Dep't of Finance v. Kateme

OATH Index No. 728/17 (Feb. 2, 2017), *adopted*, Comm'r Dec. (Feb. 15, 2017), **appended**

Petitioner established that respondent demonstrated a persistent unwillingness to perform her job, thus proving her to be incompetent. Petitioner further proved that respondent: deliberately failed to follow her supervisor's instructions; became vociferous with her supervisor on two occasions, to a point where it disrupted other workers; failed to comply with time and leave regulations on multiple occasions; was absent from her work for lengthy periods without authorization; and, failed to appear for a meeting at the Department's Advocate office when directed to. Petitioner failed to prove that respondent engaged in conduct prejudicial to good order when she absented herself from the latter part of a meeting which had to be relocated at a time that coincided with respondent's lunch break. For the sustained charges, ALJ recommends that respondent be terminated from her employment.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF FINANCE
Petitioner
- against -
JOAN KATEME
Respondent

REPORT AND RECOMMENDATION

INGRID M. ADDISON, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, the Department of Finance ("Department," "DOF," or "petitioner"), pursuant to section 75 of the Civil Service Law. Petitioner charged respondent, Joan Kateme, a level II tax auditor, with misconduct and incompetence, alleging that she: performed her duties in an improper, inefficient, negligent, or careless manner and/or neglected various duties, and failed to immediately notify her supervisor if any of her assignments could not be performed; failed to comply with her supervisor's order; was discourteous to her supervisor and disruptive in the office; engaged in conduct prejudicial to good order and discipline; failed to comply with the Department's time and leave procedures; left her assigned work location without authorization; and failed to comply with a directive to

appear before the Advocate's office, in violations of Rules I-20, I-30, I-50, II-10, V-80, V-240, VI-20, VI-30, VI-40, VII-30, and VII-40 (a-f), of the Department's Code of Conduct (ALJ Ex. 1).[1]

Respondent failed to appear for a trial on January 11, 2017. The Department presented proof that it served respondent with notice of the trial at her address on file with the Department, by regular first-class mail and by certified mail return receipt requested (Pet. Ex. 1). In addition, Leonard Shrier, Esq., an attorney who regularly appears before this tribunal, and who was retained by respondent's Union to represent her in this matter, appeared and notified the tribunal that he had only communicated with respondent on one occasion and she had not retained him. He also informed the tribunal that at a pre-trial conference respondent's uncle, not respondent, made an appearance. Further, Mr. Shrier stated that on January 5, 2017, just a few days before the trial, he had received an e-mail from respondent's aunt, informing him that respondent had received notice of the trial. I therefore found overwhelming proof that respondent had notice of the trial and deliberately defaulted. Accordingly, the trial proceeded in the form of an inquest, at which the Department presented the testimony of Ann Murray, respondent's supervisor, and documentary evidence. During the trial, petitioner moved to withdraw specification 2 of Charge V, which I granted since to do so would cause no prejudice to respondent. At the trial's conclusion, I held the record open for the Department to supplement its documentary submissions. The record closed on January 20, 2017.

For the following reasons, I find that petitioner has proven all but one of the charges by a preponderance of the credible evidence, and recommend that respondent be terminated from her employment with the Department.

ANALYSIS

Ann Murray is a level IV auditor and Group Chief in the Department's Personal Income Tax ("PIT") Unit. She has been with the Department for 30 years and has been a supervisor in the unit for 23 years. Ms. Murray oversees five auditors including respondent, who has been

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[1] The petition contained 13 charges with multiple, repetitious specifications. This tribunal has held that if the same conduct violates multiple provisions of petitioner's Code of Conduct, such conduct will only exact a single penalty. *See Health & Hospitals Corp. (Seaview Hospital Rehab. Ctr. & Home) v. Cantres,* OATH Index No. 1142/03 at 4 n. 3 (May 29, 2003), *modified,* Chief Operating Officer's Determination (July 1, 2003), *aff'd, sub nom.Cantres v. NYC Health & Hospitals Corp.,* 30 A.D.3d 164 (1st Dep't 2006); *Human Resources Admin. v. Marfo,* OATH Index No. 1643/97 at 13 n. 1 (May 27, 1998).

with the Department since May 2011, and whom she has directly supervised since 2015 (Tr. 9-10). Ms. Murray's job includes assigning cases, monitoring their progress, conducting interim and final reviews on cases and signing off on them, monitoring employee performance and their time and location, providing guidance and training, and evaluating her auditors. She is also responsible for time and leave issues (Tr. 17).

An auditor's tasks include performing audits of varying complexities, undertaking field audits, obtaining information from the taxpayer, reviewing and analyzing the information, creating work papers and audit reports and arriving at a conclusion, discussing findings with the taxpayer, and accounting for the time it took to complete tasks (Tr. 13-14). Logs are kept by the State's Finance Department and each auditor must document in the logs the work that they have done during the required daily seven hours, including a notation of contacts they have made with the taxpayer and third parties. The logs are monitored by the State since the City's DOF acts as an agent of the State. The Statute of Limitations ("SOL") for review and action on a case is three years from the date that the tax return is filed. Failure to meet the SOL means that the City loses its right to assess the taxpayer, which financially impacts the City to the tune of hundreds of thousands of dollars. Thus, Ms. Murray's ultimate goal is closure of a case within two years (Tr. 15-17).

The auditors in the PIT Unit all have college degrees, but of the five, respondent is the only one who is a licensed Certified Public Accountant (Tr. 14). Ms. Murray normally spends one to two hours per week supervising her auditors. Respondent is the exception in that she needs constant supervision because she ignores instructions, becomes abrasive, challenges her supervisor, and often spends her time listening to music or playing games. The normal caseload for an auditor is 22 cases. According to Ms. Murray, respondent is assigned 11 cases and does not complete work on those cases. Moreover, instead of providing details on the documents she has reviewed, respondent only indicates "worked on case" (Tr. 11, 18-22). Ms. Murray stated that she has issued approximately 57 conferencing memos to respondent which respondent refuses to sign for and which she has to place on respondent's desk to make sure that respondent has seen them. Ms. Murray has also sent respondent "hundreds" of e-mails regarding respondent's work (Tr. 12, 112). She voiced exasperation because she has to complete respondent's work in addition to her own work. Beside her work performance, respondent

arrives late for work, has called in sick for 13 full weeks in an 18-month period, and has failed to follow office protocol for notifying the office when she will be absent from work (Tr. 23-26).

CHARGES I, II, VI, VII, VIII, X and XI

Petitioner charged respondent with misconduct and incompetence, alleging that she performed duties in an improper, inefficient, negligent or careless manner and/or neglected various duties, and failed to comply with her supervisor's instructions, in violation of Rules I-20, I-30, VI-20, VI-30 and VI-40 of the Code of Conduct.

Specification 1

Petitioner alleged that on August 28, 2015, respondent failed to meet the Department's requirement that she timely complete the mandatory Department of Investigation ("DOI") Corruption Prevention Awareness E-Learning Training, in spite of e-mail reminders from her supervisor.

Ms. Murray testified that on August 12, 2015, she e-mailed her auditors, including respondent, reminding them that the training should be completed by August 28, 2015, and requesting that they sent her a confirmation e-mail that they had done so (Pet. Ex. 2 at 1-2). Ms. Murray's e-mail also provided instructions on how the system should be accessed in order to complete the course. On August 26, 2015, Ms. Murray e-mailed another reminder that the deadline for completing the training was fast approaching. Her second e-mail had the first e-mail with the instructions attached. On August 31, 2015, Ms. Murray e-mailed respondent that she had not received any reply to her previous e-mails as to whether respondent had completed the training (Pet. Ex. 2 at 3-4). That was followed by another e-mail to respondent on September 2, 2015 requesting a status update (Pet. Ex. 2 at 5-7). On September 9, 2015, Ms. Murray wrote respondent a memo documenting the efforts that she had made to get respondent to comply with the mandatory training requirement. In it, she noted that when she approached respondent on September 8, 2015, to inquire about the training, respondent stated that she did not complete the training because the e-mail link did not work, at which time Ms. Murray told respondent that City training could only be conducted on a City computer and not on a State computer as respondent claimed to have attempted. When Ms. Murray directed respondent to a City computer, respondent returned to say that there were no chairs at that computer, and had to be instructed by Ms. Murray to take her own chair. Respondent eventually completed the training. Ms. Murray stated that respondent refused to sign for receipt of the memo (Tr. 29-36).

As an initial matter, I found Ms. Murray to be a credible witness. In assessing credibility, this tribunal has considered factors such as: "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. 5, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998). Ms. Murray did not appear to harbor any resentment against respondent but it was apparent from her testimony that she had tried her best with respondent and was at her wits end. That being said, I find petitioner's evidence sufficiently supports the allegation that respondent did not timely complete the mandatory DOI Corruption Prevention E-Learning Training as instructed, and that she ignored her supervisor's requests, made prior to the deadline, for updates. Also, she deliberately tried to avoid compliance with the lame excuse that there were no chairs at the City computer.

Thus, specification 1 of Charge I is sustained.

<u>*Specification 2*</u>

Petitioner alleged that between September 2015 and March 2016, respondent consistently failed to perform the tasks required to complete assigned cases.

Ms. Murray testified that in general, when a case is assigned, the auditor must conduct a pre-audit analysis which involves: (1) checking the filing history of the taxpayer; (2) getting a record of the taxpayer's real estate transactions; reviewing Lexis/Nexis reports on the taxpayer; and (3) conducting internet research on the taxpayer's business, among other things. The auditor would then create work papers from the information gathered in order to analyze the case. After that, the auditor would contact the taxpayer or his/her representative for additional information. Contact information and any letters sent out should be placed in the case file (Tr. 39-43, 53).

Respondent receives tasks and standards regularly and Ms. Murray gives respondent continuous feedback by e-mails, memos and quarterly reviews. She also developed action plans to assist respondent with managing her work (Tr. 36-37, 43). On December 15, 2015, Ms. Murray issued respondent a memo regarding respondent's work performance for the previous month and how it compared with Ms. Murray's action plan dated August 27, 2015, in which she outlined improvements needed (Pet. Ex. 3).[2] She testified that in spite of the instructions given to respondent, many work papers and tax computations were incorrect and/or incomplete (Tr.

[2] The August 27 Action Plan was signed by a witness on September 2, 2015, but was unsigned by respondent.

44). Her memo to respondent provided more specifics. First, no pre-audit analysis was done on one of the cases assigned in September, and on three of the cases assigned in October, 2015. The cases were identified by assigned numbers. Second, documentation was not printed and placed in the case file. As such, cases submitted for review were missing documentation. Further, documents received from taxpayers, representatives and third parties were not timely reviewed. That included documents for priority-aged cases and expiring cases. Entries in the audit logs lacked detail. Audit time was not used efficiently causing cases to age even further. Waivers, which would validly extend the period of the audit and protect against a case aging out, were not sent. Data fields were not completed properly and updated, nor were they synchronized to the mainframe. Monthly statutory compliance reports and case turnaround reports were not timely submitted without reminders, and when they were, they contained errors. Cases submitted for review were not in proper order, were incomplete, and thorough analyses were not done, nor did comments include all the applicable information. Likewise, cases submitted for closing were not in proper order and administrative forms were incorrectly prepared. The audit reports for those cases were incomplete and lacked detail, and in some cases, significant information was missing. Six cases were returned to respondent with significant errors and detailed instructions were provided to her on how to correct them but respondent re-submitted the cases absent corrections. One of those cases was returned to respondent four times but respondent continued to send it back to her supervisor with errors (Tr. 44-51; Pet. Ex. 3).

In addition to the glaring problems outlined in her memo regarding the actual audits, Ms. Murray mentioned respondent's lack of participation in meetings and discussions, and her failure to follow the Department's time and leave policies consistently. Also, Ms. Murray testified that many times, respondent would not answer her telephone, or listen to and clear her messages such that her mailbox is always full and a taxpayer is unable to leave a message. When asked whether there was a written procedure for auditors regarding answering their phones and clearing messages, Ms. Murray replied, "That's so understood that it (sic) I don't think anybody ever thought they had to write it out" (Tr. 46).

Under this specification, petitioner alleged misconduct from September 2015 through March 2016, but only presented evidence of respondent's conduct up to November 2015. Thus, I am constrained to consider the charges for the period September 2015 through November 2015. I find that the evidence supports that respondent was given an action plan which identified her

shortcomings and provided detailed guidance for her in the performance of her job, but that she ignored the action plan and failed to perform her work or complete assignments between September and November, 2015.

Thus specification 2 of Charge I is sustained with respect to the period covering September and November, 2015.

Specification 3

Petitioner alleged that on June 3, 2016, respondent's supervisor discovered that respondent failed to perform pre-audit analyses on two of the cases assigned to her.

In May 2016, Ms. Murray assigned respondent two new cases and instructed her to conduct a thorough pre-audit analysis on them prior to contacting the taxpayer. When Ms. Murray received the cases, the audit log showed one hour for preparing the information document request ("IDR") after a pre-audit analysis. However, there was no information in the actual files to suggest that a pre-audit analysis had been done. Ms. Murray stated that respondent failed to undertake any of the reviews that she is supposed to as part of the pre-audit analysis or she would have realized that for one of the cases, the taxpayer had paid the correct amount of taxes, thus making it unnecessary to contact that taxpayer. Ms. Murray added that for the other case, respondent sent the wrong forms to the taxpayer – a withholding tax document form, and an IDR form that asked for all the wrong information (Tr. 54-56). Consequently, Ms. Murray wrote a conferencing memo, dated July 5, 2016, regarding respondent's failure to follow procedures (Pet. Ex. 4). The memo provided details of the two cases, and why one of the taxpayers should not have been contacted. It also cautioned respondent that similar contact may lead to formal disciplinary action. Ms. Murray and a witness signed the document on July 7, 2016, but respondent did not.

I find petitioner's documentation and Ms. Murray's testimony sufficient to sustain the allegation that respondent failed to perform pre-audit analyses on the two cases identified.

Specifications 4 and 5

Petitioner alleged that on August 10, 2016, a case review of respondent's work for the previous month indicated that respondent had charged excessive time to two cases. Likewise, respondent charged excessive time for cases assigned in August 2016.

According to Ms. Murray, respondent charged 40 hours to one case and 59 hours to another. Ms. Murray determined the time to be excessive because when she reviewed the case

for which respondent charged 40 hours, it took her 30 minutes to do so. With respect to the case for which respondent charged 59 hours, Ms. Murray noted that only two cell phone records were scheduled, and it should have taken respondent at most one third of the time that she charged (Tr. 57-60). Ms. Murray added that during that time that respondent was supposed to be working on the cases, Ms. Murray observed respondent staring into space, staring at documents or being absent from her desk. At other times, respondent just sat at her desk listening to music or reading the newspaper. It was respondent's lack of involvement in her work that prompted Ms. Murray to look at respondent's audit logs, and to review the time charged and the cases to which the time was charged. She stated that whenever she sees respondent reading the newspaper or playing games, she instructs respondent to stop, but most times, respondent would ignore her (Tr. 60-62). Ms. Murray wrote respondent a conferencing memo on August 10, 2016, detailing her findings (Pet. Ex. 5). She identified the cases by numbers and indicated the times that respondent charged for various activities. Ms. Murray also painstakingly explained to respondent why she deemed the times charged by respondent to be excessive.

On August 30, 2016, Ms. Murray wrote respondent another conferencing memo after her review of respondent's cases for August 2016 revealed that respondent had yet again charged excessive time for work on two cases and she had failed to make entries that justified the time charged (Pet. Ex. 6). In particular, the memo showed a breakdown of the activities that respondent charged for the cases and that the majority of time charged was for researching and preparing the case files. Ms. Murray testified that on numerous occasions over a period of many days, when she passed by respondent's desk, respondent was doing nothing but staring into space, and remaining immobile for hours at a time. This prompted her to review respondent's cases (Tr. 65). In an e-mail to respondent on August 30, 2016, Ms. Murray commemorated her observations and informed respondent that too much time had already been charged to the cases (Pet. Ex. 6). She explained that the cases for which respondent charged excessive time were the simplest cases that her unit handles, and an entire case should be reviewed and closed within 20 hours or less. As an example, Ms. Murray pointed to the number of hours charged for researching the two cases. She stated that the only issue regarding these cases was unincorporated business tax credit, and that no research is ever required on these types of cases. Respondent only needed to contact the taxpayer to obtain certain specified documents and once the taxpayer provided those documents, a computation would be done and the case would be

closed (Tr. 66-67). As far as preparing the case file is concerned, Ms. Murray testified that respondent presented her with files in which the documents were hole-punched and placed in fasteners, and charged four and six hours respectively for those activities. In her memo to respondent, Ms. Murray noted that it does not take four to six hours to punch holes in a few tax returns. Nor should it take seven hours to review the information received as respondent charged to one of the cases. As with her other conferencing memos, respondent did not sign this one.

The allegations were uncontested and I find that petitioner proved specifications 4 and 5 of Charge I, by a preponderance of the credible evidence.

To prove that the charges against respondent constitute misconduct, petitioner must establish fault on the part of respondent. The conduct must be willful or intentional, *Reisig v. Kirby,* 62 Misc.2d 632, 635 (Sup. Ct. Suffolk Co. 1968), *aff'd,* 31 A.D.2d 1008 (2d Dep't 1969), or must be the product of negligence or carelessness, *McGinigle v. Town of Greenburgh,* 48 N.Y.2d 949, 951 (1979). To prove incompetence on the other hand, petitioner must establish either that respondent lacked the ability to perform her job, or she demonstrated a persistent unwillingness or failure to do the work. *Law Dep't v. Stanley*, OATH Index No. 1540/05 at 4 (June 15, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-08-SA (Jan. 9, 2006). As distinct from misconduct, fault on the part of the employee is not necessarily required to establish incompetence. Petitioner need only prove that respondent is unable to meet the minimally acceptable threshold requirements of the duties of her title. *Employers Retirement System v. Myrick*, OATH Index No. 505/95 at 20 (Apr. 11, 1995).

In considering charges of incompetence, this tribunal has distinguished between making errors, which all employees make on occasion, and making "constant and repetitive errors." *Transit Auth. v. Ondeje*, OATH Index No. 1339/04 at 12 (Dec. 30, 2004); *compare Dep't of Housing Preservation & Development v. Hand*, OATH Index No. 2594/10 (Sept. 2, 2010) (incompetence found where respondent improperly processed 125 appointments), *with Fire Dep't v. Hodge*, OATH Index No. 574/06 (May 18, 2006) (no incompetence found where respondent made five isolated errors). Several factors are considered when distinguishing minor errors from incompetence, including: the frequency of the errors in comparison to those made by other employees and the consequences of the errors, in terms of time spent by respondent's supervisor to monitor respondent. *Hodge*, OATH 574/06 at 7; *Human Resources Admin. v. Green*, OATH Index No. 1794/02 at 19 (Dec. 6, 2002), *aff'd*, Civ. Serv. Comm'n Item No. CD

06-78-SA (Aug. 23, 2006); *Financial Information Services Agency v. Boritz*, OATH Index No. 744/91 at 18 (Apr. 16, 1991), *aff'd*, NYC Civ Serv. Comm'n Item No. CD 91-147 (Dec. 10, 1991). Notice to respondent that his performance is viewed as inadequate "is a necessary part of an incompetence case." *Ondeje*, OATH 1339/04 at 12.

Given the detailed directions in Ms. Murray's action plan dated August 27, 2015, I find that respondent demonstrated a distinct unwillingness to perform her tasks and perform them accurately. This is not a case where the worker lacks the ability to perform, given that respondent is more highly qualified than the other auditors in the unit. Rather, this is the case of a worker who does not wish to follow the directions laid out in a well-crafted plan, either because she is bored, could not be bothered with the requirements of the job, or thinks the tasks too menial for her level of qualifications. Respondent's persistent unwillingness to perform her job therefore constitutes incompetence as well as misconduct, for deliberately failing to follow her supervisor's directives, in violation of Rules I-20, I-30, VI-20, VI-30, VI-40 of petitioner's Code of Conduct.

CHARGE III

Petitioner charged respondent with misconduct, alleging that on a number of specified days between April and August 2016, respondent failed to follow lawful orders, assignments or requests of her supervisor, in violation of Rule I-50 of petitioner's Code of Conduct.

To establish misconduct here, petitioner must prove by a preponderance of the credible evidence that: an order was communicated to respondent; the order was clear and unambiguous in its content; and, having heard the order, respondent willfully refused to obey. *See Transit Auth. v. Wong,* OATH Index No. 1866/08 at 16 (Aug. 28, 2008); *Dep't of Sanitation v. Dobie,* OATH Index Nos. 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 (Sept. 19, 2007) (quoting *Dep't of Environmental Protection v. Schnell*, OATH Index No. 2262/00 at 7 (Oct. 25, 2000)); *Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Muniz*, OATH Index No. 1666/05 at 8 (Oct. 17, 2005). A supervisor's directive need not be made in definitive language containing the word "order" so long as a clear and unambiguous request was issued. *Wong,* OATH 1866/08 at 16; *Dep't of Sanitation v. David,* OATH Index No. 766/07 at 5 (Jan. 25, 2007), *modified on penalty,* NYC Civ. Serv. Comm'n Item No. CD 07-101-M (Oct. 25, 2007); *Dep't of*

Environmental Protection v. Salinas, OATH Index No. 1020/04 at 5 (Nov. 15, 2004), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 06-16-SA (Jan. 9, 2006).

Specification 1

Ms. Murray testified that on April 12, 2016, she went to respondent's desk about four times between 1:00 and 3:00 p.m. She found respondent on each occasions with ear buds in her ear and listening to her electronic device. Respondent was not working on cases. At around 2:30 p.m., Ms. Murray asked respondent to come to her desk to discuss a case. After a half hour had elapsed and respondent had not shown up, Ms. Murray returned to respondent's desk, but respondent ignored her and continued playing with some device. Ms. Murray went around the desk and stood next to respondent who finally stopped and looked at her. Ms. Murray ordered respondent to come to her desk. When respondent came, she refused to sit down to discuss the case and then left. Ms. Murray memorialized her encounter on that day in a memo to respondent (Tr. 70-72; Pet. Ex. 7). In her memo, Ms. Murray noted that she went again to respondent's desk at 3:30 p.m., and found that respondent had resumed playing with her device.

Respondent's failure to report to Ms. Murray's office when asked to do so around 2:30 p.m. was a blatant act of insubordination, as was her refusal to sit and discuss the case with her supervisor. This specification is therefore sustained.

Specifications 2 and 3

On April 18, 2016, Ms. Murray went to respondent's desk at around 9:30 a.m. and found respondent reading her newspaper. She instructed respondent to put the newspaper away but respondent just pointed to her computer to indicate that it was not working, and when asked, told Ms. Murray that it had been non-functional for four days. Respondent had not previously informed Ms. Murray that her computer was not working. She further told Ms. Murray that she had called the Help Desk and that they indicated that they would get back to her. Ms. Murray suggested that respondent engage herself with non-computer dependent work, to which respondent replied that she did not have her eyeglasses because she had lost them on the train and was awaiting a call from the Metropolitan Transit Authority. Ms. Murray explained that respondent could have organized her files, made copies, punched holes, reviewed her case notes and cases, and made handwritten notes. She added that even before respondent's computer problems, she had observed respondent using the computer without her glasses, and that on the very day, respondent was reading the newspaper without her glasses (Tr. 74-79). In sum, Ms.

Murray testified that respondent did no work during the time that her computer was not working. In her contemporaneous e-mail to respondent, Ms. Murray was more specific about the tasks she directed respondent to work on while respondent's computer was down. In particular, she instructed respondent to revise the statutory schedule for a particular case about which she had previously e-mailed respondent on April 12, 2016 (Pet. Ex. 8). The memo also revealed that on subsequent days, respondent displayed the same behavior. On April 20, 2016, respondent signed in at 9:01 a.m., and when Ms. Murray passed by her desk, respondent was having breakfast and reading the newspaper. Likewise, when Ms. Murray passed by her desk at 10:00 a.m. on April 26, 2016, respondent was reading her newspaper and Ms. Murray instructed her to put the paper away. The memo further noted that respondent charged the entire days of April 15, 18, 19 and 20, 2016, to computer problems.

Contrary to Ms. Murray's testimony and to petitioner's proof in the form of Ms. Murray's conferencing memo, specification 2 alleged the date of respondent's insubordination as April 26, rather than April 18, 2016. I find it appropriate to *sua sponte* conform the specification to the evidence. *See Law Dep't v. Lawrence,* OATH Index No. 1312/10 at 10 (Mar. 30, 2010), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-36-A (May 11, 2011) (specification conformed to the proof at trial); *Dep't of Correction v. Patterson*, OATH Index No. 1884/02 (Feb. 25, 2003), *aff'd in part, rev'd in part*, Comm'r Decision (May 9, 2003), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 05-09-M (Mar. 10, 2005) (specification conformed to the credible evidence at trial); *Dep't of Correction v. Sostre-Valentin,* OATH Index No. 1923/99 (Sept. 22, 1999), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 00-94-SA (Nov. 14, 2000) (appropriate to conform charge to correspond to the proof since respondent and other witnesses were of the incident charged); *Dep't of Correction v. Bovell,* OATH Index No. 1910/99 at 2, n.1 (Aug. 13, 1999) (respondent not prejudiced by conforming charge to proof presented at trial).

I find that respondent was insubordinate on April 18, 2016, when she ignored her supervisor's instruction to revise the statutory schedule for a particular case, especially since she had been e-mailed about it previously. Ms. Murray credibly testified that no reliance on the computer was required to do so.

Specifications 2 and 3 of Charge III are therefore sustained.

Specifications 4, 5 and 6

Employees' weekly timesheets must be submitted each Monday morning. Ms. Murray's deadline for approving the timesheets is Wednesday. At 4:54 p.m. on Monday, May 2, 2016, Ms. Murray sent respondent an e-mail reminder to submit her timesheet. At 9:44 a.m. on May 3, she sent a follow-up reminder to respondent. Later that day at 5:16 p.m., she sent respondent yet another reminder to submit her timesheet or respondent would not get paid. Ms. Murray testified that on the afternoon of May 3, she had also taped a large note to respondent's computer monitor reminding her to submit her timesheet. Respondent eventually submitted her timesheet on May 4, 2016 (Tr. 81-83; Pet. Ex. 9 at 1, 2, 3).

Ms. Murray testified that every month, she is required to give an update on expiring cases. Also on May 2, 2016, she e-mailed respondent a list of expiring cases and maintained that she requested an update which respondent failed to provide. She sent two follow-up e-mails on May 10, and another on May 13. By May 17, respondent still had not provided feedback on the cases (Tr. 83-84). On that date, Ms. Murray issued respondent a conferencing memo outlining the various requests she had made, noting respondent's failure to comply with her requests, and cautioning respondent that formal disciplinary could be preferred against her (Pet. Ex. 9).

Specification 6 of Charge III alleges that on May 5, 2016, respondent was instructed to prepare and submit a case for closing with a due date of May 13, and that respondent was sent a reminder on May 11, but she did not complete the task by the deadline. Petitioner did not provide any of the e-mail instructions to respondent for this particular task but Ms. Murray testified that as of the date of her contemporaneous conferencing memo of May 17, respondent still had not submitted the case and recalled that it took a long while for respondent to do so. The conferencing memo which Ms. Murray testified, was provided to respondent, contained specifics of the case number that she had requested for closing (Tr. 84; Pet. Ex. 9).

Petitioner's documentary submissions and Ms. Murray's testimony are sufficient for me to find respondent guilty of misconduct by deliberately ignoring her supervisor's verbal and written requests regarding timely submission of her timesheet, providing updates on expiring cases, and submitting a case for closing by a specific date.

Specifications 4, 5 and 6 of Charge III are sustained.

Specification 7

Ms. Murray testified that on June 28, 2016, she walked by respondent's desk at around 1:18 p.m., and found respondent with ear buds in her ear. She was also reading a newspaper and

not doing any work. Respondent's lunch period is from 12:00 noon to 1:00 p.m., and she had already signed in that she had returned from lunch. Ms. Murray approached respondent who ignored her initially, so Ms. Murray walked around the desk and stood at respondent's side. She told respondent that her lunch period was over and instructed her to put away the newspaper, which respondent did. Ms. Murray wrote respondent a conferencing memo on the same day, because of respondent's failure to work during working hours (Tr. 86-87; Pet. Ex. 10).

Given Ms. Murray's testimony and her contemporaneous memo, I do not find that respondent failed to comply with her supervisor's instruction as charged. Therefore, specification 7 of Charge III is not sustained.

Specification 9[3] *and 10*

On June 30, 2016, at around 4:00 p.m., Ms. Murray observed respondent at her desk with her ear buds in and playing a game on her personal electronic device. Ms. Murray called respondent's name on multiple occasions and knocked on respondent's cubicle, but respondent never acknowledged her presence until she went around respondent's desk and stood beside her. She told respondent to put the game away as respondent was supposed to be working. Respondent did not comply. Ms. Murray walked away and returned about 15 minutes later. Respondent was still playing her game. Ms. Murray again told respondent to put the game away, at which time respondent gave her a "smirk" and then put it away. Ms. Murray issued respondent a conferencing memo on the same day (Tr. 89-90; Pet. Ex. 11).

Respondent exhibited similar behavior on July 6, when Ms. Murray walked by respondent's desk at around 10:15 a.m., and found that respondent was not working. Instead, she had her ear buds in, and was playing a game on her electronic device. Ms. Murray walked away and 15 minutes later found respondent doing the same thing. She called out to respondent and knocked on her cubicle to get respondent's attention. When she did, she instructed respondent to put the game away. Ms. Murray could not recall if respondent complied with her request because the next time she visited respondent's cubicle was around 1:20 p.m. the same day, after respondent had returned from lunch, when, once again, respondent was playing on her electronic device. At that time, she instructed respondent to put the game away, but offered no testimony as to whether or not respondent complied with her instruction (Tr. 91-93; Pet. Ex. 12).

[3] Petitioner conceded that it miss-numbered the specifications by omitting Specification 8.

While it is clear that respondent disobeyed her supervisor's instructions on June 30, petitioner did not prove that respondent failed to comply with her supervisor's instructions on July 6, 2016. Her supervisor could not recall, and the contemporaneous conferencing memo did not indicate whether or not respondent complied with Ms. Murray's request on July 6, 2016.

Thus, specification 9 of Charge III is sustained, but specification 10 is not.

Specification 11

Every two months, the auditors complete a progress report on the status of all the cases in their inventory. This is done by looking at the prior report and making a written record of everything they have done between that report and the current report. The supervisor discusses the report with each auditor, then makes adjustments and submits the report to the manager. The report is due at a specific time and Ms. Murray normally informs her auditors when they should submit their reports to her. On July 29, 2016, Ms. Murray e-mailed all the auditors in her unit and instructed them to remit their progress reports to her by the end of the day on August 2, 2016. She also gave particular instructions on how the report should be completed. By the deadline, respondent had failed to submit her report. On the following day, Ms. Murray sent respondent a reminder. She sent respondent a further reminder on August 4, 2016. Ms. Murray explained with frustration that when respondent fails to perform her tasks, Ms. Murray is the one who completes them because she is ultimately responsible for providing the reports to the manager. She explained that it is a painstaking process for her because she has to access the audit logs for each case and read everything contained therein. On August 5, 2016, she issued respondent a conferencing memo in which she noted that as of that date, respondent had not submitted her progress reports (Tr. 95-99; Pet. Ex. 13).

Petitioner's documentary evidence and Ms. Murray's testimony support that respondent failed to comply with her supervisor's directive to submit progress reports by August 2, 2016.

Specification 11 of Charge III is therefore sustained.

Specification 12

Ms. Murray testified that on August 3, as she was sitting at her desk, which is located about four cubicles away from respondent's cubicle, she heard music which affected her ability to concentrate. She got up to investigate the source of the distraction and discovered that the music was coming from respondent, who was wearing ear buds but had the volume turned up. Ms. Murray asked respondent on two occasions to lower the volume and told respondent that ear

buds are intended for her to listen to her music without disturbing others, but respondent did not. Ms. Murray returned to her desk and e-mailed respondent about her loud music. She also expressed her intention to issue respondent a memo about the music and respondent's refusal to comply with her supervisor's request. She testified that she had to insert ear plugs in order to concentrate on her work. Ms. Murray also noted that respondent continued to play loud music in spurts over a couple of days. On August 5, 2016, she issued respondent a conferencing memo, which indicated that on August 4, Ms. Murray again asked respondent to lower the volume of her music and respondent failed to do so (Tr. 99-103; Pet. Ex. 14).

The specification alleges that on August 3, 4 and 5, 2016, respondent was asked by her supervisor to turn down the music on her personal device, and that she ignored her supervisor's requests. However, the testimony and supporting evidence establish that respondent failed to comply with her supervisor's request on August 3 and 4, 2016. There was no testimony or documentary evidence to establish that Ms. Murray directed respondent to turn down her music on August 5, 2016.

Therefore, specification 12 is sustained only with respect to the allegations pertaining to August 3 and 4, 2016.

Specification 13

On June 20, 2016, Ms. Murray e-mailed respondent about a particular case which she identified by number. Ms. Murray noted in her e-mail that the case was a priority aged case and that respondent had scheduled an exit conference with the taxpayer without informing Ms. Murray. She testified that the case was a problematic one and that respondent had scheduled a meeting with the taxpayer to be held on the second day after Ms. Murray returned from vacation, and she had not told Ms. Murray about it. In fact, she only found out when the taxpayer showed up at their office. She was unprepared for the meeting and simultaneously, the taxpayer did not have the proper work papers. In her e-mail, Ms. Murray reminded respondent that the supervisor must be present for all exit conferences. On June 29, Ms. Murray sent respondent a follow-up e-mail directing her to schedule a meeting with the same taxpayer and letting respondent know the dates of her (Ms. Murray's) availability. Ms. Murray testified that she and her supervisors were monitoring this particular case because respondent had previously "messed up" on it. After her June 29 e-mail, she repeatedly asked respondent if a meeting had been scheduled as directed, but respondent kept insisting that the taxpayer did not get back to her. After multiple days of

receiving the same response from respondent, Ms. Murray called the taxpayer's representative who informed her that respondent had scheduled a meeting for August 25, 2016. She confronted respondent who acted as if she was unaware that she had scheduled a meeting with the taxpayer. Ms. Murray issued respondent a conferencing memo on August 8, 2016, detailing respondent's failure to comply with her prior e-mails (Tr. 103-08; Pet. Ex. 15).

Specification 13 of Charge III, that respondent concealed from her supervisor, a scheduled meeting with a taxpayer, is sustained.

Specification 14

Ms. Murray testified that because the computers of all her auditors were being upgraded, they were instructed to drop off their computers at the New York State DOF office at 15 Metro Tech Center. Each auditor was given a designated time, but respondent did not go at the time that she was supposed to. Ms. Murray could not recall if respondent offered an explanation, but she stated that respondent was given a second opportunity. She spoke with respondent and made sure that respondent understood that her second appointment was scheduled for August 7, 2016 at 4:30 p.m. At around 4:52 p.m. that day, when Ms. Murray passed by, respondent was still at her desk. Ms. Murray reminded her that she should have gone to the State office at 4:30 p.m., but when she asked if respondent intended to go to the State office, respondent kept repeating that she was leaving at 5:00 p.m. Ms. Murray stated that respondent did not comply with her instructions on August 7, 2016. She maintained that respondent's failure to take her computer to the State office caused problems for the technical workers because they were on a tight schedule with many upgrades to perform. Ms. Murray's manager eventually instructed her to not schedule another appointment for respondent until after everyone else's computers were upgraded (Tr. 109-13).

Petitioner submitted an e-mail dated August 8, 2016, from Joel Stern to the auditors and copied to Ms. Murray, requesting that the auditors drop off their computers by the end of the day. In an e-mail to respondent dated August 9, 2016, Ms. Murray directed respondent to go to Metro Tech Center to drop off her computer at 4:30 p.m. that day. Also on August 9, Ms. Murray issued respondent a conferencing memo in which she indicated that respondent failed to comply with instructions to drop off her computer on August 6 and then again on August 7, 2016 (Pet. Ex. 16).

Even though petitioner did not produce copies of the e-mail directives to respondent on August 6 and 7, 2016, I find the contemporaneous conferencing memo sufficiently establishes that respondent was issued instructions on those dates and she failed to comply with the instructions. *See 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."); *see also 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).

Specification 14 of Charge III is therefore sustained.

Specification 15

Ms. Murray testified that on August 30, 2016, she instructed respondent to e-mail her statutory schedules for a certain case by 2:00 p.m. that day. Ms. Murray knew that the schedules had been completed because the audit log for the case indicated that respondent had completed them. She also instructed respondent to e-mail her the audit reports for three different cases and the statutory schedule for another case by 4:00 p.m. that day, because the audit logs for those cases indicated that the items requested had been completed. However, respondent left the office at 5:00 p.m. without complying with Ms. Murray's instructions (Tr. 114-15). As a result, Ms. Murray issued respondent a conferencing memo on August 31, 2016 (Pet. Ex. 17).

While the conferencing memo included an allegation that respondent failed to comply with instructions to submit her timesheet on August 30, 2016, and petitioner produced Ms. Murray's e-mail to respondent in support, that allegation was not included in the charges filed and I decline to conform the charge to the proof in respondent's absence.

Therefore, specification 15 of Charge III is sustained only as it relates to respondent's failure to comply with her supervisor's request for statutory schedules of respondent's cases.

CHARGE IV

Petitioner charged respondent with being uncivil and discourteous to her supervisor, in violation of Rule V-80 of petitioner's Code of Conduct.

Specification 1

On July 5, 2016, Ms. Murray issued respondent a conferencing memo for failure to follow proper procedures and insubordination (Pet. Ex. 18). She testified that on the same morning, respondent came over and asked for something to do. Ms. Murray reminded respondent of changes she had instructed respondent to make to a particular case the previous week. But respondent did not want to make the changes and so they began to discuss the case. Respondent insisted that Ms. Murray had not properly reviewed the case. But Ms. Murray stated that while she recognized and acknowledged respondent's concern about the case, she also identified other concerns, which is the reason why she issued written instructions about the case to respondent. The instructions were in an e-mail dated June 30, 2016. However, respondent kept repeating herself and began to get loud and disruptive. She stood up and yelled at Ms. Murray while co-workers, including four auditors, looked on as they were unable to work. Ms. Murray opined that respondent's behavior was particularly loud and disruptive, but when she asked respondent to leave her cubicle, respondent refused, forcing Ms. Murray to leave her own cubicle. That resolved the problem for a little while, but respondent returned to Ms. Murray's cubicle and as they resumed discussion of the case, she once again became loud and disruptive, so much so that Ms. Murray had to call her manager. Eventually, Ms. Murray and respondent went to the manager's office where they discussed the case for a couple hours, and the manager supported Ms. Murray's viewpoint. Ms. Murray shared that as of the date of trial, respondent still had not followed her instructions and that she might end up having to assume responsibilities for the case (Tr. 118-23; Pet. Ex. 18).

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. In fact, an employee may disagree with a supervisor so long as the disagreement remains within the bounds of decorum and discretion. *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 4-5 (Oct. 22, 2007); *Human Resosurces Admin. v. Bichai,* OATH Index No. 211/90 at 11 (Nov. 21, 1989), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 90-54 (June 15, 1990).

Ms. Murray credibly testified that respondent was so loud and obnoxious that her behavior affected the other auditors as well as other workers in the office. Moreover, the fact that Ms. Murray had to call her manager when respondent returned to her cubicle and resumed her shouting suggested that Ms. Murray may well have been intimidated by respondent, even though there was no testimony that respondent threatened her verbally. But verbal threats and/or profanity are not the sole predicates for characterizing behavior as intimidating. *See Law Dep't v. Lawrence,* OATH Index No. 1312/10 at 7-9 (Mar. 30, 2010), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 11-36-A (May 11, 2011) (respondent intimidated supervisor by standing in the single doorway to her office and refusing to leave despite multiple requests, causing her to feel trapped, given the animosity that respondent was displaying); *Health & Hospitals Corp. (Kings County Hosp. Ctr.) v. Bobbitt*, OATH Index No. 850/07 (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).

In sum, I find that respondent was uncivil and discourteous to Ms. Murray on two occasions when: 1) she raised her voice and continued her tirade that not only disrupted other staff members, but forced Ms. Murray from her cubicle; and 2) she returned to Ms. Murray's cubicle and was so vociferous that Ms. Murray had to call her manager.

Charge IV is therefore sustained.

CHARGE V

Petitioner charged that respondent engaged in conduct prejudicial to good order and discipline in violation of Rule V-240 of petitioner's Code of Conduct.

Specification 1

According to Ms. Murray, a staff meeting was scheduled for May 19, 2016 for her entire unit, which comprised 25 to 30 people. The meeting commenced at 10:30 a.m. in the 12th floor conference room. At 12:00 noon, they had not yet completed the agenda for the meeting but they had to relocate to the 10th floor conference room in the same building because another party had booked the 12th floor conference room. Everyone was instructed to immediately proceed to the 10th floor. Ms. Murray testified that respondent failed to do so, but she could not be certain that all staff went to the resumption of the meeting on the lower floor. Later the same day, Ms. Murray e-mailed respondent requesting an explanation for her absence from the latter part of the meeting, but respondent did not reply. Ms. Murray therefore issued respondent a conferencing memo on May 23, 2016, which respondent refused to sign (Tr. 124-27; Pet. Ex. 19).

As previously noted, to establish misconduct, petitioner must prove by a preponderance of the credible evidence that: an order was communicated to respondent; the order was clear and unambiguous in its content; and, having heard the order, respondent willfully refused to obey. *See Health & Hospitals Corp. (Bellevue Hospital Ctr.) v. Tanvir*, OATH Index No. 797/10 at 5 (Dec. 17, 2009) (to prove insubordination, petitioner must establish that an unambiguous order was communicated to employee and employee willfully refused to obey the order); *see also Human Resources Admin. v. Shehid*, OATH Index No. 1603/05 at 3 (Aug. 26, 2005) (insubordination committed by failing to report to reassigned work location); *Transit Auth. v. Merrit*, OATH Index No. 963/97 (Oct. 30, 1997). Ms. Murray did not make clear whether staff were told that it was imperative that they show up for the resumption of the meeting. Moreover, she had previously testified that respondent's lunch period begins at 12:00 noon (Tr. 87). Given that Ms. Murray was unsure whether or not respondent was the only one who failed to relocate to the 10th floor, petitioner did not establish that a clear and unambiguous order was issued to staff which respondent refused to obey, and that such refusal constituted conduct prejudicial to good order and discipline.

Charge V is therefore not sustained.

CHARGE IX

Petitioner charged that respondent violated Rule VII-40 of the Department's Code of Conduct by failing to comply with its time and leave procedures.

Petitioner's employee handbook provides that when calling in sick, an employee must speak with his/her supervisor within a half-hour of the scheduled start time. Voice messages and e-mails are not permitted. If the supervisor is unavailable, the employee must continue to call until he/she is able to speak with the person designated to receive such calls. Employee Handbook at V-5 (2011). The employee handbook also provides for an Absence Control Stepping Procedure. Each instance of undocumented sick leave taken during the week equals four points. Each instance of undocumented sick leave, taken before or after a scheduled day off, equals five points. When a worker has accumulated between five and nine points, the supervisor will have an informal discussion with the worker. After reaching between 10 and 14 points, the supervisor will conduct a second interview and prepare written details of the discussion. When the worker has accumulated between 15 and 19 points, a second interview is conducted and the supervisor will review the case with the Department advocate. The discussion will also be documented. After 20 to 24 points has been accumulated, the supervisor will issue a final warning to the employee that he/she will not be paid for any future of undocumented sick leave. A person has reached sanction status when he/she is required to provide documentation for each instance of sick leave. Employee Handbook at V-8, V-9 (2011).

Specifications 1, 2, 3

Petitioner presented multiple certified printouts of respondent's timekeeping records which were redacted in part, as well as a spreadsheet created by Ms. Murray, from the information on those records (Pet. Ex. 20). The timekeeping records showed that between August 17 and November 6, 2015, respondent had 19 instances of undocumented sick leave, and not 20 as alleged by petitioner. Some of respondent's absences comprised partial days (Tr. 130-34). Ms. Murray noted that doctors notes must be provided within five days of the absence but stated that the timekeeping unit made exceptions for respondent such that on many occasions, respondent produced medical notes much later, sometimes as late as two months. Thus, leave which had been categorized as leave without pay or LWOP, would be reversed (Tr. 137-38).

Respondent's timekeeping records also showed that on October 20, 2015, respondent took five and three-quarter hours of sick time (not six and three-quarter hours as alleged) which

were converted to leave without pay. Ms. Murray testified that by that time, respondent had reached sanction status, which meant that going forward, any undocumented sick leave would be converted to absence without official leave ("AWOL") (Tr. 135; Pet. Ex. 20). Ms. Murray bemoaned respondent's high absenteeism rate because she was left to do respondent's work (Tr. 35-36). In any event, she did not notice respondent's absence on October 20, 2015, until around 2:30 p.m. None of respondent's co-workers, nor her managers, knew where she was, nor had they been told that she was leaving. When Ms. Murray checked Citytime, the City's timekeeping system, she learned that respondent had signed in at 8:23 a.m., had submitted a request for sick leave at 9:47 a.m., and had left at 9:51 a.m. without telling anyone (Tr. 139-40).

Ms. Murray testified that on July 12, 2016, respondent called in sick by leaving a message on Ms. Murray's voice mail, and did not call back to personally speak with her supervisor as she is required to do (Tr. 140-42).

Petitioner's evidence and Ms. Murray's testimony support the charge that respondent failed to comply with petitioner's time and leave procedures.

The allegations contained in Charge IX are therefore sustained.

CHARGE XII

Petitioner charged respondent with leaving her assigned work location without authorization to do so, in violation of Rule VII-30 of petitioner's Code of Conduct.

Specification 1

Ms. Murray testified that each auditor has a laptop computer. Repairs on these computers are done at the New York State DOF office at 15 MetroTech Center, which is a five-minute walk from petitioner's office. On April 19, 2016, respondent was scheduled to take her computer for repairs. Ms. Murray discussed with respondent about how respondent should spend her time in the interim. She told respondent that if the repairs were estimated to take more than one hour, respondent should return to the office. Ms. Murray testified that respondent left for 15 MetroTech at 11:00 a.m., after which she did not hear from respondent. At 1:24 p.m., the technician called to inform Ms. Murray that respondent's computer had crashed, which meant the there was a serious problem with the computer and it would take a while to be repaired. Meanwhile, respondent had not called her. At about 3:43 p.m., Ms. Murray called the technician and about one hour later, she received a message that the technician had finished reimaging

respondent's computer but still had to restore her files, and were going to work on it for the remainder of the day. The technician suggested that respondent come the following day to retrieve her laptop. Ms. Murray maintained that from the time that respondent left to drop of her computer until about 4:45 p.m. on April 19, 2016, she did not hear from her. At that time, respondent called to inform Ms. Murray that she would not be returning to the office, but she did not disclose where she was. As a result, Ms. Murray had to lock away respondent's work papers which displayed taxpayer information (Tr. 143-47). The following day, when Ms. Murray asked respondent about her laptop, respondent replied that she would be going to collect the computer. She then left the office at 10:30 a.m. to collect it. The technician called Ms. Murray at around 12:30 p.m. to notify her that respondent had picked up her computer, but respondent did not return to the office until 2:20 p.m. Ms. Murray conceded the possibility that respondent had taken her lunch break during the time that she was out but noted that respondent's lunch break is one hour (Tr. 148-50). On April 20, 2016, Ms. Murray wrote respondent a conferencing memo which she refused to sign. Petitioner also submitted the e-mail correspondence between Ms. Murray and the State DOF technician regarding respondent's computer (Pet. Ex. 21).

There is no doubt that respondent was authorized to drop off and pick up her computer at the State DOF, which is located approximately five minutes from her office, but she was absent for approximately six hours on April 19, and four hours on April 20, 2016, which were excessive and unauthorized, even discounting her lunch break.

Charge XII is therefore sustained.

<u>CHARGE XIII</u>

Petitioner charged that respondent failed to appear at meetings before the Department's Advocate's office when requested to do so, in violation of Rule II-10 of petitioner's Code of Conduct.

Specifications 1 and 2

Ms. Murray testified that respondent was scheduled to attend a meeting at the Advocate's office on July 28, 2016, but she did not keep the appointment (Tr. 150-51). Petitioner submitted an e-mail from petitioner's counsel to respondent on July 27, 2016, reminding respondent of the meeting. Counsel also mentioned in her e-mail that she was attaching a copy of her original notification letter to respondent on July 11, 2016, but the letter was not submitted at trial. Also

presented was an e-mail from Ms. Murray to counsel on the same date, confirming that Ms. Murray had printed out the e-mail reminder and handed it to respondent (Pet. Ex. 22). Ms. Murray testified that on the date of the scheduled meeting, counsel called and asked for respondent. Ms. Murray went to respondent's desk and informed her that the Advocate's office was expecting her, and that her union representative was already present. About 15 minutes later, after receiving another call from counsel, Ms. Murray went back to respondent and told her to immediately stop what she was doing and report for her meeting, but respondent ignored her (Tr. 151-53). Ms. Murray issued respondent a conferencing memo on August 1, 2016, regarding respondent's failure to attend the scheduled meeting on July 28, 2016 (Pet. Ex. 22). She answered in the affirmative when asked whether respondent had missed any other meetings with the Advocate's office, but did not mention a date (Tr. 154). Nor was there anything in petitioner's submissions to support a finding that respondent missed another meeting on August 16, 2016, as alleged.

Accordingly, the record supports a finding that respondent purposefully ignored numerous notifications of a meeting at the Advocate's office, and indeed failed to show up at that meeting on July 28, 2016, only.

Specification 1 of Charge XIII is sustained, but specification 2 is not.

FINDINGS AND CONCLUSIONS

1. Petitioner proved incompetence and misconduct as alleged in Charges 1, II, VI, VII, VIII, X and XI, in that respondent demonstrated a persistent unwillingness to perform her job, and deliberately failed to follow her supervisor's directives, in violation of Rules I-20, I-30, VI-20, VI-30 and VI-40 of petitioner's Code of Conduct.

2. Petitioner established Charge III, that on a number of specified days between April and August 2016, respondent failed to follow her supervisor's lawful orders, assignments or requests, in violation of Rule I-50 of petitioner's Code of Conduct.

3. The evidence in support of Charge IV established that respondent was uncivil and discourteous to her supervisor on two occasions when she raised her voice and continued a tirade that disrupted other workers and forced her supervisor out of the supervisor's cubicle, and later on became vociferous once

again, causing her supervisor to call the manager. Respondent's conduct was in violation of Rule V-80 of petitioner's Code of Conduct.

4. Petitioner failed to prove Charge V, that respondent engaged in conduct prejudicial to good order and discipline, in violation of Rule V-240 of petitioner's Code of Conduct, when she absented herself from the resumption of a staff meeting which was relocated from one floor to another, and which coincided with respondent's lunch break.

5. Petitioner proved the allegation in Charge IX, that respondent failed to comply with time and leave regulations, in violation of Rule VII-40 of petitioner's Code of Conduct.

6. Petitioner proved that respondent was absent from her work location without authorization on two separate occasions as alleged in Charge XII. Respondent's unauthorized absence was in violation of Rule VII-30 of petitioner's Code of Conduct.

7. Petitioner's proof for Charge XIII supported a finding that respondent failed to appeared at only one scheduled meeting with the Department's Advocate office, and not two meetings as charged. Respondent's failure to attend the meeting was in violation of Rule II-10 of petitioner's Code of Conduct.

RECOMMENDATION

Upon making the above findings and conclusions, I reviewed a copy of respondent's personnel abstract in order to recommend an appropriate penalty. Respondent started working for petitioner as a City Tax Auditor on May 16, 2011. For each of the last five years, respondent has received "unsatisfactory" evaluations. In 2014, respondent was issued a verbal warning and later, a written warning, for excessive lateness. In 2015, respondent accepted a penalty of the loss of 10 annual leave days for disruptive and disorderly behavior and neglect of duties.

Petitioner now seeks respondent's termination from her employment. I find that appropriate.

Respondent was found incompetent for being persistently unwilling to perform her job. She was also found guilty of misconduct for: deliberately failing to follow her supervisor's instructions on multiple occasions; being uncivil and discourteous to her supervisor; failing to comply with time and leave regulations by accumulating multiple instances of undocumented

sick leave; being absent from her job location without authorization; and, failing to appear for a scheduled meeting before the Advocate's office. In short, respondent violated numerous rules of petitioner's Code of Conduct. With each conferencing memo, respondent was placed on notice that her performance, as well as her behavior, was sub-standard. Yet, she never adjusted her behavior, and continued to display a complete disinterest in her work and disregard for authority, to the point of ignoring a scheduled meeting with the agency's Advocate's office. This was further compounded by her failure to appear before this tribunal.

In the majority of cases where, as here, the employee has demonstrated a prolonged and persistent pattern of unsatisfactory work performance, this tribunal has recommended termination or demotion. *See Dep't of Consumer Affairs v. Yampolsky,* OATH Index No. 2269/10 (Aug. 12, 2010) (termination recommended for clerical associate who not only improperly or inefficiently performed her duties on 13 occasions, but was persistent in her refusal to do the job as directed); *Human Resources Admin. v. Hampton*, OATH Index No. 517/08 (Dec. 12, 2007) (demotion recommended for clerical employee who consistently demonstrated an inability to properly carry out required tasks, even after receiving detailed instructions from supervisors); *Employers Retirement System v. Myrick*, OATH Index No. 505/95 (Apr. 11, 1995) (termination recommended for a computer associate who repeatedly and insubordinately failed to perform his job functions); *Dep't of Finance v. Smalls*, OATH Index No. 316/94 (Jan. 27, 1994) (demotion recommended for a supervisor of cashiers who repeatedly failed to perform assigned tasks in a proper and timely fashion and committed various instances of insubordination, but deemed able to perform a less demanding position); *Bd. of Education v. Cook*, OATH Index No. 733/90 (Apr. 9, 1990) (termination recommended for food services manager who failed to keep accurate records, complete reports, manage ordering food supplies, and observe nutritional guidelines).

I find that respondent's incompetence plus the other proven charges against her warrant a recommendation of respondent's termination from employment, and I so recommend.

Ingrid M. Addison
Administrative Law Judge

February 2, 2017

SUBMITTED TO:

JACQUES JIHA, PH.D.
Commissioner

APPEARANCES:

CAROLE BEROFF, ESQ.
ARI LIEBERMAN, ESQ.
Attorneys for Petitioner

No Appearance for or by Respondent

7/28/17

February 15, 2017

Via Certified and Regular
Mail: Return Receipt Requested

Joan Kateme

Re: **Notice of Determination Pursuant to Section 75 of New York State Civil Service Law**

Dear Ms. Kateme:

I have reviewed Judge Ingrid M. Addison's Report and Recommendation, and the record of the administrative hearings held on January 11, 2017 regarding the Notice and Statement of Charges dated August 19, 2016.

Based upon that review, I hereby adopt the findings of fact and penalty in the Report and Recommendation. ***Therefore, the penalty imposed upon you for your misconduct is termination.***

Under the provisions of Section 76 of the New York State Civil Service Law, you are entitled to appeal from this determination by application either to the New York City Civil Service Commission (www.nyc.gov/csc) or to a court in accordance with provisions of Article 78 of the Civil Practice Law and Rules. If you elect to appeal to the Commission, such appeal must be filed in writing within 20 days of receipt of this determination.

Sincerely,

for JACQUES JIHA, PH.D.
COMMISSIONER
NEW YORK CITY DEPARTMENT OF FINANCE

Cc: Personnel File
CERTIFIED MAIL# 70051820000741416891