order, efficiency, and discipline of the Department by engaging in the conduct referenced above and as alleged in Charge 6.

RECOMMENDATION

Having made the above findings, I requested and reviewed a summary of respondent's personnel record. Respondent began working for the Department in 2010. Since 2013, respondent's supervisors have rated his overall work performance as good or very good. His disciplinary history consists of a 20-day suspension without pay for engaging in similar conduct including failing to comply with supervisors instructions for filling out timesheets, improperly documenting overtime availability and adding non-work-related comments to work tracking forms. This matter was litigated before this tribunal, where the charges against respondent were sustained. *Fire Dep't v. Toner*, OATH Index No. 2741/15 (June 30, 2016).

There is little doubt that respondent is an able and competent carpenter. However, being a carpenter and an employee with the Department requires more than carpentry and repair work. Respondent is required to adhere to Department policies and procedures and to follow the directives of his supervisors. The penalty for false or inaccurate paperwork and failure to follow procedures can range from a ten-day suspension to termination of employment depending upon the frequency or severity of the misconduct and the employee's disciplinary history. In this matter, respondent was found to have engaged in similar conduct just two years prior to this matter. Respondent's failure to accurately complete the required paperwork according to his supervisors' repeated instructions and directives is a result of respondent's refusal to comply rather than his ignorance of the policies as he claimed at trial. However, there must be a balance between the penalty imposed, the nature of the misconduct, and respondent's disciplinary history. The proper penalty should not be based upon the number of charges, but the severity of the proven misconduct. *Dep't of Probation v. James*, OATH Index No. 535/90 at 4 (Feb. 6, 1990). Petitioner's request for a 60-day suspension without pay is excessive. Although respondent's misconduct is persistent, a substantial penalty should be sufficient to impress upon respondent the need to adhere to rules and procedures. Such penalty should be consistent with

the principles of progressive discipline. *Human Resources Admin. v. Williams*, OATH Index No. 3072/09 (Jan. 15, 2010). Accordingly, I recommend a 45-day suspension without pay.

Joycelyn McGeachy-Kuls
Administrative Law Judge

March 28, 2018

SUBMITTED TO:

DANIEL A. NIGRO
Commissioner

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