Dep't of Correction v. Rolando

OATH Index No. 2417/17 (Jan. 12, 2018), *adopted*, Comm'r Dec. (Feb. 27, 2018), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2018-0221 (July 5, 2018), **appended**

Correction officer charged with drinking alcohol while on duty, with failing to perform his assigned duties, and with making false statements concerning his activities. Based on video surveillance and respondent's own admissions, ALJ found that all of the charges should be sustained and recommended that respondent be terminated from employment.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
YARDLEY ROLANDO
Respondent

REPORT AND RECOMMENDATION

SUSAN J. POGODA, *Administrative Law Judge*

Petitioner, the Department of Correction ("Department"), brought this disciplinary proceeding pursuant to section 75 of the Civil Service Law. The charges allege that respondent Yardley Rolando, a correction officer, drank alcohol while on duty and was intoxicated, failed to perform his assigned duties, and made false statements concerning his activities during his assigned tour (Pet. Ex. 1).

At the September 14, 2017 trial, the Department presented the testimony of two employees, a video showing respondent's actions at his post during his tour and other documentary evidence. Respondent testified on his own behalf, admitting that he drank alcohol on duty, was intoxicated, did not perform most of his duties, and made false entries in the logbook.

For the reasons provided below, I find that the evidence was sufficient to sustain all of the charges and recommend that respondent's employment be terminated.

ANALYSIS

The four charges concern respondent's actions during his 11:00 p.m. to 7:30 a.m. tour on July 3 and 4, 2015, at Otis Bantum Correctional Center, where respondent was assigned to the 4 South A post in the punitive segregation unit ("CPSU"). Among respondent's duties on this post were monitoring the housing area from his post, conducting tours of the area every 30 minutes, and logging these actions into the post logbook.

The most comprehensive evidence of respondent's actions during that tour was shown by video surveillance footage (Pet. Ex. 3 (a)) of respondent's post. Upon this tribunal's review of the videos and as recounted in a detailed chronology prepared by an investigator (Pet. Ex. 3 (b)), respondent is seen arriving at his post at 11:24 p.m. with three water bottles in his pants pockets. At around 12:07 a.m., respondent sits at his post and eleven minutes later takes two sips from one of the water bottles. From 12:34 a.m. to 12:45 a.m., respondent reclines his chair back and appears to have his eyes closed. In the next few minutes, respondent is seen wiping his face when an officer and some inmates go by and a captain writes in the post logbook.

At 1:05 a.m., another officer, Officer Batka, comes to respondent's post with a Pepsi bottle, Ginger Ale bottle, and a bag of chips. From 1:05 a.m. to 1:51 a.m., the two officers remain at respondent's post, both drinking from one of the water bottles respondent brought into the facility. At one point, respondent pours some of the contents of the water bottle into the Pepsi bottle, and both officers then drink repeatedly from the Pepsi bottle. After Officer Batka leaves, respondent writes in the logbook and again slouches down in his chair and appears to close his eyes for approximately two hours, not completing any tours (Pet. Ex. 4 (c) (d) (e)). At 4:11 a.m., a male captain talks to respondent, smells the water bottles, and takes one away.[1]

After the captain leaves at 4:15 a.m., respondent again sits back in his chair and does not complete any tours. At 4:35 a.m., Assistant Deputy Warden ("ADW") Johnson arrives at respondent's post and conducts a tour with respondent and another officer. After the tour, the ADW and respondent are seen speaking and respondent hands her the Pepsi and water bottle he has at his post. At 4:54 a.m., respondent and ADW Johnson exit the area.

Petitioner also presented the transcript and audio of the sworn interview statements of ADW Johnson (Pet. Ex. 7). ADW Johnson stated that on July 3 she was the tour commander. At around 4:50 a.m., she came to respondent's post and asked respondent and the other officer

[1] The Department stated at trial that Officer Batka is deceased (Tr. 21).

on duty to accompany her on a tour. When respondent replied to one of her questions, she detected a "strong odor of alcohol." She also noted that respondent's voice was unusually loud, his eyes were red, and his face was red. She questioned respondent, who did not deny he had been drinking. After the tour was completed, ADW Johnson asked respondent how he had access to the alcohol. He did not reply, but the ADW noticed two bottles on respondent's desk. In a Pepsi bottle, she could detect the odor of alcohol and confiscated both bottles. She then called the central operations desk and called for a captain, who escorted respondent to ADW Johnson's office. ADW Johnson placed the bottles in a safe.

Respondent was administered a breathalyzer test for alcohol at the Health Management Division at 10:38 a.m. and at 10:58 a.m. The test results showed that .105 and .086 were categorized on the toxicology report (Pet. Ex. 10) as "serious intoxication" and "serious physical instability." On the test form, respondent wrote that he had consumed vodka. The liquid in the Pepsi bottle was also tested and showed that it contained 10.79 per cent ethanol (Pet. Ex. 11).

Respondent admitted all of the facts alleged in the charges. He admitted that he drove to work after drinking all afternoon, that he brought alcohol on to his post and drank it through his tour, and that he was very intoxicated. He admitted that, due to his intoxication, he remembered little and was not alert. He also admitted that, as shown on the video, he did not perform tours of the housing area every 30 minutes as required and falsely reported that he did in the post logbook (Pet. Ex. 6).

Respondent testified that his girlfriend had a miscarriage in June 2015 and he started drinking. Alcohol was his friend and became "the only person I could talk to" (Tr. 55). On July 3, 2015, respondent's family organized a barbecue because they knew he would be working on July 4. Respondent arrived at approximately 2:00 p.m. and left around 9:00 p.m. or 9:30 p.m. During that time, he consumed "everything under the moon," including vodka, tequila, and cognac (Tr. 56-57, 76). When he left the party he was very intoxicated (Tr. 77). He also carried away some of the liquor because there was "a lot lying around" and it would save him from purchasing liquor of his own. He poured some of the liquor into an empty water bottle and placed it on the back seat of his car with other water bottles (Tr. 60). He drove to his job at Riker's Island, parking in a guest lot, and proceeded to his post at CPSU, taking all the bottles with him (Tr. 57-61).

At his post, respondent wrote in his logbook when he arrived. At some point, he sipped from one of the water bottles and realized for the first time that it contained alcohol, not water. He proceeded to drink the alcohol at his post (Tr. 61, 77). Instead of going to meal, he had another officer bring him a Pepsi. Although respondent stated that his memory of the tour was poor and limited to "bits and fragments" (Tr. 59), he did recall other staff "coming in and out" (Tr. 62). Respondent testified that his responsibilities included making 30 - minute tours of the housing area in order to ensure the care, custody and control of the inmates in CPSU. This included physically checking the inmates for "signs of life" (Tr. 53, 79). He conceded that, although he wrote in the logbook that he toured every 30 minutes, he did not actually do so, as confirmed by the video surveillance (Tr. 63). He stated that he knew what he was supposed to do but "the alcohol . . . didn't allow me" and he was "highly intoxicated" (Tr. 64). He recalled making a tour with a deputy warden, sitting down, and then having another supervisor called to the post and asking about what occurred during his tour and the Pepsi bottle (Tr. 65). He denied that he ever gave alcohol to any other officers (Tr. 64).

After the incident, respondent was sent home and suspended for 30 days. When he returned to work he was assigned to modified duty in the transportation division doing odds and ends, running errands and making photocopies (Tr. 66-67).

Respondent testified that, following the incident, he "went to seek treatment" but was refused by one facility in the Bronx (Tr. 67), which was a court-ordered program for ex-inmates (Tr. 84-85). He also spoke with a psychiatrist but, because he needed a "full program," did not go any further because "nobody is willing to help me" (Tr. 67-68). At that point, he stopped seeking treatment because he didn't want to hear "no" again (Tr. 68, 94). For the next two years, respondent continued to use alcohol but it was "nothing" because he was not arrested for driving while intoxicated and was hurting only himself by letting "all those demons back in my body" (Tr. 69).

Finally, in August 2017, approximately a month before the scheduled OATH trial, respondent "begged" to be admitted to the same Bronx facility he had approached in 2015. On August 14, 2017, he began group and individual discussion sessions once per week for 12 weeks (Tr. 69-72, Resp. Ex. A (6)). He has been given urine tests and all of the tests have been negative (Tr. 72). Respondent indicated that the sessions were "great" and that he "can't wait to go back" (Tr. 72).

Respondent testified that he loves his job as a correction officer and found it "shameful" that he had his shield taken away and was reassigned to modified duty (Tr. 74-75). He wants "a thousand per cent" to keep his job and have his shield returned (Tr. 75).

At the outset, I did not find credible respondent's contention that he inadvertently brought the alcohol to his post (Tr. 14, 60, 77). As respondent himself admitted, he spent several hours during the late afternoon and evening on July 3 drinking heavily and then filled an empty water bottle with vodka and put the bottle in the backseat of his car with other water bottles. He then carried all the bottles to his post (Tr. 60-61). The only logical reason for using a water bottle, rather than taking a liquor bottle, would be to conceal that it contained alcohol. Respondent admitted in his MEO 16 interview that most of the water bottles were sealed. Since respondent put all the bottles from his car into his backpack and brought three bottles into the facility, it is unlikely he would mistake the opened bottle containing vodka for the two potentially sealed water bottles (Pet. Ex. 6B at 5, 9-12). At his post, he began sipping from one of the bottles, which he admitted contained vodka (Tr. 77). Given the implausibility of this account, respondent's compelling motive to minimize his misconduct and avoid termination, and his admitted deception in filling a water bottle with vodka, his testimony that he took the bottle of liquor to his post by accident was not believable.

Based upon petitioner's proof and respondent's own admissions, I find that during his tour on July 3-4, 2015, respondent intentionally brought alcohol to his post and drank it, becoming increasingly intoxicated for his entire tour. I further find that, due to his intoxication, he reclined in his chair with his eyes closed for a major part of the tour and that he did not perform most of the required housing area tours. I also find that respondent falsely wrote in his logbook that he performed all of his tours and falsely filled out the incident report (Pet. Exs. 9, 12).

Respondent's actions violated Department Rules and Regulations sections 3.05.010 ("All employees shall be accountable to the Commanding Officer for their assigned areas and they shall be responsible for performing their work efficiently."); 3.05.120 ("Members of the Department are responsible for the efficient performance of their duties and for the proper supervision of any inmates under their direction."); 3.20.010 ("Members of the Department shall present a professional demeanor and as an employee of the City of New York shall act in a dignified manner. While on duty, they shall comport themselves in a manner that will not bring

criticism upon themselves or the service which they represent."); 3.20.020 ("Members of the Department shall be fit for and subject to duty at all times except when on sick report."); 4.30.020 ("Members of the Department shall not make any false entries or notations or render any false reports concerning the business of the Department."); 7.05.090 ("A Correction Officer shall be constantly alert, while on duty, observing everything that takes place on the post within sight or hearing and shall constantly patrol the post during the tour of duty. The officer shall observe the actions of inmates for any abnormal conditions that might indicate suicidal tendencies.). I further find that respondent violated Department Directive No. 7503-R in that respondent engaged in the use of, or the abuse of alcohol on and off duty which impaired his ability to perform his duties.

At the commencement of the trial, counsel for respondent requested that the OATH report and recommendation not be published "in any way, shape, or form" based upon Civil Rights Law section 50-a (Tr. 7-8). This law provides that "personnel records . . . under the control of . . . a department of correction of individuals employed as correction officers" cannot be disclosed without an officer's consent or a court order. Civ. Rights Law § 50-a (Lexis 2017). This tribunal has held that section 50-a does not apply to OATH reports, which are regularly uploaded to both a legal research website maintained by New York Law School and to Lexis. *See Dep't of Correction v. Victor*, OATH Index No. 388/15, mem. dec. (Feb. 3, 2015) (OATH reports held not to be "under the control" of the City Department of Correction and thus not within the confidentiality provisions of section 50-a of the Civil Rights Law). Respondent's request not to publish this OATH report and recommendation is denied.

As a defense to the charges, respondent's counsel also posited that the evidence would show that respondent was intoxicated at work because he suffers from alcoholism and requested that respondent's name should be redacted from this report and recommendation (Tr. 7-8). This request must also be denied.

This tribunal's proceedings are presumptively open to the public and its decisions are issued without redaction in furtherance of the public interest. *See* 48 RCNY § 1-49 (Lexis 2018); *see also Mosallem v. Berenson*, 76 A.D.3d 345, 348 (1st Dep't 2010) ("Under New York Law, there is a broad presumption that the public is entitled to access to judicial proceedings and court records"); *Dep't of Correction v. Victor*, OATH Index No. 388/15, mem. dec. at 4 (Feb. 3, 2015) ("OATH's publication of its reports and recommendations without redaction furthers the

public interest in transparency and open government"); *Dep't of Environmental Protection v. Capezza*, OATH Index No. 1536/14 at 4 n.1 (June 13, 2014), *adopted in part, rejected in part*, Comm'r Dec. (May 1, 2015), *aff'd in part, rev'd in part*, NYC Civ. Service Comm'n Case No. 2015-0610 (Nov. 4, 2015) (denying respondent's request to remove his name from a published decision). Indeed, section 1-49(d) of this tribunal's rules provides for publication of decisions without redaction unless the administrative law judge finds that "legally recognized grounds exist to omit information from a decision."

OATH has removed a respondent's name from decisions in which there is discussion of sensitive medical information. *See, e.g., Dep't of Correction v. M.C.,* OATH Index No. 2343/15 at 1 n.1, 15-17 (Mar. 17, 2016) (respondent's name redacted because decision contained information about sensitive mental health issues); *Human Resources Admin. v. Anonymous*, OATH Index No. 2596/10 at 1 n.1, 9-10 (Jan. 31, 2011) (respondent's name removed from decision that included detailed discussion of his history of physical and mental illness); *Admin. for Children's Services v. J.M.*, OATH Index No. 3350/09 at 1 n.1, 5-6 (Apr. 5, 2010) (withholding respondent's name from a report that contained significant discussion of respondent's mental condition).

Redaction requests have been rejected, however, where the respondent placed his or her private health information in issue to defend against or to mitigate the severity of the charged misconduct. *See Human Resources Admin. v. Charleman*, OATH 1653/16 at 2 (Aug. 5, 2016) (redaction request denied where respondent placed her mental health in issue as a defense and did not elaborate upon her condition or present documentary evidence to demonstrate a legally cognizable basis for redaction); *Capezza*, OATH 1536/14 at 4 n.1 (respondent's redaction request denied, in part, because he placed his medical condition in issue by testifying about it at the hearing); *Fire Dep't v. Palleschi*, OATH Index No. 192/11 at 6-7 (Dec. 20, 2010), *aff'd,* 102 A.D.3d 603 (1st Dep't 2013) (denying respondent's request to seal his counseling records because he placed his health in issue by way of defense).

Based on the record, respondent has failed to demonstrate a legally cognizable basis for the removal of his name from the decision.

In sum, all of the charges should be sustained.

FINDINGS AND CONCLUSIONS

1. Specification 1 of DR No. B0085/2016 should be sustained in that, during the midnight tour on July 3-4, 2015, respondent took alcohol on his assigned post and was intoxicated, in violation of Department Rules and Regulations sections 3.05.010, 3.05.120, 3.20.010, 3.20.020 and Department Directive No. 7503-R.

2. Specifications 2 and 3 of DR No. B0085/2016 should be sustained in that, during the midnight tour on July 3-4, 2015, respondent was not alert at his post and failed to do required tours of his assigned area in violation of Department Rules and Regulations sections 3.05.010, 3.05.120, 4.35.020, and 7.05.090.

3. Specification 4 of DR No. B0085/2016 should be sustained in that, during the midnight tour on July 3-4, 2015, respondent made false entries in a logbook indicating that he had completed tours which he did not complete in violation of Department Rules and Regulations section 4.30.020.

RECOMMENDATION

A copy of respondent's personnel history was provided to the Tribunal at the conclusion of the trial for the purposes of recommending an appropriate penalty (Tr. 108-109). The Department seeks respondent's termination (Tr. 106). Respondent was appointed in 2011 and has no prior disciplinary record. For most of the last six years, his sick leave usage has been low. He was late four times in 2015 and 2016. Respondent's generally good work record provides some grounds for mitigation of penalty.

Respondent submitted eight letters from a number of individuals in support of penalty mitigation. His former girlfriend wrote that her miscarriage in June 2015 "seemed to change" respondent and she noticed him "drinking on a daily basis". Their relationship ended in July 2015 (Resp. Ex. A1). Respondent's former and current captains wrote that respondent performs his limited duty tasks "without complaints" (Resp. Ex. A2) and "follows instructions well," displaying "that he cares about his fellow officers" (Resp. Ex. A3). Another captain wrote that respondent was a "team player" and that the intoxication incident was a "momentary lapse in better judgement" (Resp. Ex. A4). A church member indicated that respondent was a young man with "much potential" who was a "role model" (Resp. Ex. A5). The director of the Bronx treatment program confirmed that respondent did an intake interview in July 2015, was advised to apply to another program, and as of August 9, 2017 is enrolled in an outpatient substance

abuse treatment program (Resp. Exs. A6, A7, A8). A program counselor wrote that respondent has been willing to "address and discuss his situation" (Resp. Ex. A9). Captain Fuller, who had on occasion supervised the respondent, testified that he "is a good officer" (Tr. 47).

In this case, respondent brought alcohol to his workplace, drank and remained intoxicated for nearly his entire tour, neglected most of his duties, and falsified logbook entries to cover up his condition. Being intoxicated at the workplace is a serious form of misconduct that has generally resulted in termination where the employee has a significant disciplinary history. *See Human Resources Admin*. v. *Anonymous*, OATH Index No. 212/13 at 10 (Nov. 21, 2012), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 13-25-SA (May 13, 2013) (termination of employment imposed for being intoxicated at work where employee had a significant and relevant prior disciplinary record); *Health & Hospitals Corp. (Coler-Goldwater Specialty Hospital & Nursing Facility) v. Rhodes*, OATH Index No. 2506/11 at 4 (Sept. 20, 2011) (termination of employment recommended for an employee with a significant disciplinary record who was intoxicated while on duty); *Dep't of Environmental Protection v. McGrath*, OATH Index No. 1111/95 at 10-11 (Mar. 24, 1995) (termination of employment recommended where employee, who was intoxicated while on duty, had a significant disciplinary history). At least one prior case holds that termination would be appropriate for a correction officer who reported to duty intoxicated. *See Dep't of Correction v. Mason,* OATH Index No. 2229/99 (Sept. 14, 1999).[2]

Respondent's misconduct in this case is among the most serious offenses a correction officer can commit. By being intoxicated on his post, by bringing alcohol into the facility to exacerbate that intoxication, and by neglecting his responsibilities to monitor the inmates and tour the housing area, respondent placed the inmates in his care as well as his fellow officers at considerable risk. If an incident had occurred during this time, it is clear that respondent could not have responded appropriately. Respondent compounded his misconduct by inviting another officer to share the alcohol, likely causing him to become impaired and neglect his post. The Department investigator notes that Officer Batka is seen on video surveillance sitting at his post with his head in his hand for two and one-half hours after he leaves respondent and failed to complete any of his tours during that period (Pet. Ex. 3(b)).

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[2] *Cf. Dep't of Correction v. Irwin*, OATH Index No. 217/84 (Aug. 15, 1984) (correction officer who reported to work while intoxicated and after ingesting cocaine, established a prior history of alcoholism, and immediately completed a residential alcohol treatment program suspended for 90 days).

Additionally, this tribunal has repeatedly found that acts involving the falsification of documents deserve the severe penalty of termination. *Dep't of Correction v. Roman,* OATH Index No. 1026/05 (Feb. 10, 2006) (recommending termination of correction officer who availed himself of an unauthorized public benefit, altered documents which he produced to investigators, and made false and misleading statements during an MEO 16 interview); *Dep't of Correction v. Fuller***,** OATH Index No. 2144/05 (Nov. 28, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD06-120-SA (Nov. 14, 2006) (recommending termination for officer who signed false statements submitted to the Housing Authority in application for subsidized housing); *Health and Hospitals Corp. (Harlem Hospital Center) v. Manning*, OATH Index No. 1480/10 (May 26, 2010) (special officer with twenty years of employment and one reprimand, terminated for abandoning post, making false entries in memo book); *see also Dep't of Education v. Matos*, OATH Index No. 214/04 (Feb. 13, 2004), *modified on penalty*, Chancellor's Dec. (Apr. 2, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD05-17-SA (Apr. 15, 2005) (despite longevity of service and lack of prior record, respondent terminated for falsification of time sheets); *Transit Auth. v. Robertson,* OATH Index No. 1019/02 (Apr. 9, 2002) (recommending termination for a supervisor who created false documents and submitted them in support of three emergency-leave requests).

In his closing, respondent's attorney suggests that due to respondent's good work record and the various supporting letters his penalty should be about 40 days suspension, inclusive of respondent's previously served 30 day suspension (Tr. 97). While respondent's work record warrants some consideration of a mitigation of penalty, none of the letters of respondent's friends, colleagues, or counselors contain any significant additional factors of mitigation. The faint praise that respondent did not complain and is a team player offers little to outweigh the Department's legitimate concerns. Nor did respondent's eleventh hour enrollment in a treatment program suggest that anything more than that he wishes to avoid losing his job. *See Dep't of Correction v. Fuller***,** OATH 2144/05 (Nov. 14, 2006) (correction officer with no disciplinary record who furnished letters from colleagues and a religious organization attesting to her character and reliability terminated for submitting false statements to the government).

Under the circumstances of this case, the principles of progressive discipline do not preclude termination. *See Dep't of Correction v. Flaherty,* OATH Index No. 413/05 (Feb. 16, 2015), *modified on penalty,* Comm'r Dec. (Mar. 31, 2005) (7-year correction officer with an

unblemished record terminated for driving while intoxicated and sentenced to probation); *Dep't of Education v. Sunda***,** OATH Index No. 2403/17 at 12 (Oct. 26, 2017) (10-year employee with no prior formal disciplinary history terminated for insubordination and neglect of duties). *See also Collins v Jacobsen,* 247 A.D.2 269 (1st Dep't 1998) (corrections officer intentionally brought contraband into facility endangering the safety of others, terminated for single act of misconduct; *Keith v. NYS Thruway Auth.*, 132 A.D.2d 785, 786 (3d Dep't 1987) (long and unblemished record does not foreclose dismissal from employment for single incident of misconduct.

Respondent's counsel also offered a legal defense by contending that, under the decision in *McEniry v. Landi*, 84 N.Y.2d 554 (1994), respondent has a disability and should not be terminated. In *McEniry*, the Court of Appeals interpreted the Human Rights Law as barring an agency from dismissing a rehabilitated alcoholic for past alcohol-induced time-and-leave violations. There the recovering employee established that his absences were causally related to alcoholism. *See Dep't of Sanitation v. R.M.*, OATH Index No. 543/13 (Dec. 13, 2012) (suspension rather than termination found appropriate for sanitation worker who completed rehabilitation for alcoholism after committing eight time-and-leave violations).

The facts in *McEniry* were entirely different from those in the instant case. Here, there was very little proof offered to show that, in 2015, respondent was an alcoholic such that alcoholism caused the July misconduct. Respondent's description of the effect that his girlfriend's miscarriage had upon him sounded embellished and contrived, particularly since they were evidently having relationship problems at the time. Other than respondent's testimony that he began drinking heavily sometime in June 2015 after learning about his girlfriend's miscarriage, he provided no other details, witnesses or records to substantiate he was suffering from alcoholism prior to and on July 3 and 4, 2015. The only documents respondent submitted were (1) a July 25, 2015 letter from an outpatient treatment program stating that respondent did an intake interview on July 7, 2015 with the recommendation that he apply to another program; (2) a letter from the same outpatient treatment program that on August 9, 2017 respondent enrolled in the clinic's outpatient substance abuse program; and (3) a letter from respondent's former girlfriend stating that after she suffered a miscarriage in June 2015 she "noticed him drinking on a daily basis" (Resp. Exs. A1, A6, A8, A9).

Respondent never mentioned having a problem with alcohol during his September 2015 MEO 16 interview. After the incident, respondent made only the feeblest of efforts to obtain treatment and, significantly, waited some two years before ever actually enrolling in a counseling program. There was no indication that, in those intervening two years, respondent had any other problems related to alcoholism. His work attendance was good and his use of sick leave extremely modest.

Unlike in *McEniry*, respondent's misconduct was not being absent or late. Instead, respondent's derelictions included bringing alcohol into a correctional facility, drinking on duty, and failing to do most of his job duties, falsifying documents and placing inmates and staff at risk. Knowing that he was intoxicated when he left the barbeque, he drove on public highways endangering the public. He did not call in sick or notify a supervisor when he realized he could not stop drinking the alcohol while on post. Instead, he continued to drink alcohol. Such deliberate and deceitful misconduct has been held not to fall within the ambit of *McEniry*. *See Transit Auth. v. Camacho,* OATH Index No. 108/95 (Oct. 13, 1994) (*McEniry* not applicable to transit police officer found guilty of making false memo book entries and being absent from post terminated despite pleas of being alcoholic); *Fire Dep't. v. Murolo,* OATH Index No. 560/95 (Feb. 24, 1995), *aff'd,* 246 A.D. 2d 653 (2nd Dep't. 1998) (*McEniry* did not protect firefighter who committed serious intentional acts from the appropriate penalty of termination); *Dep't of Correction v. Brown*, OATH Index No. 200/88 (July 28, 1988) (*McEniry* not applicable to employee found guilty of being out of residence without permission while on sick leave and of falsely reporting sick more than twenty times). *McInery* thus offers no support for holding that respondent cannot be dismissed.

Here, the Department appropriately seeks termination of respondent's employment. Although respondent has presented some mitigation, it did not outweigh the Department's legitimate concerns.

The Department requires that its corrections officers be physically and mentally able to honestly and faithfully perform their duties at all times. This vigilance is especially crucial when a correction officer is assigned to CPSU, where inmates are locked in for twenty three hours a day and must be checked every 30 minutes for "signs of life" (Tr. 43, 79). Respondent's misconduct has "in effect destroyed the trust placed in him as a member of the Department". *Murolo,* 246 A.D. 2d at 654. *See Pell v. Bd. of Education,* 34 N.Y.2d 222 (1974) (where an

employer can no longer have confidence in an employee's ability to perform his duties with honesty, termination from employment justified).

Accordingly, I recommend that respondent be terminated from his employment.

Susan J. Pogoda
Administrative Law Judge

January 12, 2018

SUBMITTED TO:

CYNTHIA BRANN
Commissioner

APPEARANCES:

SHIRLEY IRICK, ESQ.
Attorney for Petitioner

KOHLER & ISAACS, LLP
Attorneys for Respondent
BY: PETER C. TROXLER, ESQ.

THE CITY OF NEW YORK
CITY CIVIL SERVICE COMMISSION

In the Matter of the Appeal of

YARDLEY ROLANDO

Appellant

-against-

DEPARTMENT OF CORRECTION

Respondent

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

CSC Index No: 2018-0221

DECISION

YARDLEY ROLANDO ("Appellant") appealed from a determination of the Department of Correction finding Appellant guilty of incompetency and/or misconduct and imposing a penalty of termination following disciplinary proceedings conducted pursuant to Civil Service Law Section 75.

The Civil Service Commission ("Commission") heard arguments from the parties on June 21, 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.

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

[redacted]

Nancy G. Chaffetz, Commissioner
Chair

[redacted]

Rudy Washington, Commissioner
Vice Chair

[redacted]

Larry Dais, Commissioner

[redacted]

Charles D. McFaul, Commissioner

Dated: 07/05/2018.