

Dep't of City Planning v. Kelly

OATH Index No. 516/19 (Jan. 7, 2019)

City planner charged with repeated insubordination, calling 911 and having police respond to an incident with her supervisor, and incompetence in failing to meet project deadlines. ALJ found that 14 of the charges should be sustained and recommended that the employee be terminated.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CITY PLANNING
Petitioner
- against -
ANGELA KELLY
Respondent

REPORT AND RECOMMENDATION

JOHN B. SPOONER, *Administrative Law Judge*

This disciplinary proceeding was referred to me in accordance with section 75 of the Civil Service Law. Respondent Angela Kelly is a city planner II employed by petitioner, the Department of City Planning (DCP). Respondent is charged with repeated insubordination, calling 911 and having police respond to an incident with her supervisor, and incompetence in failing to meet multiple project deadlines.

A trial on the charges was held before me on November 8, 9, 15, and 19, 2018. Petitioner presented the testimony of three supervisors and a timekeeper. Respondent called four co-workers and testified on her own behalf, denying any misconduct.

For the reasons explained below, I find that 14 of the charges should be sustained and recommend that respondent be terminated.

ANALYSIS

Respondent has worked at DCP for 17 years, conducting analysis on traffic and its impact on New York City and its population (Tr. 507-08). She was originally a highway transportation specialist and later became a city planner (Tr. 508).

Respondent suffers from bilateral carpal tunnel in her wrists and had two surgeries to treat this condition in 2016 (Tr. 513-14). Beginning on June 12, 2017, respondent was on approved FMLA leave due to carpal tunnel in her wrists. Respondent stopped receiving paychecks in July 2017 when her leave balances were exhausted (Tr. 80).

According to a July 24, 2017 letter from Dana Cohen, the director of human resources (“human capital”) for DCP, this leave was scheduled to end on August 3, 2017, but was evidently extended to August 23, 2017 (Tr. 514; Resp. Ex. C). In the same letter, respondent was directed to provide, one week before her return, documentation from her medical provider confirming her fitness to return to work.

Sometime in August 2017, DCP management decided that, due to several difficult interactions between respondent and other staff, respondent should be examined by a psychiatrist for fitness under section 72 of the Civil Service Law. On August 15, 2017, after respondent sent Ms. Cohen a medical note indicating that respondent was fit to work on August 23, Ms. Cohen notified respondent that she could not return to work until she underwent “an independent medical exam to determine if you are capable of performing the duties of your position” (Resp. Ex. B). An official letter to this effect was sent to respondent on September 1, 2017. In an attachment enclosed with the letter, Ms. Cohen wrote that respondent was “erratic,” “hostile,” “volatile,” and “antagonistic” and characterized her appearance at DCP offices on August 22, 2017, as improper (Resp. Ex. E).

Although respondent followed DCP’s instructions, the section 72 examination did not take place for over a month. On September 1, 2017, Ms. Cohen sent respondent a letter notifying her that she was scheduled for a psychiatric examination on September 8 at 4:00 p.m. (Resp. Ex. E). Respondent had the September 8 appointment rescheduled to September 12. According to respondent, when she appeared for this appointment, the address given was Maimonides Hospital and she was told that no doctors there saw outpatients. Respondent contacted her union and Ms. Cohen for guidance and was sent back to the same address twice

more and told the same thing (Tr. 519-20). Finally, in October 2017, respondent was seen by another psychiatrist who, after the interview, told respondent she could return to work (Tr. 521).

The delay in completing the examination left respondent without pay for over two months and, in finally restoring respondent to payroll retroactively, two direct deposits were reversed and reissued. According to Ms. Guido, timekeeping staff was initially instructed by Ms. Cohen not to pay respondent for the period in August after she was directed to undergo a psychiatric examination. After Ms. Cohen sought guidance from the Department of Citywide Administrative Services as to respondent's pay status, respondent was restored to payroll at the end of September 2017 and began receiving paychecks again in October for the period beginning on September 1 (Tr. 78-79, 110-11). Two of the direct deposit paychecks for September were for incorrect amounts. In order to remedy this issue, DCP had to pull back the deposits and, several days later, make new deposits with the correct amounts (Tr. 35-36, 78-79).

Respondent returned to work on November 14, 2017. By this time, respondent had received the paychecks she was due from September 1 through November 2017 (Tr. 85), although her paycheck for the last two weeks of August had not been delivered and all of her leave balances had not yet been restored (Tr. 86, 94).

Respondent's Motion to Dismiss

As a preliminary matter, I note that a motion to dismiss made by respondent was denied at the commencement of trial. Respondent's counsel moved to dismiss six specifications based upon the lack of specificity, particularly as to dates of the alleged misconduct (Tr. 9). Several of the specifications included at least one date but also included the phrase "on multiple occasions" without any specific date reference. OATH rules provide that a charging petition should consist of a "short and plain statement of the matters to be adjudicated" with specifics as to "the date, time, and place of occurrence. 48 RCNY § 1-22.

It must be said that the charges in this case are neither short nor plain. Instead of pleading the facts of the incidents charged and referring to the rules which were violated, the six charges each allege violations of six different rules and then repeat by incorporation the facts of multiple incidents, resulting in some incidents being re-plead as many as five times. Charge III, alleging discourtesy, has no specific factual allegations whatever and simply incorporates by

reference the facts alleged in charges I and II. As pointed out by this tribunal in the past, such duplicative pleadings are confusing, particularly to unrepresented parties, and are not encouraged. *Dep't of Homeless Services v. Aigbedion*, OATH Index No. 2340/07 at 1 n.1 (Nov. 2, 2007). The references to insubordination on “more than one occasion” in charge I, specification 9, without any further date reference, as well as the reference to harassing behavior on “multiple occasions” in charge II, specification 2, with vague date references to November 2017 and after July 2018, provide more confusion than information as to what specifically is being alleged as misconduct.

Due to the deficient pleading, one minor act of discourtesy contained in petitioner’s proof cannot be sustained as misconduct. Specifically, in the closing by petitioner’s counsel, he contended that charge III should be sustained based upon a January 2018 e-mail sent by respondent to Mr. Kaufman, in which respondent referred to Mr. Kaufman as “Master” Kaufman (Pet. Ex. 38), which Mr. Kaufman noted was “highly insulting” and “inappropriate” (Tr. 401-02). However, charge III never alleges that the January 2018 e-mail was misconduct and, instead, indicates that the only discourteous actions by respondent are those specifically alleged in charges I and II. No misconduct can therefore be sustained based upon this e-mail.

The remainder of the charges here, when combined with the discovery provided prior to trial, were sufficient to place respondent upon adequate notice of the misconduct being alleged. *Dep't of Juvenile Justice v. Clements*, OATH Index No. 1198/06 at 2 n.11 (Apr. 24, 2006), *modified on penalty*, NYC Civ. Serv. Comm’n Item No. CD07-44-SA (Apr. 5, 2007); *Dep't of Correction v. Williams*, OATH Index No. 521/97 at 2-3 (Jan. 7, 1997). Furthermore, the appropriate remedy for poorly pleaded charges is more typically an order compelling an amended pleading, not dismissal.

The motion to dismiss was therefore denied since all of the specifications included at least one date and respondent was placed on adequate notice of specific incidents by the discovery provided by petitioner.

November 2017 Communications re: Pay Checks and Leave Balances

Charge I specification 1 alleges that communications from respondent to her supervisors, the human capital division, and upper management in November 2017 were insubordinate and

“harassing.” Charge II, specification 2 alleges that in November 2017 and on other occasions respondent’s “excessive questioning” and other behavior was “harassing.” As discussed below, these charges should be sustained.

Respondent’s confrontational e-mails began on November 6, 2017, when she wrote a lengthy e-mail to Mr. Kaufman, the chief operating officer, complaining that she was unable to return to work on this date. She also accused Ms. Cohen of not doing her job in better communicating with respondent, of having a “moral compass [which] is questionable,” of “purposefully” sending respondent incorrect information about the psychiatric appointments, of refusing to authorize direct deposit of respondent’s paychecks, and of losing one of respondent’s paychecks. She stated that, in her opinion, Ms. Cohen engaged in an “abuse of power,” was “unfit to perform her duties” and should be sent for a psychological fitness exam (Pet. Ex. 35).

Between November 14 and 21, 2017, respondent wrote 13 more e-mails to various staff members concerning her paychecks and her leave balances, most of which had a similar tone to the November 6 e-mail to Mr. Kaufman. On November 14, 2017, the day respondent returned to work, she e-mailed Ms. Guido at 7:55 a.m. asking for her leave balances (Pet. Ex. 1). Later that day, Ms. Cohen sent an e-mail to respondent stating that she would be paid retroactively for the period from August 16 to 30, 2017, with a list of her paychecks from August through November 2017 (Pet. Ex. 1).

Ms. Guido testified that, on November 14, she audited respondent’s pay and leave balances for the time she was absent from work from August to November 2017 (Tr. 34-35). Ms. Guido created the spreadsheet of respondent’s paychecks from August through November 2017 which was provided to respondent by Ms. Cohen.

By an e-mail sent at 8:08 a.m. on November 15, apparently in an effort to establish that Ms. Cohen gave respondent false information about the psychiatric appointments, respondent demanded that Ms. Cohen send her copies of the psychiatric examination notifications “in the same manner that you received it,” along with confirmation letter of her scheduled appointments. She accused Ms. Cohen of tampering with her bank accounts and causing “multiple credit issues” and making her bank “fed up” with her. She asked about reimbursement for bounced check fees and demanded the “exact dates” of the period for which the leave balances were restored (Pet. Ex. 2).

A few minutes later, respondent wrote again to Ms. Cohen asking that she “please ensure each pay period is reflected in separate paychecks and have them state explicitly for which pay period it covers” (Pet. Ex. 3). Ms. Cohen replied that morning, explaining that the copies of the psychiatric examination appointments could be picked up, providing respondent’s annual and sick leave balances, and noting that respondent’s one outstanding paycheck from August would be provided by check shortly (Pet. Ex. 3).

Respondent replied to this e-mail minutes later, making eight itemized demands for further documents concerning erroneous psychiatric appointments, more details on how the leave balances were calculated, the “exact dates” respondent was on FMLA leave, asking yet again about missing paychecks, and demanding “what about all of my check fees?” (Pet. Ex. 3).

The following day, November 16, 2017, respondent sent seven more e-mails on the check and leave issues. She first wrote to timekeeping staff again, complaining that she was forced to close her bank account due to “too much fraudulent activity,” apparently a reference to the deposit reversals (Pet. Ex. 3). She asked, “[H]ow will I be compensated for Dana [Cohen]?” Ms. Singh, the deputy director of human capital, replied stating she would review the issues and call respondent either later that day or the next at the latest. Respondent replied at 11:17 a.m., “Please just e-mail the responses. Thanks!”

An hour later, respondent wrote again to Citytime complaining that she had spent “all morning” on the telephone with a personnel representative who told her more payroll reversals were coming. She again complained that she owed “hundreds of dollars” which were “slated” to come out of her bank account. In the afternoon she wrote again that a DCP payroll staff member, Ms. Shaw, had been “kept out of the loop.” She then stated, “Dana, Tricia and Darling please verify for me what you done, asap” (Pet. Ex. 3). She then wrote yet another e-mail to Ms. Cohen, stating that she was “working on this bank issue all day and NOT MY WORK” and that she was “headed back” to the bank. She then e-mailed that she changed her mind and would be in late the next morning “taking care of this issue” (Pet. Ex. 3).

Apparently around the same time, respondent went to Ms. Guido’s office to ask her yet more questions about the paycheck issue. Ms. Guido testified that she had prepared a detailed spreadsheet of all of respondent’s paychecks showing all of the payroll adjustments, which had been e-mailed to respondent by Ms. Cohen. Respondent told Ms. Guido that she did not want to

review the spreadsheet but wanted to hear the information from Ms. Guido herself. As they spoke, Ms. Cohen was outside Ms. Guido's office using a paper shredder. Without warning, respondent slammed the door to Ms. Guido's office. This prompted Ms. Cohen to open the door and ask Ms. Guido if she was all right. According to Ms. Guido, respondent then "screamed" at Ms. Cohen (Tr. 59-60). Ultimately, Ms. Guido called another manager to come to her office to "diffuse" the situation and encourage respondent to leave (Tr. 62-63). Ms. Guido described this interaction in an e-mail she wrote the following day to Ms. Cohen (Tr. 63; Pet. Ex. 4).

Following the meeting with Ms. Guido, respondent wrote to Mr. Schmidt and Ms. Cohen, copying Mr. Kaufman and Ms. Kapur, the executive director of DCP, asking to let her know "if it is not ok for me to resolve this issue on citytime." She then wrote, "Dana Cohen please refrain from telling lies and accusing me of doing things I did not (slamming doors), I can accuse you of much more" (Pet. Ex. 3).

On November 17, 2017, respondent wrote a long e-mail to Mr. Kaufman, the chief operating officer, stating that she was upset that she had not been asked to attend Ms. Cohen's going-away party, that she had merely "closed" not slammed the door to Ms. Guido's office the day before because she "could not hear myself speak," and that she was "tired of being misunderstood." She asked why it was a problem for her to ask detailed questions about timekeeping and payroll issues and complained about the "slow response time" which was affecting her life (Pet. Ex. 4).

On November 21, 2017, respondent wrote yet another e-mail to Ms. Guido, copied again to Ms. Kapur, asking when her paychecks and leave balances would be restored. Later that day, Mr. Kaufman wrote respondent a stern e-mail instructing her to direct requests only to himself and Ms. Singh, Ms. Cohen's replacement as director of human capital, and to stop copying e-mails to Ms. Kapur or other upper management (Pet. Ex. 1).

On November 22, 2017, respondent was sent an e-mail by Ms. Singh with a detailed accounting of the leave and payroll issues respondent had been asking about (Pet. Ex. 5).

Mr. Kaufman testified that, on November 27, 2017, he and Ms. Singh tried to meet with respondent to discuss a formal written warning they were delivering to respondent concerning her "unprofessional communication" (Tr. 397-98). Respondent declined to meet with them but, at 3:32 p.m., she wrote to Mr. Kaufman complaining that he and Ms. Singh had "parked"

themselves at her desk and tried to prevent her from leaving for her therapy appointment (Pet. Ex. 37). In a reply e-mail, Mr. Kaufman attached a letter stating that respondent's "unprofessional communication" with DCP staff was discourteous, harassing, and insubordinate and constituted misconduct under DCP's Standards of Conduct. He wrote that a failure to follow DCP rules would result in further disciplinary action (Pet. Ex. 36).

In his testimony, Mr. Kaufman indicated that he found respondent's e-mails "combative" and "many times inappropriate" (Tr. 377). He also noted that respondent's insistence on copying the chair and executive director on her e-mails was disruptive and unnecessary (Tr. 391-92).

Ms. Guido estimated that she spent 80 per cent or some 10 to 15 hours per week in November 2017 dealing with respondent's questions and e-mails (Tr. 50). Ms. Guido admitted that it took the office two weeks to issue respondent's missing paycheck and fully restore her leave balances due to various problems with manually correcting respondent's Citytime and payroll records (Tr. 46). Ms. Guido characterized her interactions with respondent as "horrible" due to respondent's refusals to cooperate (Tr. 32).

In respondent's testimony, she stated that she did not intend to harass or annoy anyone by sending the November e-mails and did so because she was "completely frustrated" by the failure to address the paycheck and leave issues (Tr. 551), although she provided no details to explain exactly what caused her frustration.

The charges that respondent's communications with management and other staff in November 2017 was insubordinate and harassing should be sustained. Respondent's accusatory and berating e-mails in November 2017, and her interaction with Ms. Guido in which she slammed the door, were shown to violate various DCP rules, which prohibit "being uncivil or discourteous" or "engaging in conduct that negatively affects good order and discipline." DCP Standards of Conduct, rules 2(I) and 2(P). On the day of respondent's return, she was provided with a list of her paychecks and told that her leave balances would be restored within a matter of days. Respondent offered no details as to why, after obtaining this information on November 14, she proceeded to spend virtually all of her work hours barraging timekeeping and management staff with insulting, and demanding e-mails for the next two weeks. Indeed, it is fair to infer that respondent's e-mails were due, not to any need for new information, but to anger at her return to work being delayed by the psychiatric exam.

Based upon the e-mails and Ms. Guido's testimony, charge I, specification 1 and charge II, specification 2 should be sustained.

Other Insubordination

The remainder of charge I alleges that respondent disobeyed various orders from her supervisor to attend meetings, communicate with a new supervisor, return to her assigned workstation, and abide by a supervisor's denial of an overtime request. Most of these allegations failed to establish misconduct.

Charge I, specification 2 alleges that respondent disobeyed an order to attend two meetings on March 23, 2018. Ms. Smith testified that, on Friday, March 23, 2018, she scheduled a meeting with respondent by sending her an appointment via e-mail for 1:00 p.m. Ten minutes before 1:00, respondent replied that the meeting was "at lunch time" and asked that it be rescheduled to the following Monday. Ms. Smith then asked respondent at 12:52 p.m., "How about 2 or 2:30 before our Marisa Meet and Greet" (Tr. 127-28; Pet. Ex. 10). Ms. Smith was referring to a scheduled meeting that afternoon with the new chair of the agency, Ms. Lago, who was meeting with the transportation division at 3:30 (Tr. 129). Respondent did not reply to Ms. Smith's e-mail (Tr. 129).

Respondent denied missing any meeting on March 23, stating that the meeting with the executive director at 3:30 p.m. conflicted with the time she left her office for her occupational therapy appointment (Tr. 531).

In order to establish insubordination, petitioner must establish three elements: 1) that an order was communicated to respondent; 2) that the content of the order was unambiguous; and 3) that respondent willfully refused to obey the order. *Dep't of Environmental Protection v. Schnell*, OATH Index No. 2262/00 at 7 (Oct. 25, 2000). Here, petitioner's proof established that, by sending respondent an appointment to meet with her that afternoon, Ms. Smith, as respondent's supervisor, was directing her to meet at the appointment time or, if necessary, reply and arrange a different time. Ms. Smith reaffirmed that she wished for respondent to meet with her by replying and offering different times. Respondent's postponement of the meeting and her failure to reply to Ms. Smith's suggestions for a different time of 2:00 or 2:30 was insubordinate in that it ignored Ms. Smith's direction to meet with her that afternoon.

However, the proof that respondent was ordered to attend the 3:30 p.m. meeting with Ms. Lago, the agency head, was insufficient. Apparently the entire staff of the division was notified of this meeting through a calendar appointment, with no instructions as to whether or not attendance was mandatory. It was also undisputed that respondent had been given approval to leave at 3:30 p.m., in part to attend therapy appointments. Respondent's failure to appear at this meeting was not insubordinate. Therefore, charge I, specification 2 should be sustained in part and dismissed in part.

Charge I, specification 3 alleges that in April 2017 respondent disobeyed orders to report to Ms. Smith rather than to her old supervisor. Up until March 2018, respondent's supervisor had been Mr. Schmidt, the director of the DCP Transportation Division (Tr. 509). On March 29, 2018, Mr. Kaufman sent respondent an e-mail notifying her that her new supervisor was Ms. Smith. Respondent replied to this e-mail, indicating that this was "unacceptable." She also sent an e-mail stating that assigning her a new supervisor did not address the "on-going hostile work environment" she was forced to work in (Pet. Ex. 39).

Mr. Kaufman replied to respondent's e-mail the following day, confirming that Ms. Smith was her new supervisor and that Ms. Smith would not be reporting to Mr. Schmidt concerning respondent (Pet. Ex. 39).

Despite being informed that Ms. Smith was her supervisor on March 29, respondent sent an e-mail on April 4, 2018, to Mr. Schmidt, not to Ms. Smith, indicating that she was sick and unable to work (Pet. Ex. 9).

Respondent testified that when she sent the April 2 e-mail to Mr. Schmidt she did not have Ms. Smith's e-mail address and, since Mr. Schmidt arrived earlier, she thought it appropriate to notify him (Tr. 574).

The proof of insubordination was insufficient for this charge. While it was clear that respondent was given an order to report to Ms. Smith, and not Mr. Schmidt, she was not prohibited from e-mailing Mr. Schmidt. Respondent's testimony that, when she was at home and notifying her supervisors that she was sick, she was uncertain of Ms. Smith's e-mail address and therefore sent an e-mail from her personal e-mail account addressed to Mr. Schmidt whose e-mail she remembered, was credible. This charge should also be dismissed.

Charge I, specification 7 alleges that respondent moved her seat without permission. This charge rests upon e-mails between respondent and Ms. Smith. On April 26, 2018, while on her way to work, Ms. Smith received an e-mail from respondent stating that the computer was being repaired, that she was sitting at another workstation, and stating she “will remain there” if it was all right with Ms. Smith. Ms. Smith replied, “No problem, thanks for letting me know” (Pet. Ex. 13).

The following day, Ms. Smith was out of the office and was told by Mr. Schmidt that respondent was moving all of her belongings to the new workstation. Ms. Smith sent respondent an e-mail telling her that the new workstation was “temporary” and that respondent must return to her original seat when her computer was repaired. Respondent replied stating that Ms. Smith had “offered” her a seating change in March and asked what was making Ms. Smith “renege” this offer. Ms. Smith replied directing respondent to return to her “original seat,” stating they could discuss it later, and indicating that seat changes had to be approved by operations. Respondent replied to this e-mail, copying Mr. Kaufman stating she was “really not clear.” Ms. Smith replied again, telling respondent to return to her original seat and that she should consider the matter “closed.”

Some two hours later, respondent sent yet another e-mail stating that she was not “clear” as to why she could not remain at the new desk and asking that the “criteria” for seat assignments be provided “so that I may share agency wide” (Pet. Ex. 13). Ms. Smith replied to this e-mail observing that “too much time” had been spent on the move issue and that respondent must obey her orders.

Respondent testified that, prior to April 7, she had repeatedly requested to move to another location. She also stated that she never intended to permanently move to another workstation and understood that the different work location was only temporary (Tr. 532-34), testimony directly contradictory to the e-mails she wrote to Ms. Smith.

Respondent’s repeated e-mails to Ms. Smith on the seat change, sent after Ms. Smith had told respondent to return to her assigned location and even after Ms. Smith told respondent the issue was “closed,” were deliberately disrespectful and insubordinate. Respondent’s statements that she was “unclear” about Ms. Smith’s order that she return to her assigned workstation was clearly untrue and her suggestion that she would broadcast the seat assignment criteria “agency

wide” was a sarcastic challenge to Ms. Smith’s and Mr. Kaufman’s authority. This charge should be sustained.

Harassing Behavior

Charge II alleges that respondent engaged in harassing communications with her supervisors. Specification 1 alleges that respondent used “threatening and intimidating language” in communications about Ms. Cohen, the former director of human capital. As noted above, on November 7, 2017, respondent sent an e-mail stating that Ms. Cohen was not doing her job, had a “moral compass [which] is questionable,” “purposefully” sent respondent incorrect information about the psychiatric appointments, refused to authorize direct deposit of respondent’s paychecks, and lost one of respondent’s paychecks. Respondent stated that Ms. Cohen engaged in an “abuse of power,” was “unfit to perform her duties” and should be sent for a psychological fitness exam (Pet. Ex. 35).

After Ms. Cohen left DCP in November 2017, respondent continued to write e-mails about her. On April 19, 2018, in reply to an earlier e-mail regarding an upcoming union meeting, respondent sent an e-mail to the human capital staff asking why “Dana Bennewitz aka Dana Cohen” was on the union meeting e-mail, whether Ms. Cohen was a consultant, and whether DCP was “currently sharing my information with her.”

Ms. Stanley, the director of human capital, replied to this e-mail stating that respondent should take up any questions as to the mailing with the union. Respondent replied to this e-mail, again asking to know if “Dana Bennewitz Cohen” had access to her personnel information. Ms. Stanley then replied, stating that Dana Bennewitz was a different person than Dana Cohen and later wrote that neither Ms. Bennewitz nor Ms. Cohen had access to DCP systems (Pet. Ex. 28). Ms. Stanley considered the e-mail exchange “confusing” and “more than was reasonable and necessary” (Tr. 298).

Respondent offered no explanation as to why she believed, or had any formation to support, her accusation that the individual on the April 2018 e-mail was Dana Cohen.

Respondent’s accusations that Ms. Cohen was immoral, that she deliberately denied respondent pay, and that she was “unfit,” were harassing and in violation of the DCP Standards of Conduct, rule 2(B), prohibiting harassing behavior. Her suggestions that another individual

who shared the same first name must be Ms. Cohen and her demand to know whether this person had access to respondent's personnel files was also unreasonable, discourteous, and also in violation of DCP rules. This charge should be sustained.

Job Performance

Charge I, specifications 4, 5, and 6, and charge V, specifications 1, 2, and 3 allege that, from February through June 2018 respondent failed to complete assignments as directed by her supervisor and that these failures constituted incompetence under DCP rules.

The primary evidence in support of these allegations was the testimony of Ms. Smith, respondent's assigned supervisor as of March 2018. Much of Ms. Smith's testimony was corroborated by a detailed log of her communications with respondent, beginning on March 22, 2018 (Pet. Ex. 7).

Ms. Smith testified that she has worked for DCP since 2007. In March 2018, she was promoted to the position of deputy director of the DCP Transportation Division, working under Director Schmidt (Tr. 116-18). At around the same time, due to conflicts between Mr. Schmidt and respondent, Ms. Smith was assigned to act as respondent's supervisor (Tr. 119). According to Mr. Kaufman, this arrangement was explained to respondent in an e-mail sent by Mr. Kaufman on March 29, 2018 (Pet. Ex. 8). In supervising respondent, it was decided that Ms. Smith would report not to Mr. Schmidt but to Mr. Schmidt's supervisor, Mr. Slatkin (Pet. Ex. 9; Kaufman: Tr. 409). Respondent replied to Mr. Kaufman's March 29 e-mail stating that the supervision by Ms. Smith was "not an acceptable solution to me" (Pet. Ex. 8).

Ms. Smith indicated that she was told by Mr. Schmidt that, from late 2017 to early 2018, respondent had been assigned to complete a report on the best international practices on the urban uses of electronic vehicles (Tr. 126). On March 26, 2018, at Ms. Smith's request, respondent sent Ms. Smith the draft of an electronic vehicles report. Ms. Smith noted that this draft was the same document which respondent had submitted in December or January to Mr. Schmidt, with Mr. Schmidt's comments on it and no subsequent edits by respondent (Tr. 131; Pet. Ex. 7). When Ms. Smith met with respondent later on March 26 to discuss the draft, Ms. Smith asked respondent for an updated version. Respondent promised to give her a version that would "look nice" later in the day. Respondent then supplied an edited version which looked

like a series of copy and pastes from unattributed internet sources. This was confirmed when Ms. Smith put the draft into a plagiarism editor and found that all of the language was copied from various websites, including, inexplicably, an art history website, and reproduced with various font sizes and colors (Tr. 131-32). Ms. Smith observed that the draft was “not even remotely” work that she found to be acceptable (Tr. 132).

According to Ms. Smith’s log, she e-mailed respondent on April 6 directing her to edit the report draft by adding a summary “using her own words.” Ms. Smith repeated these instructions in a meeting with respondent on April 9 and gave respondent a deadline of April 13 for a “final version” (Tr. 133; Pet. Ex. 7). Ms. Smith scheduled another meeting with respondent on April 12, before which respondent should submit a “page or two” of the edited report for review. Respondent submitted nothing and, at the meeting, Ms. Smith again told respondent that the report needed “fewer copies and pastes and more of her own words” (Tr. 135). Since she realized that respondent would not be able to meet the April 13 deadline, Ms. Smith extended the deadline for the final draft for a week to April 20 and requested submission of additional revisions by April 13 (Tr. 136). Ms. Smith directed respondent to focus on “thinking on how to apply the international best practices [on electronic vehicles] to NYC planning and thought” (Pet. Ex. 7).

On April 17, having received nothing from respondent, Ms. Smith requested a new draft. Respondent submitted a “partial rewrite” via e-mail, consisting of approximately three paragraphs of text concluding that many countries are “achieving short-term goals” regarding electronic vehicles and indicating that best practices would be “voluntary global agreements” as to standards (Pet. Ex. 11). Ms. Smith noted in her log that these paragraphs were “topically insufficient and largely lifted from other sources.” Upon receiving the paragraphs, Ms. Smith sent an e-mail requesting the full draft of the report so that Ms. Smith could provide further comments and respondent could then finish the project by Friday, April 20 (Pet. Ex. 11). Respondent replied that past deadlines had not been met due to the “overwhelming” stress in the division and promised to send the document when it was completed. In an e-mail sent later that day, respondent promised to submit the “original research assignment with your suggestions” by Friday, April 20. In reply, Ms. Smith again directed respondent to submit a copy of the report by the next day (Pet. Ex. 11).

On April 18, respondent sent Ms. Smith a new copy of the report, which was unchanged from the earlier draft except for one paragraph. On April 19, Ms. Smith again met with respondent to discuss the report. Ms. Smith told respondent the report was not in final form and still included primarily text from other sources, some of which were not properly attributed. Ms. Smith asked again that the discussion focus on “actual worldwide best practices” and not on charging voltages and consumer advice for buying an electric car. Respondent told Ms. Smith that she felt that the current work environment was “stressful,” that she felt excluded from others in the agency, and that other employees have had friction with Mr. Schmidt. Respondent promised to provide a final draft of the report the following day (Pet. Ex. 7).

Respondent failed to submit anything on April 20. On the morning of April 23, Ms. Smith sent respondent an e-mail directing her to send the report immediately. Respondent replied she would submit it “at end of today.” Ms. Smith sent respondent two more e-mails directing her to submit the report that morning. Ms. Smith spoke with respondent around noon and asked again for the report; respondent refused to send it until the end of the day and Ms. Smith stated that was unacceptable. Ms. Smith then met with respondent, told her that she would no longer be working on the electric vehicle assignment, and gave respondent a new research assignment on rapid delivery.

At around 3:35 p.m., having received nothing from respondent, Ms. Smith sent respondent an e-mail indicating that she was “closing out” respondent’s responsibilities for the electronic vehicle project and would be giving her a new assignment. At the end of the day on April 23, Ms. Smith spoke to respondent at her desk. Respondent denied that she ever agreed to send the report by the end of the day. As Ms. Smith was speaking, respondent turned and walked away (Tr. 146; Pet. Ex. 7).

Respondent sent an e-mail the next day, telling Ms. Smith she should simply use the draft respondent had submitted the week before (Pet. Ex. 12).

Respondent’s new assignment concerned research on rapid delivery involving courier services and deliveries to private residences. When Ms. Smith initially met with respondent, she gave her a written set of instructions with details as to the scope and contents of the report, the need for a draft outline, and a schedule indicating that the final report would be due on May 28, 2018, with outlines and drafts due each week prior to that. After each draft was submitted, a

meeting with Ms. Smith and respondent would be held to discuss the progress of the project and provide feedback on the latest draft.

The first deadline for the rapid delivery project was to provide a “draft outline” by April 30, 2018. Ms. Smith indicated that she wanted the outline to include bullet points of the topics and questions to be addressed in the report (Tr. 160). Respondent provided an outline by April that Ms. Smith was “satisfied with” (Tr. 161). The next deadline was to provide a “final outline” by May 7, with a meeting with Ms. Smith at 10:30 a.m. on May 8. Ms. Smith received nothing on May 7. On May 8 at 10:23 a.m., respondent asked to reschedule the meeting. Ms. Smith wrote an e-mail agreeing to reschedule but indicated that respondent must provide a final outline by the end of the day, that she was “disappointed” that respondent was missing the deadlines agreed to, and that she needed more advance notice for future schedule changes (Pet. Ex. 15).

Ms. Smith received nothing from respondent on May 8. On May 9, she held a meeting with respondent and asked her whether she was “performing well.” Respondent admitted that she was not performing well due to being “stressed out” (Tr. 164). Ms. Smith observed that, at around this time, respondent was “very often” at the front desk talking with other employees (Tr. 165).

Other than the rapid delivery project, respondent’s only other assignment at this time was three hours per week at the zoning help desk (Tr. 165).

On May 14, respondent submitted the “working draft” of her report, consisting of six single spaced pages of text with headings roughly following the original draft outline headings suggested in Ms. Smith’s original instructions (Pet. Ex. 16). Ms. Smith observed that the first few paragraphs were “strong” and “impressed” her. The remainder of the text, however, consisted only of headings, bullet points, and quotes, an outline rather than a draft of a complete report (Tr. 167).

The final draft of the report was due on May 21. Ms. Smith received nothing that day, but, on the morning of May 22, respondent, indicating that she was “in the thick of it,” submitted a new draft (Pet. Ex. 17). Ms. Smith performed a word count of the new draft and found that only 420 additional words had been added since the week before, observing that this might be “what you would produce in a day” (Tr. 170). Ms. Smith regarded this draft as “not even remotely” satisfactory since much of the text was still in the form of bullet points (Tr. 171; Pet.

Ex. 7). Later that day Ms. Smith called respondent into her office and told her that she was “extremely unsatisfied” with her lack of communication and her lack of respect (Pet. Ex. 7).

The final report was due on May 28. Again respondent submitted no report on this day and did not communicate with Ms. Smith. On May 30, respondent sent Ms. Smith another copy of the report with no substantive changes and many bullet points rather than full sentences. Ms. Smith met with respondent and told her that her submission was not a “satisfactory completion” of the assignment and that they would therefore “move on” to a new assignment (Tr. 184; Pet. Ex. 7).

The third assignment Ms. Smith gave respondent on May 30 involved the creation of PowerPoint slides of “commercial loading berths” for a research study. Again Ms. Smith provided respondent with a sheet of written instructions indicating that she was to prepare 30 slides with images of loading berths and accompanying address, zoning, and location statistics. The final slides were to be completed no later than June 19, with several interim deadlines to insure that the assignment was done on time (Pet. Ex. 20). Ms. Smith indicated that she would be out of the office from June 2 to 15 and that during that time respondent should e-mail Ms. Smith and two other planners. Ms. Smith felt that this assignment, while not all that “interesting,” would be very easy for respondent to complete (Tr. 183-84).

The first deadline for the assignment was to provide a “template” with a sample building, zoning district designation, and data sources by the following day, May 31. Respondent submitted nothing by this deadline. Observing that respondent was talking at the front desk all morning, Ms. Smith e-mailed respondent twice asking for the template by the end of the day (Tr. 187; Pet. Ex. 21). Instead of the loading dock template Ms. Smith requested, respondent sent the generic DCP PowerPoint slide with no actual content (Tr. 189-90). In an e-mail, respondent complained to Ms. Smith about her “micro-management style” which was “aggressive” and “not conducive to my work flow.” She asked that she be permitted to work “without your distractions” (Pet. Ex. 21). Ms. Smith replied indicating that the template provided was not what she requested, that the multiple deadlines given to respondent were due to her past inability to complete work on time, and that, since Ms. Smith would be out of the office for two weeks, respondent would have the opportunity to “turn things around” (Pet. Ex. 21).

Pursuant to the assignment schedule, respondent was directed to produce 15 slides by June 8 and all 30 slides by June 14. Respondent was then to set up a meeting with Ms. Smith to review the slides. Ms. Smith was told by e-mail and texts from two co-workers that, while Ms. Smith was away during the first two weeks in June 2018, they saw respondent “hanging out” at the reception desk on the 30th floor (Tr. 192; Pet. Ex. 27).

Ms. Smith returned to the office on June 18 and received an e-mail from respondent that morning with only six slides. Respondent produced nothing further by the following day, June 19, the date of the confrontation between Ms. Smith and respondent that resulted in respondent’s suspension.

Respondent did not dispute any of the facts testified to and documented by Ms. Smith concerning her work assignments in 2018. Respondent stated that her working relationship with Ms. Smith was “not a pleasant one” because of Ms. Smith’s micromanagement and standing near her desk, which created a “hostile and harassing” working environment (Tr. 529, 531).¹

The charges as to respondent’s failure to complete her work assignments alleges incompetence, as well as insubordination. The DCP Standards of Conduct provides that incompetence is “the negligent performance of one’s duties.” DCP Standards of Conduct, rule 3(A). Incompetence under Civil Service Law section 75 has been defined as including the inability to perform one’s job as well as the persistent unwillingness or failure to do the work. *See Human Resources Admin. v. Hampton*, OATH Index No. 517/08 at 8-9 (Dec. 12, 2007) (eligibility specialist found to be incompetent for failing to complete job assignments of issuing checks and shredding files); *Employees Retirement System v. Myrick*, OATH Index No. 505/95 at 34 (Apr. 11, 1995) (employee found guilty of multiple charges of incompetence and insubordination); *Office of Management and Budget v. Perdum*, OATH Index No. 998/91 at 24 (June 17, 1991) (finding employee incompetent not because “he was incapable of performing his job [but] because he failed and neglected to do so”).

¹ Respondent had earlier filed a complaint with the State Division of Human Rights on November 13, 2017, alleging that she was discriminated against due to race and a disability from June to November 2017 (Pet. Ex. 41). Specifically, she wrote that she was told by security on November 6, 2017, that she was “terminated,” was forced to pick up her paychecks “in the street,” had paychecks lost in the mail, and paychecks withdrawn from her account. An amended similar complaint was filed on February 2, 2018 (Pet. Ex. 42). On August 6, 2018, the Division issued a determination dismissing respondent’s complaint on the grounds that there was insufficient evidence to support the claims of discrimination (Pet. Ex. 43).

The evidence here shows that respondent's deficient work performance fits the pattern of incompetence from these prior cases. Between March and June 2018, respondent was given three successive assignments and provided several weeks to complete each. Even though these constituted respondent's only assignments, none were completed. As to the electric vehicles report, respondent copied and pasted a few paragraphs found on the internet into a document sometime in early 2018. Mr. Schmidt noted in early March 2018 that he found respondent's work on his project unsatisfactory. When given some three weeks by Ms. Smith to edit and expand this information, respondent repeatedly submitted the same patchworked document and ultimately spent some three weeks writing one paragraph. When ordered repeatedly to submit the report by April 23, respondent ignored the deadline entirely and told Ms. Smith she could simply use the old drafts that Ms. Smith had noted were insufficient.

For the rapid delivery report, respondent did submit an outline on deadline. After two weeks, respondent wrote two paragraphs, which Ms. Smith noted were well done. However, the remainder of the report consisted of outline headings which Ms. Smith had given respondent as guidelines. During the following week, when respondent was directed to finalize the report, respondent apparently added some 400 words but left the draft with outline bullet points instead of full sentences and structured text. At this time, Ms. Smith observed that respondent was frequently chatting with other workers at the front desk and away from her own workstation.

For the final assignment, respondent was given approximately three weeks to deliver 30 PowerPoint slides with photos of loading berths. After that time, respondent completed only six slides yet, according to other workers who reported to Ms. Smith, respondent found time to frequently "hang out" at the front desk.

Respondent's complaints about her supervisors and the supposed "stress" at the job provided no excuse for her failure to complete her work. In her testimony, respondent did not elaborate on the supposed stress and, indeed, the evidence suggested that the only stress respondent faced was being given work assignments to complete by specific deadlines, something she was apparently unaccustomed to. Respondent's grievances against her supervisors seemed heavily embellished. She stated that she was denied ergonomic equipment but only mentioned an adjustment to her work lighting and it was unclear when, if ever, a formal request for this was ever made (Tr. 534).

Respondent's willful failure to complete any assignments from March to June 2018 constituted incompetence, in violation of DCP Standards of Conduct rules 2(A) and 3(A).

June 19, 2018 Call to 911

Three of the charges allege that respondent's interactions with Ms. Smith on June 19, 2018, culminating in respondent's call to 911, were insubordinate and harassing. Other charges allege that respondent insubordinately failed to appear at an August 2018 meeting and persisted in copying upper management on routine e-mails, after being told not to do so.

According to Ms. Smith, she returned from her vacation on June 18 and expected to see the 30 slides respondent had been assigned to create. On that day, respondent had completed only six slides. Ms. Smith and respondent were scheduled to meet at 9:30 a.m. on June 19, 2018, to discuss respondent's work on the slide project. At the meeting in Ms. Smith's office, Ms. Smith began to discuss with respondent the fact that the project was incomplete, despite respondent having given some three weeks to finish it (Tr. 197-99). As Ms. Smith was speaking, respondent turned and walked out of the office (Tr. 199). Admitting that she was "furious," Ms. Smith followed respondent back to her desk and told respondent that her departure from the office in the middle of a meeting was "unacceptable" (Tr. 200-01). Respondent sat down at her desk, put her hand out to signal Ms. Smith not to speak to her, and put in her earphones (Tr. 203-04). Ms. Smith told respondent that she was going to unplug her earphones. Respondent then plugged the earphones into her phone and, without touching respondent, Ms. Smith pulled the earphone plug out of the phone jack (Tr. 205-06, 271). According to Ms. Smith, respondent's earphones remained in her ears (Tr. 268). Ms. Smith then told respondent that she would send her an e-mail concerning the incident, which she immediately did (Tr. 206).

Ms. Smith sent respondent an e-mail (Pet. Ex. 24) at 9:50 a.m., writing that respondent had failed to complete the slides assignment, despite telling a supervisor that she was "up to date" in her work, and had been seen socializing when she should have been working. She wrote that respondent's refusal to speak with Ms. Smith and her failure to complete assignments were "highly unprofessional." She also wrote that she would approve only two of the 7.5 overtime hours which respondent had requested to volunteer at an after work event.

At 9:55 a.m., respondent replied to this e-mail (Pet. Ex. 23), stating that Ms. Smith had “chased” her down the hallway “screaming,” was “ripping and throwing” her personal items on her desk, and that this behavior was “intolerable.” She wrote that she owed Ms. Smith a few PowerPoint slides before the end of the day. Some six minutes later, Ms. Smith replied to this e-mail writing that she was “confused” by respondent’s e-mail about the incident, that she had never raised her voice, and only unplugged her earphones to prevent respondent from ignoring her (Pet. Ex. 23).

Ms. Smith attended a 10:00 a.m. meeting with a supervisor. A few minutes later respondent called 911 to report the incident and summon the police. According to the police report (Resp. Ex. G), the police officers were notified of the incident at 11:00 a.m.

When Ms. Smith came out of the meeting at 11:00 a.m., Ms. Smith observed several uniformed police officers in the office area. Respondent was in a conference room speaking with one of the officers (Tr. 211). Ms. Smith described the incident to one of the officers, admitting that she pulled the ear phone plug out but denying that she had pulled the earphones from respondent’s ears (Tr. 213).

DCP interviewed six staff members who were present on the date of the incident. Only one, Mr. Ma, indicated that he saw the exchange between respondent and Ms. Smith. He stated that the two were “kind of arguing” but he could not understand what was said. He indicated that, on a scale of 1 to 10, Ms. Smith was speaking at a volume of 2.5. The summary of these interviews was provided to respondent in an e-mail from Ms. Stanley, sent on August 6, 2018 (Pet. Ex. 31).

Respondent testified that the discussion with Ms. Smith began with the topic of the slides, which respondent indicated she planned to complete before the end of the day. Ms. Smith then told respondent that she would not approve the 7.5 hours of overtime because respondent’s work was “not up to standard.” Respondent was upset to hear this and told Ms. Smith she was excusing herself and then returned to her desk (Tr. 540). She went to her desk and put on her earphones. She “was selecting a station” when her head was “pulled back” (Tr. 540), apparently by her ear phone cord becoming “entangled” in her earrings (Tr. 578). She turned to see Ms. Smith behind her “screaming” at her that she would not approve the overtime and further that

respondent would not be “listening to any music today” (Tr. 540). According to respondent, Ms. Smith “nearly ripped [her] earring out” of her ear (Tr. 579).

When Ms. Smith left, respondent called her union representative and explained what happened. He advised her to call the police. Respondent explained that she called the police because she was “afraid” and had been frightened by Ms. Smith standing behind her and pulling out her earphones (Tr. 541).

There were a few other eyewitnesses to the incident, although they could provide few details of what occurred. According to Ms. Stanley, Mr. Solis, an intern who witnessed the incident, stated that Ms. Smith’s voice was not loud but was only 2.5 on a scale from 1 to 10 (Tr. 320). Mr. Prassas, another city planner, recalled being in the area when respondent and Ms. Smith had their interaction on June 19. He did not see what happened but later walked past respondent’s cubicle and saw a pair of earphones lying on the floor (Tr. 478-79).

Ms. Johnson, a clerical associate, testified that she is a co-worker of respondent’s and was at work on a different floor on June 19. She recalled that respondent called her and sounded “funny.” Ms. Johnson came to respondent’s floor and they went to the lunchroom, where respondent told her that she had a meeting with Ms. Smith and Ms. Smith was “acting kind of irate.” Respondent walked out of the meeting to her desk and put her earphones in her ears. Respondent said that Ms. Smith then “snatched” the earphones out of respondent’s ears. Respondent seemed “shocked” that this had happened and “didn’t look right” (Tr. 463-66). Ms. Johnson testified that she advised respondent to “call the police” because if someone had assaulted a supervisor they would likely call the police (Tr. 466).

Following the incident, respondent was suspended without pay for 30 days. When respondent returned to work in July, she was reassigned to an office in Brooklyn (Smith: Tr. 218).

There were only minor disputes as to what occurred between Ms. Smith and respondent on the day in question. Both Ms. Smith and respondent indicated that respondent abruptly left Ms. Smith’s office in the middle of a discussion of her work performance, that respondent went to her desk and put in her earphones, and Ms. Smith followed respondent and stopped her from using the earphones.

The only disputed fact was whether Ms. Smith unplugged respondent's earphones or pulled the earphones from respondent's ears. As to this fact, both witnesses had motives to lie – Ms. Smith to deny losing her temper and grabbing the earphones in anger because of respondent's insubordinate behavior and respondent to suggest that her call to 911 had, in fact, been motivated by violence from Ms. Smith. Of the two witnesses, Ms. Smith was the more credible. She admitted that she was “furious” at respondent for walking away from the meeting with her. Her testimony that she unplugged, rather than ripped off, respondent's earphones was corroborated by her e-mail (Pet. Ex. 23) sent a few minutes later, in which she stated that she unplugged the earphones from respondent's computer. Ms. Smith's testimony that she spoke to respondent in a stern but not overly loud tone was corroborated by the hearsay statement from one of the interns who indicated that Ms. Smith never shouted.

Respondent's testimony that Ms. Smith ripped the earphones from her ears and screamed at her was contradicted by absence of a single witness who heard anything that was said between the two. Further, respondent's testimony that Ms. Smith violently ripped her earphones from her ears seemed embellished in an effort to justify her spiteful action of calling 911.

Charge I, specification 9 alleges that respondent was insubordinate in walking out of Ms. Smith's office during a discussion of her job assignment and then refusing to speak further with Ms. Smith. Charge IV, specification 3 alleges that respondent's call to 911 was discourteous and caused unnecessary alarm to the DCP staff.

Both of these charges should be sustained. Respondent's abrupt departure from Ms. Smith's office while the two were in the middle of discussing respondent's work assignment was discourteous. Respondent's refusal to speak further with Ms. Smith, putting in her earphones and holding up her hand when Ms. Smith came to her desk, was insolent and deliberately insulting.

Most significantly, respondent's outrageous call to 911 after the encounter with Ms. Smith was egregious misconduct, in violation of an employee's basic obligation to be courteous and to avoid actions which “negatively affects good order and discipline.” DCP Standards of Conduct, rule 2(P).

Charge I, specification 9 and charge IV, specification 3 should be sustained.

Other Insubordination

The charges allege several other acts of insubordination which occurred in June and August 2018. Charge I, specification 8 alleges that respondent sought overtime without approval and “questioned” her supervisor’s authority when this request was denied on June 19, 2018. This charge refers to May 10, 2018, a date as to which no proof was offered. The charge also seems to relate to respondent’s volunteering for an event which occurred on June 14, 2018. The announcement indicated that volunteer time would be from 5:00 to 10:00 p.m. Ms. Smith replied to a May 31 e-mail from respondent, asking to attend the event, with the following message: “Hi Angela, thanks for asking. A couple of hours on the 14th is fine” (Pet. Ex. 19). After the June 14 event, respondent put in a request for 7.5 hours of overtime, for which she would receive compensation time.

Although Ms. Smith never testified to any verbal discussion about the overtime request, respondent stated that, on the morning of June 19 during a supervisory meeting, Ms. Smith told respondent that the 7.5 hours of overtime would be denied. Respondent indicated that this was one of the reasons she left Ms. Smith’s office (Tr. 540). Right after respondent walked out of Ms. Smith’s office and the earphone incident, Ms. Smith e-mailed respondent stating that she would approve a “couple” of hours of overtime and that respondent should submit the request again (Pet. Ex. 24).

Respondent contended that the overtime request was wrongly denied. Respondent explained that, since she has been at DCP, she has volunteered for many after hours events and received compensation time. She assumed that the approval from Ms. Smith was approval to work the entire event, which did not end until 10:00 p.m. She therefore put in for the five hours of the event as well as for her travel time to the Bronx and back, which totaled 7.5 hours (Tr. 536-37).

Ms. Canty, an administrative manager in the DCP Bronx office, testified that respondent reported to assist in a DCP event in the Bronx on June 14 and was there from around 4:15 p.m. until the event ended at 9:15 p.m. Ms. Canty stated that employees who volunteered for DCP events were expected to remain for the entire event and received compensation time for the event itself and for travel time to get home from the event. Ms. Canty herself received five hours of comp time for the event (Tr. 452-54).

The proof here indicated that respondent requested advance approval to volunteer at an after-work event and received compensation time for doing so. Respondent also presented credible proof, through Ms. Canty, that it was common for employees to remain at events for the duration and then receive compensation time, including travel time home. Even though Ms. Smith told respondent in the e-mail that respondent was approved for only a “couple” of hours, it was not misconduct for respondent to request an amount of overtime which was consistent with past practice and constituted volunteer work for the entire event. There was also no proof that, following the denial of the overtime request by Ms. Smith, respondent did or said anything insubordinate or inappropriate. The proof on charge I, specification 8 is insufficient and should be dismissed.

Charge I, specification 11 alleges that respondent failed to attend an informal conference on August 8, 2018, concerning the instant disciplinary charges. On July 13, 2018, respondent was mailed a letter notifying her of the disciplinary charges and scheduling an informal conference on the charges on August 8, 2018, at 2:00 p.m. at 22 Reade Street (Pet. Ex. 44). According to a notation on the letter, on July 25, 2018, respondent “refused to review and sign” for the letter. Respondent acknowledged receiving the letter upon her return from suspension (Tr. 569).

Respondent was also sent an e-mail by Ms. Stanley on July 25, 2018, reminding her of the August 8 conference (Pet. Ex. 45). In her testimony, respondent also acknowledged receiving this e-mail (Tr. 569). Respondent admitted that she did not appear for the August 8 conference and offered no excuse for this non-appearance (Tr. 570-71).

Respondent’s unexcused failure to appear at the August 8 conference, without offering an excuse, was insubordinate and this charge should be sustained.

Charge I, specification 1 alleges that respondent “continued to inappropriately refer human resources-related issues” to upper management after being told not to do so. As noted above, on November 21, 2017, after respondent copied Ms. Kapur, the executive director, on an e-mail concerning her pay and leave, Mr. Kaufman instructed her to stop the practice of sending e-mails to upper management about routine timekeeping matters (Pet. Ex. 1). On August 7, 2018, respondent sent an e-mail regarding to a routine daily assignment to her supervisor, copying Ms. Kapur. When the supervisor admonished respondent for copying Ms. Kapur,

stating that she had been directed several times not to do so, respondent replied that Ms. Kapur had once given a general directive about the assignment in question.

Respondent's persistent copying of Ms. Kapur on e-mails involving her daily work assignment, after being repeatedly told not to do so, was insubordinate and this portion of charge I, specification 1 should also be sustained.

In sum, 14 of the specifications should be sustained and 2 dismissed, as indicated above.

FINDINGS AND CONCLUSIONS

1. Charge I, specification 1 and charge II, specification 2 should be sustained in that, in November 2017, respondent sent some 13 e-mails to other agency personnel concerning her pay and leave which were insubordinate and harassing and also sent e-mails on routine matters to upper management, in violation of DCP Standards of Conduct, rules 2(A), 2(B), 2(I) and 2(P).
2. Charge I, specification 2 should be sustained in part in that, on March 23, 2018, respondent's supervisor ordered her to meet with her and respondent failed to do so, in violation of DCP Standards of Conduct, rules 2(A) and 2(P). The remainder of specification 2 should be dismissed.
3. Charge I, specification 3 should be dismissed in that petitioner failed to prove that respondent's e-mails to her old supervisor were misconduct.
4. Charge I, specification 7 should be sustained in that, on April 27, 2018, respondent's supervisor ordered respondent to return to her workstation and she refused, writing multiple e-mails inaccurately stating that she did not understand the order, in violation of DCP Standards of Conduct, rules 2(A) and 2(P).
5. Charge I, specification 8 should be dismissed in that petitioner failed to prove that respondent's request for overtime for a June 14, 2018 event was misconduct.
6. Charge I, specification 9 should be sustained in that, on June 19, 2018, respondent walked out of her supervisor's office in the middle of a meeting and refused to speak with her, in violation of DCP Standards of Conduct, rules 2(A), 2(I), and 2(P).

7. Charge I, specification 11 should be sustained in that, on August 8, 2018, respondent failed to attend a meeting she had been ordered to attend, in violation of DCP Standards of Conduct, rules 2(A) and 2(P).
8. Charge II, specification 1 should be sustained in that, in November 2017 and in April 2018, respondent sent e-mails accusing a supervisor of being immoral and unfit, in violation of DCP Standards of Conduct, rules 2(B), 2(I) and 2(P).
9. Charge IV, specification 3 should be sustained in that, on June 19, 2018, after a dispute with her supervisor, respondent called 911 and unjustifiably summoned the police, in violation of DCP Standards of Conduct, rules 2(B), 2(I) and 2(P).
10. Charge I, specification 4 and charge V, specification 1 should be sustained in that, in March 2018, respondent willfully failed to complete a report on electric vehicles, in violation of DCP Standards of Conduct, rules 2(A) and 3(A).
11. Charge I, specification 5 and charge IV, specification 2 should be sustained in that, in April 2018, respondent willfully failed to complete a report on rapid delivery, in violation of DCP Standards of Conduct, rules 2(A) and 3(A).
12. Charge I, specification 6 and charge V, specification 3 should be sustained in that, in April 2018, respondent willfully failed to complete an assignment to create 30 PowerPoint slides, in violation of DCP Standards of Conduct, rules 2(A) and 3(A).

RECOMMENDATION

Upon making the above findings, I requested and received further personnel information about respondent in order to make a penalty recommendation. Respondent has been employed by DCP since November 2001. She has no disciplinary record. Respondent's 17 years of service provide some grounds for mitigation of the penalty here.

Only three evaluations were provided for respondent. In 2013, she was rated as "very good," with Mr. Schmidt writing that respondent was a "very good employee" but noting that respondent could be contributing more in the research area. In 2014, Mr. Schmidt rated respondent as "good" and stated that she was reliable, enthusiastic, and maintained a high level of quality in her work. In 2017, respondent was rated as "unsatisfactory," although, as

mentioned above, this evaluation was later retracted due to the limited time respondent worked during the previous year.

There is little question that some of the misconduct displayed in this case is extensive and egregious. Respondent's emergency call to 911 after the disagreement with Ms. Smith in June 2018 was spiteful and inexcusable. Even had respondent's exaggerated account of the incident been fully credited, she offered no justification for considering Ms. Smith's tugging on her earphones as an emergency requiring police intervention. The testimony of Mr. Kaufman and Ms. Stanley made it apparent that the arrival of the police paralyzed the office for the afternoon, requiring that various staff be interviewed while other staff watched. Astonishingly, respondent displayed no regrets over having made the 911 call, apparently continuing to regard it as justifiable.

Likewise, respondent's failure, over the course of three months, to complete any of the work assigned to her, despite being given ample time to do so, was serious misconduct. Even assuming that, based upon the abstract description provided by Ms. Smith, the electric vehicle assignment may have been challenging, the record made it clear that, over the course of four months, respondent made little effort to complete it. She seemed to have copied and pasted together text from an array of websites and then ignored the very specific editing directions from Ms. Smith to use this information to fashion a research report. She then failed to meet the reasonable deadlines given to her on the next two assignments. The fact that, at this time, respondent was observed chatting with staff members at the reception desk strongly suggests that respondent's failure to complete the assignments was more willful than negligent.

In November 2017, the proof established that respondent spent virtually the entire month battling with timekeeping staff about her leave and paycheck issues. Further, rather than waiting for her issues to be addressed, she peppered staff with hourly e-mails of complaint, occasionally copying upper management. She insisted on escalating her grievances by copying upper management on her e-mails, despite being told not to do so. These actions, too, were discourteous, insubordinate and disruptive.

I also must reject the argument of respondent's counsel that the unfitness proceedings begun in August 2017 against respondent somehow mitigate her misconduct. It may be true that the decision to initiate section 72 proceedings while respondent was on FMLA leave was ill

advised. It also seems that there were several miscommunications and resultant delays in properly scheduling and notifying respondent of her mandatory fitness examination. None of these incidents, however, excuses the hostile, disrespectful, and irresponsible actions taken by respondent over the course of the next eight months, culminating in her reckless call to 911 on June 19.

Respondent's misconduct in this case demands a severe penalty. Respondent's hostile and arrogant treatment of her co-workers, supervisors and staff members alike, demonstrates a warped and irresponsible attitude toward her job. This attitude is confirmed by the proof that respondent did virtually no productive work from February through June 2018. Respondent's insubordination and deplorable work performance strongly suggest that she will never be a satisfactory employee.

Past cases suggest that termination, as requested by petitioner, is the appropriate penalty for workers, like respondent, who display both incompetence and insubordination. *See Dep't of Buildings v. Lamitola*, OATH Index No. 871/12 (Mar. 5, 2012) (plans examiner terminated for repeatedly disobeying orders and other misconduct); *Health and Hospitals Corp. (Bellevue Hospital Ctr.) v. Tanvir*, OATH Index No. 797/10 at 9 (Dec. 17, 2009) (lab associated who refused assignments and was absent without authorization terminated); *Human Resources Admin. v. Agran*, OATH Index No. 515/07 at 9 (Jan. 26, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD07-81-A (July 27, 2007) (supervisor who "starkly refuses do any of the work for which she is being paid" terminated); *cf. Human Resources Admin. v. Hampton*, OATH Index No. 517/08 (Dec. 12, 2007) (supervisor who ignored orders from her supervisor, shirked her work assignments while she held personal telephone conversations, and was discourteous to clients demoted rather than terminated due to her 25 years of service).

Based upon respondent's misconduct and her incompetent work performance, I recommend that respondent be terminated.

John B. Spooner
Administrative Law Judge

January 7, 2019

SUBMITTED TO:

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Chair

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