Health & Hospitals Corp. (Harlem Hospital Ctr.) v. Stephens

OATH Index No. 2053/20 (Apr. 21, 2021), *adopted*, CEO Dec. (May 18, 2021), **appended**

Respondent, a laboratory supervisor, repeatedly refused or failed to perform assigned tasks, ignored orders to obtain approval for overtime and shift changes, did not include supervisors on emails as required, sent discourteous emails to supervisors, falsified timesheets, and was excessively late and absent from work. Termination of employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
HEALTH AND HOSPITALS CORPORATION (HARLEM HOSPITAL CENTER)
Petitioner
- against -
JOUY STEPHENS
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner, the Health and Hospitals Corporation, Harlem Medical Center, brought this disciplinary proceeding under section 7.5 of its Personnel Rules and Regulations, charging respondent, clinical laboratory technologist Jouy Stephens, with 85 acts of misconduct. The charges included: failing to attend scheduled meetings; refusing or failing to perform duties; sending discourteous or inappropriate emails; making false statements to a supervisor; failing to include supervisors on emails as instructed; working overtime and on holidays without required approval; falsifying timesheets; changing shifts without prior approval; removing her timesheet from a designated area without approval; being absent without leave ("AWOL") four times; being excessively late or absent from work; and failing to provide certificate of dispositions for two arrests (ALJ Ex. 2).

At a three-day trial, which ended on February 5, 2021, and was conducted remotely via Webex videoconference due to the COVID-19 pandemic, petitioner relied on documentary

evidence and the testimony of a former employee. Respondent testified in her own behalf, called two other witnesses, and offered documentary evidence.

For the reasons stated below, most of the charges should be sustained and respondent's employment terminated.

ANALYSIS

The charges arise from respondent's conduct as a Microbiology Supervisor in Harlem Hospital's Pathology Department from July 2018 to November 2019. At trial, petitioner relied primarily on contemporaneous documents, including emails to and from respondent; Dr. Helen Richards, Director of Pathology; Dr. Eskoban Ebose, Senior Associate Director of Pathology; and Maria Rienton, Assistant Director of Pathology (Tr. 81-82). Petitioner also presented testimony from Heeral Mody, a labor relations specialist, who investigated the allegations against respondent (Tr. 148-49, 152, 171).

Denying any wrongdoing, respondent offered inconsistent and incredible claims. For example, she denied knowing Dr. Ebose or Ms. Rienton and claimed that she knew nothing about most of the emails that petitioner presented (Tr. 94-95, 102, 107, 284, 379). Yet she also claimed that Dr. Ebose had harassed her, Ms. Rienton had a "fancy title" but was not her supervisor, and petitioner had "fired" Dr. Ebose and Ms. Rienton (Tr. 82, 85, 228-29, 364, 380; Pet. Exs. 2, 3, 24, 34).

Background

On June 11, 2020, a pre-trial conference scheduled for June 22 was adjourned to July 27, at the request of respondent's attorney, Jay Jaffe (ALJ Ex. 1). On July 24, this tribunal granted Mr. Jaffe's motion to withdraw as counsel due to a breakdown in communication with respondent (Tr. 4). After respondent phoned in during the July 27 conference and stated she would not be participating, trial was scheduled for September 9, 2020.

In August 2020, this tribunal sent an email to the parties reminding them of the trial date and advising respondent that she had a right to an attorney or other representative to assist her (ALJ Ex. 1). At 11:00 p.m. on September 8, respondent sent an email to this tribunal stating that she would not be attending trial the next day and requesting an adjournment (ALJ Ex. 1). Shortly before 9:00 a.m. the next day, I replied to respondent via email and told her to phone the

number that had been provided at the trial's scheduled start time, 9:30 a.m., to make her application (ALJ Ex. 1; Tr. 5-6). When respondent failed to call in, I phoned her and, after a brief conversation, she hung up (Tr. 7). I called back and left a message on respondent's voicemail, explaining that if she failed to call in the trial could go forward in her absence (Tr. 9). Petitioner's counsel objected to any further delay and noted that she had two witnesses who were prepared to testify (Tr. 10-11). I adjourned the matter to the afternoon, to give respondent more time to call back (Tr. 10-12).

Shortly after noon, respondent called and asked to postpone trial until the pandemic was over because she was having difficulty obtaining an attorney (Tr. 411-12, 417). Respondent said that she had no prior contact with this tribunal, her union, or Mr. Jaffe. She claimed that she only found out the prior day that Mr. Jaffe was no longer her attorney (Tr. 411-14, 417). A representative from respondent's union was on the Webex call and she disputed respondent's claims (Tr. 422). Over petitioner's objection, I adjourned trial to December 9, 2020 (Tr. 24-26; ALJ Ex. 1). Respondent, who had hung up during the call, was advised via email to act promptly to obtain counsel and cautioned that if she failed to appear on December 9, the trial would go forward in her absence (ALJ Ex. 1).

On December 7, 2020, via email, respondent requested another adjournment to obtain counsel (ALJ Ex. 1). Petitioner opposed respondent's request (ALJ Ex. 1; Tr. 26). I advised respondent to appear on December 9 to discuss her application (ALJ Ex. 1).

On December 9, 2020, respondent renewed her request for an adjournment and said that a local elected official was assisting her to obtain counsel, who would be available in January 2021 (Tr. 23, 29-31, 69). I noted that respondent's previous attorney, Mr. Jaffe, was relieved six weeks before the first trial date, respondent waited until the eve of trial to request an adjournment, and the matter had been adjourned three months over petitioner's objection for respondent to obtain new counsel (Tr. 23-25). Respondent insisted that she did not know who Mr. Jaffe was, she had no contact with him, and that her union never communicated with her about obtaining an attorney (Tr. 27, 33-34, 41-43). Though respondent acknowledged that she contacted this tribunal in July, she also claimed that she had not received any emails from petitioner or this tribunal (Tr. 62). When respondent refused to provide her email address, I advised her that further correspondence would be sent to her work email (Tr. 64).

Petitioner opposed any further adjournment (Tr. 27). Respondent's former counsel and a representative from respondent's union disputed respondent's claims regarding the union's efforts to assist her and provided a copy of a text message exchange with respondent as well as correspondence that had been sent to respondent, via first-class, certified, and electronic mail (Tr. 33-34, 44-51, 49-50, 57-58; ALJ Ex. 1). Respondent claimed that she had no recollection of that communication (Tr. 67).

Based on the age of the case, respondent's delay in making her request, her refuted claim that her union and former attorney had made no effort to contact her, and the prior three-month adjournment for respondent to obtain new counsel, I denied her request for another adjournment (Tr. 69, 71). However, I advised the parties that after petitioner presented its evidence, trial would resume in January (Tr. 69, 71). After petitioner began introducing documents in evidence, respondent refused to participate and hung up (Tr. 72-74, 121-22).

Respondent failed to show good cause for a second adjournment. *See* 48 RCNY § 1-32(b) (requiring good cause for adjournment); *Rao v. Gunn*, 73 N.Y.2d 759, 761 (1988) (disciplinary matter may proceed where agency had a strong interest in resolving the charges and employee requested an indefinite adjournment); *Health & Hospitals Corp. (Kings Co. Hospital Ctr.) v. Kahn*, OATH Index No. 1051/15 at 2 (July 15, 2015) (noting that "last-minute adjournment requests are disfavored" and "subject to the most rigorous scrutiny"). And respondent suffered no prejudice by the denial of a second adjournment. On December 9, 2020, petitioner offered documents in evidence. On December 28, new counsel appeared pro bono on her behalf and received a three-week continuance, over petitioner's objection, to review the evidence and prepare respondent's defense (ALJ Ex. 1; Tr. 148).

When trial resumed on January 25, 2021, petitioner called Ms. Mody, a former employee, as witness. Ms. Mody recalled that she worked for petitioner as a labor relations specialist and she investigated the allegations against respondent (Tr. 153-54, 174, 193). Ms. Mody also investigated multiple claims that respondent had made against Dr. Ebose, including allegations of verbal harassment, and was unable to substantiate any of them (Tr. 173). According to Ms. Mody, she never received complaints about Dr. Ebose from any other employee and, contrary to respondent's claims, petitioner did not "fire" him; he retired (Tr. 82, 171, 195, 197-98).

Though Ms. Mody testified credibly, she was not an eyewitness to the misconduct that was allegedly committed by respondent (Tr. 177, 203). To prove the specific charges, petitioner presented voluminous, contemporaneous documents.

Respondent objected to petitioner's reliance on documents. Hearsay is admissible in administrative proceedings and may form the sole basis for findings of fact. *See Police Dep't v. Ayala*, OATH Index No. 401/88 (Aug. 11, 1989), *aff'd sub nom. Ayala v. Ward*, 170 A.D.2d 235 (1st Dep't 1991); *Gray v. Adduci*, 73 N.Y.2d 741 (1988); *Health & Hospitals Corp. (Kings Co. Hospital Ctr.) v. Hutchinson*, OATH Index No. 1937/12 at 5-6 (Sept. 28, 2012). Relevant considerations include the level of detail, corroboration, the burden of production, and the declarant's identity, availability, personal knowledge, and independence or bias. *See Dep't of Environmental Protection v. Barnwell*, OATH Index No. 177/07 at 7-8 (Sept. 18, 2006).

Here, most of the allegations were based on complaints from Dr. Ebose and Ms. Rienton. Dr. Ebose was prepared to testify and called in, via Webex, on the first day of trial, before it was adjourned; however, neither he nor Ms. Rienton worked for petitioner by the time trial resumed in January 2021 (Tr. 197-98). Petitioner did not show what efforts it made to contact those former employees, but that is not dispositive. The detailed documentary evidence was prepared at the time of the alleged misconduct and in many instances was corroborated by respondent's own emails.

Though respondent suggested that emails attributed to her were fraudulent, she offered no credible evidence to support that claim and she acknowledged that her emails were protected by a password that she had not shared with anyone (Tr. 366-67). Indeed, respondent's trial testimony belied her claims that she knew nothing about the contents of emails and other documents. Thus, except where noted, I found petitioner's documentary evidence to be reliable.

The specific allegations are addressed below.

Neglect of duties[1]

Petitioner alleges that respondent neglected her duties by failing to attend meetings, provide data, and perform tasks. To prevail, petitioner needed to show that respondent had an obligation to perform a task, she was aware of that duty, and she failed to perform it. *See Branam v. Simons*, 300 A.D.2d 973 (3d Dep't 2002) (misconduct found where 911 dispatcher negligently sent emergency personnel to wrong address). Neglect of duty is more than an error in judgment. *See Dep't of Sanitation v. Richards*, OATH Index No. 529/06 at 3 (Feb. 3, 2006) (minor error, corrected during supervision, is not misconduct). Here, the evidence showed that respondent neglected numerous tasks that were assigned to her.

Petitioner alleges that respondent failed to provide information to the "Cerner Team" on July 9, 2018, did not work collaboratively on September 21, 2018, and failed to attend meetings with the Cerner Team on six occasions: July 9, July 10, August 24, September 7, September 21, and December 4, 2018 (ALJ Ex. 2, specifications 1, 2, 3, 11, 12, 13, 14, 45). Respondent testified that the Cerner Team included outside consultants who were assisting laboratories with software (Tr. 277). Though respondent met with the Cerner Team on other occasions and had a good rapport with them, she insisted that she was not notified about the specific meetings at issue (Tr. 239, 277-78, 368). These charges should be sustained, in part.

On June 29, 2018, Dr. Ebose sent an email, labeled "high importance," to respondent regarding meetings with the Cerner Team on July 9 and 10, 2018 (Pet. Ex. 26). Despite that clear directive, the evidence showed that respondent failed to provide information to the Cerner Team and failed to attend meetings on July 9 or 10.

On July 10, 2018, Dr. Ebose sent an email to respondent stating, "Yesterday [July 9], you were not available to the Cerner Team who is visiting all week for Microbiology data collection" (Pet. Ex. 26). He reported that he went to the laboratory at noon and again 30 minutes later, but "none of the microbiology staff knew your whereabouts" and that respondent "was unavailable to provide needed information to the Cerner Team" (Pet. Ex. 26). Dr. Ebose noted that

[1] The petition referred to specific acts that respondent committed or omitted, along with dates, and asserted "the foregoing" violated Rule 7.5 of its Rules and Regulations, its Code of Conduct, and other policies and procedures (ALJ Ex. 1). It would have been preferrable for each specification to cite to a specific section of each rule or procedure that was violated, but there was no undue prejudice because the petition and documentary evidence informed respondent of the alleged misconduct. *See Health & Hospitals Corp. v. Case*, OATH Index No. 595/95 (Apr. 6, 1995) (noting that better practice is to include specific rule violation, but no prejudice where discovery and petition provided respondent with adequate notice of the charges). Petitioner also provided a summary of Ms. Mody's investigation that identified the exhibits that corresponded to each specification (Pet. Ex. 59; Tr. 142).

respondent was also unavailable on July 10 (Pet. Ex. 26). Based on this evidence, petitioner proved specifications 1, 2, and 3, which allege that respondent failed to attend two meetings and did not provide information needed for those meetings.

The evidence regarding the remaining specifications is not as clear. In an email exchange beginning shortly after 4:00 p.m. on September 21, a Cerner representative notified Dr. Ebose, Ms. Rienton, and Director of Pathology Dr. Richards, that nobody from Microbiology attended meetings on August 24, September 7, or September 21 (Pet. Ex. 26). Dr. Ebose noted that respondent, the Microbiology Supervisor, was required to attend those meetings (Pet. Ex. 26). However, respondent replied via email, "I was never told about this" and it was her understanding that a co-worker, Dianne Davis, was involved with the project (Pet. Ex. 26). Dr. Ebose replied by referring to the June 29 email assigning her to this task and stating that Ms. Davis "took over when you failed to arrive or show up on several occasions" (Pet. Ex. 26).

Petitioner did not offer any document sent prior to September 21 to prove that respondent knew that meetings were scheduled for August 24, September 7, or September 21. Instead, petitioner introduced an email from September 24, which stated that the meetings had been set up since "late August" and respondent's name was on the invitation (Pet. Ex. 26). Notably, the emails also suggest that a co-worker, Ms. Davis, "took over" the task. There was no proof that respondent was told before September 24 that Ms. Davis was only temporarily re-assigned to this task. When respondent was notified on September 24 that she was still required to attend the meetings, she asked for data that had been collected and offered to help complete the project (Pet. Ex. 26). Because petitioner failed to provide a copy of the notice that was reportedly sent to respondent in "late August," it did not prove that respondent was aware of the dates of meetings that she missed in September or that she failed to work collaboratively, as alleged in specifications 11, 12, 13, and 14.

Specification 45 alleges that respondent also "failed to attend the scheduled microbiology meeting with the Cerner team" on December 4, 2018. The only evidence to prove the charge was a brief email sent from Ms. Rienton to respondent at 9:55 a.m. on December 4, marked "high" importance with "Cerner Meeting Today" in the subject line. In the body of the email, Ms. Rienton wrote, "Hi Jouy, Cerner people were looking for you today. I came to your lab and office and you are not there. Please come on time [to these] meetings" (Pet. Ex. 27). The email does not show that there was a scheduled meeting on December 4, what time the meeting was

scheduled for, whether respondent received prior notice of the meeting, or what she did after receiving Ms. Rienton's email. Thus, specification 45 should be dismissed because petitioner failed to prove that respondent was aware of the meeting or that she failed to attend it.

Specification 81 alleges that respondent failed to sign her timesheet when she arrived and left for work on September 22, 2019. This specification should be dismissed because it appears to have been an isolated, minor oversight and does not rise to the level of misconduct.

Insubordination

Petitioner alleges that respondent refused to perform assigned tasks on seven occasions (ALJ Ex. 2, specifications 15, 30, 36, 56, 69, 77, and 78). These specifications should be sustained, in part.

To prove insubordination, petitioner needed to show that a supervisor ordered respondent to perform a task and she refused to carry it out. *See McGinigle v. Town of Greenburgh*, 48 N.Y.2d 949, 951 (1979). Absent threats to health or safety, an employee must "obey now, grieve later." *Admin. for Children's Services v. Rosenblatt*, OATH Index No. 1507/04 (Dec. 13, 2004), *aff'd*, 36 A.D.3d 458 (1st Dept 2007). The order need not be a formal command if it is a clear request. *Dep't of Environmental Protection v. Schnell*, OATH Index No. 2262/00 at 8 (Oct. 25, 2000) (rejecting the argument that there is no obligation to comply where supervisor does not utter the phrase "direct order"). Refusal need not be expressed; it can be inferred from a deliberate, passive failure to comply. *See Health & Hospitals Corp. (Correctional Health Services) v. LaSane*, OATH Index No. 1165/02 at 6-7 (Aug. 8, 2002).

Specification 15 alleges that respondent refused to comply with a direct order when she failed to work with Cerner Team during data collection on September 21, 2018. This specification concerns data collection and differs from specification 13, which accused her of failing to attend a meeting, but it suffers from the same defect. The allegations are based on emails written three days after the meeting, when Dr. Ebose noted that there "was a problem with Cerner data collection task" assigned to respondent, she "failed to perform the task," and she claimed that she was not told about the task (Pet. Ex. 26). At trial, respondent denied that she failed to work with the Cerner Team on data collection and again insisted that she did not know about the September 21 meeting (Tr. 242-43). Because the emails offered by petitioner do not

show that respondent was given a clear directive about what data she was expected to gather on September 21, specification 15 should be dismissed.

Specifications 30 and 36 allege that respondent refused to run a flu data report on November 14 and 20, 2018, as directed. On November 20, 2018, Ms. Rienton sent respondent an email asking for a flu data report and stating that she had asked respondent to perform this task two weeks earlier. Respondent replied, "Remember you said you were taking it over," insisted that she was not in charge of flu data, and noted that Ms. Davis was assigned to attend flu infection control meetings. In reply, Ms. Rienton emphatically denied that she ever said that she was taking over this task, she made clear that Dr. Ebose wanted respondent to continue with the same process of reporting the information, and she gave respondent a direct order, "I am saying this one more time. Please prepare the report and submit it tomorrow" (Pet. Exs. 30, 31).

In response to Ms. Rienton's direct order, respondent replied, "I cannot prepare any report if I don't know what you are talking about or how to prepare it. I told you where to get the report" (Pet. Ex. 31). At trial, respondent testified that the report should have been run by the Hematology Department (Tr. 268-69). Even if another department should have run the report, as respondent claimed, that did not excuse her from preparing the report when Ms. Rienton asked her to run it. The refusal to do so was insubordinate because respondent was given a direct order and she refused to follow it. Thus, specifications 30 and 36 should be sustained.

Respondent's claims that she did not know what Ms. Rienton was talking about and that she did not know how to prepare the report, were demonstrably false. Petitioner presented evidence that nine months earlier respondent reported this data to petitioner's central office. Moreover, emails that respondent sent on November 15 and 20 suggest that the real reason why she refused to prepare the report was that Ms. Davis was earning overtime to attend meetings and respondent resented having to prepare a report for those meetings (Pet. Ex. 28).

Specification 56 alleges that respondent disobeyed an order on January 4, 2019, directing her to take corrective action towards a subordinate who failed to show up for work. This specification should be sustained. On January 4, 2019, respondent notified Ms. Rienton that a Microbiology worker did not appear for work on December 31, 2018. In multiple emails, Ms. Rienton directed respondent to take corrective action. Despite those repeated orders, respondent refused to take corrective action against the employee. Instead, respondent accused Ms. Rienton

of "targeting her" and stated, "You need to deal with this, instead of pushing the responsibility on me" and "I will not be doing your job for you" (Pet. Ex. 22).

At trial, respondent testified "I don't know anything about" the emails (Tr. 284, 379). She insisted that Dr. Ebose, rather than Ms. Rienton, was her supervisor and she further claimed that there was no need for any corrective action because the matter was resolved within the Microbiology Department (Tr. 377-79). I did not credit respondent's claims. Respondent's testimony showed that she knew a good deal about the incident and her own emails confirm that she reported to Ms. Rienton. The emails demonstrate that respondent refused to perform a supervisory task because she wanted Ms. Rienton to take care of it. Respondent's refusal to take corrective against the employee, despite repeated instructions to do so, was insubordinate.

Specification 69 alleges that on February 27, 2019, respondent failed to notify Department leadership about an issue with a piece of laboratory equipment. On March 1, 2019, Dr. Ebose asked respondent why she failed to notify laboratory leadership that an instrument, referred to as a VITEK 2, was not working since February 27, and he stated, "Please note that this is a patient safety issue" that had to be reported (Pet. Ex. 43). On March 4, respondent replied that she did not know anything about this issue, Dr. Ebose should direct his questions to the person who reported the problem, and "this issue is closed" (Pet. Ex. 43).

Ms. Rienton informed respondent, the supervisor of the Microbiology Laboratory, that she was responsible for reporting this incident and respondent again replied that her subordinate did not report the incident to her. Ms. Rienton replied that a member of respondent's staff stated that he told respondent about the issue (Pet. Ex. 43). In response, respondent stated that her subordinate "had no right to say anything" and backup procedures prevented any delays in reporting results. Respondent also asked Ms. Rienton whether she had taken any action to resolve the issue (Pet. Ex. 43). At trial, respondent denied any wrongdoing and claimed that if the equipment did not work, it would be a "big issue" that would have prevented doctors from receiving patient data, and she would have notified Dr. Ebose (Tr. 290-91).

This specification should be sustained. As supervisor of the Microbiology Laboratory, respondent should have been known whether a major piece of equipment in her laboratory had not been working for two or more days – especially if, as respondent testified, it was a "big issue" preventing doctors from receiving patient data. Thus, respondent's claim that she knew

nothing about the issue was not credible and her refusal to explain why she delayed reporting the error, despite two separate orders to do so, was insubordinate.

Specifications 77 and 78 allege that respondent refused to run flu tests on two occasions as instructed on April 22, 2019. Petitioner relied on a "Relief from Duty" memo issued April 22, 2019, reporting that, in the presence of Dr. Ebose and two others, Dr. Richards told respondent to perform flu tests that were part of her assigned duties, and respondent categorically refused to perform the tests and said she would rather be sent home (Pet. Ex. 32). When respondent refused to obey the order, she was relieved of duty without pay for the remainder of the day and directed to report to petitioner's Office of Labor Relations the next day (Pet. Ex. 32).

Respondent did not dispute that she was relieved from duty after refusing to obey orders from Dr. Richards on two occasions on April 22, 2019 (Tr. 300). Instead, she claimed that another department was responsible for flu tests (Tr. 300-02). To support her claim, respondent presented a document that referred to an automated process for detecting flu virus, entitled "Hematology Policy & Procedure," but that procedure did not go into effect until February 10, 2020 (Resp. Ex. B). Respondent also offered a document to show that the Microbiology Department had been closed as of March 30, 2019, and she had been transferred to the Core Laboratory effective April 15, 2019 (Resp. Ex. C). But respondent offered no credible evidence to support her claim that another laboratory was responsible for running the tests on April 22. Even if respondent's claim was credited, it is not a defense. Respondent was familiar with the tests and had performed them in the past. When a supervisor directed her to perform the tests on April 22, respondent had a duty to "obey now, grieve later." Because respondent failed to do so, she was insubordinate. Specifications 77 and 78 should be sustained.

Discourtesy

Petitioner alleges that from July 2018 to March 2019, respondent sent 22 discourteous emails to supervisors (ALJ Ex. 2; specifications 7, 16, 17, 22, 24, 25, 28, 29, 31, 34, 37, 39, 47, 48, 49, 51, 57, 58, 70, 74, 75, 76). Respondent testified that she had no recollection of sending the emails, she did not know what they referred to, or they were taken out of context (Tr. 243, 261, 285). These allegations should be sustained, in part. Petitioner's policies and procedures require employees to be courteous towards patients, co-workers, and supervisors, and to treat them "in a respectful and dignified manner" (Pet. Ex. 49, Managing Behaviors That Undermine a

Culture of Safety). However, not every workplace disagreement is misconduct, "even when voices are raised and emotions are vented." *See Health and Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Freeman*, OATH Index No. 1399/06 at 9 (July 20, 2006). Employees may disagree with supervisors within the bounds of decorum and discretion. *Health & Hospitals Corp. (Lincoln Medical & Mental Health Ctr.) v. Thomas*, OATH Index No. 531/04 at 5 (May 4, 2004). Relevant factors include the dispute's context, substance, tone, and duration. *See Admin. for Children's Services v. Rucando*, OATH Index No. 633/05 at 8 (Apr. 29, 2005). These principles also apply to emails; disagreements are permitted but they must remain within the range of acceptable workplace behavior. *Compare Dep't of Buildings v. Lamitola*, OATH Index No. 871/12 at 9 (Mar. 5, 2012) (discourtesy proved where, in response to an email ordering a medical exam, the employee replied, "[W]hat makes you think you're entitled to demand that I take a medical physical with a doctor of your choosing?" and that his medical condition was "none of your business"), *with Dep't of Correction v. Smith*, OATH Index No. 667/13 at 12 (July 19, 2013), *aff'd*, NYC Civ. Serv. Comm'n Case No. 35546 (May 6, 2014) (though refusal to perform a task is misconduct, expressing concern about out-of-title work and writing, "This is not my job," on a note attached to an email was not misconduct); *see also Transit Auth. v. Felix*, OATH Index No. 1206/09 at 4 (June 16, 2009) (while the tone of an email, including the comment, "I don't see why I have to do all this unnecessary work," could have been more accommodating, it was not rude or insubordinate).

Here, the emails at issue were disagreements about timekeeping or work responsibilities. Five of the emails involved respondent disputing whether she or her department were responsible for a task, but they were not rude or discourteous (ALJ Ex. 2, specifications 17, 24, 29, 37, 48). For example, on November 14, 2018, respondent replied to a request for a report by writing, "I was not responsible for the report because the test was under hematology; therefore, hematology has to do the report" (Pet. Ex. 30). To the extent respondent neglected a task or disobeyed an order, that was misconduct addressed in other specifications, but the emails disclaiming responsibility were not separate acts of misconduct. *See Smith*, OATH No. 667/13 at 12. Thus, specification 29, relating to the November 14 email, and specifications 17, 24, 37, and 48, which involve similar emails, should be dismissed.

Four other specifications involved timekeeping disputes (ALJ Ex. 2; specifications 22, 28, 39, 75). For example, on November 26, 2018, Ms. Rienton sent respondent an email

reporting that she twice went to respondent's worksite between 9:00 a.m. and 9:30 a.m. on November 19 and 21, and did not see her there (Pet. Ex. 37). Respondent replied, "I was here at my correct time if you have an issue, we can go to HR . . . how about tomorrow . . . Please bring the policy with you when we go to HR" (Pet. Ex. 37). To the extent respondent falsified her timesheet, that was misconduct and addressed in specifications 35 and 38. But her denial of wrongdoing was not discourteous. Thus, specification 39, which pertains to the November 26 email, and specifications 22, 28, and 75, which involve similar emails, should be dismissed.

Three specifications involved emails that could have been more tactful, but they did not amount to misconduct and should be dismissed (ALJ Ex. 2, specifications 7, 16, 51). Specification 7 concerned respondent's reply to an email sent by Dr. Ebose on July 23, 2018, where he attached respondent's timesheet and alleged that it was false or inaccurate, because he did not see her when he made his morning rounds at 9:15 a.m. (Pet. Ex. 33). Petitioner alleges that respondent replied, "Don't put my timesheet on the internet," suggested that attaching her timesheet to the email was a violation of her privacy, and stated "You will stop tampering with my timesheet when I put down my correct time" (Tr. 236-37). As a preliminary matter, the petition neglects to mention that respondent began her email with, "Please note" and the email does not include the phrase "stop tampering" (Pet. Ex. 33). As for respondent's statement that Dr. Ebose had violated her privacy by attaching her timesheet to an email, she was mistaken but not discourteous.

Specification 16 alleges that on September 24, 2018, in reply to an email from Dr. Ebose noting respondent's failure to collect data for a Cerner Team meeting, respondent wrote "You should be more concerned in getting the implementation done by the project's target date" (Pet. Ex. 26). This email has the substance and tone of an ordinary workplace dispute. It did not rise to the level of misconduct.

Specification 51 alleges that on December 10, 2018, respondent committed misconduct by sending an email to supervisors stating, "[P]ay me my overtime, or else I am reporting you" and "you cannot tell union members that you are not paying them overtime when they already worked." Respondent sent that email in reply to an email from Ms. Rienton, which stated that she would no longer approve respondent's overtime if she failed to obtain prior approval (Pet. Ex. 5). Though respondent committed misconduct when she disobeyed directives to obtain prior

approval for overtime, her email complaining about not getting paid for work was not discourteous. Specification 51 should be dismissed.

Specifications 47 and 49 allege that on December 4 and 5, 2018, in response to a request for information, respondent wrote on December 4, "What are they going to do with the information are they going to present it [?] Furthermore, do they know what it means" and she wrote on December 5, "You should not email in this type of manner. Don't you ever use that language to me again." Though petitioner introduced other emails from December 4 and 5, they do not include any of the language cited in the specifications (Pet. Exs. 5, 27). Thus, specifications 47 and 49 should be dismissed.

Eight of the emails at issue went beyond ordinary workplace disputes and were discourteous. In these emails, respondent did not merely disagree with her supervisors; she challenged their competence, maligned their integrity, or made baseless, unsupported claims that were not responsive to emails that had been sent to her. These specifications should be sustained (ALJ Ex. 2, specifications 25, 31, 34, 57, 58, 70, 74, 76).

On November 8, 2018, in reply to an email about the hospital's tardiness policy, respondent wrote an email to ten hospital employees that Dr. Ebose and Ms. Rienton "need to look at the policy for harassment of employees and nepotism" (Pet. Ex. 21; ALJ 2, specification 25). There was no evidence to support respondent's claim of nepotism. Her email was discourteous because it unfairly maligned Dr. Ebose and Ms. Rienton.

Specification 31 alleges that on November 14, 2018, in response to Ms. Rienton's[2] request for information about working on a holiday, respondent wrote, "To whom do you have to justify me working the holiday? I thought you were in charge" (Pet. Ex. 3; Tr. 261). There was no need for respondent to challenge Ms. Rienton's authority.

Specification 34 alleges that on November 15, 2018, respondent wrote an email to Dr. Richards, questioning why a co-worker was getting paid overtime to attend a meeting on her day off and respondent again alleged that this was "a form of nepotism" (Pet. Ex. 28). At trial, respondent claimed that her email was taken out of context and she was merely asking who had approved the co-worker's overtime (Tr. 26). Respondent is mistaken. The email did not only ask about overtime approval; it included baseless accusations against her supervisors.

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[2] Several specifications referred to Ms. Rienton as "Supervisor M.R." and Dr. Ebose as "Director Dr. E.E." (ALJ Ex. 2). Though it was obvious from context and the emails offered in evidence that petitioner was referring to Ms. Rienton and Dr. Ebose, respondent claimed that she did not know who "M.R." and "E.E." were (Tr. 261).

Specifications 57 and 58 refer to two emails that respondent sent on January 4, 2019, in response to Ms. Rienton's order to take corrective action against a subordinate who did not show up for work on December 31. In her reply emails, respondent refused to take corrective action, and she gratuitously added, "You need to deal with this instead of pushing off responsibility on me" and "I will not be doing your job for you" (Pet. Ex. 22). These emails were discourteous because they accused Ms. Rienton of shirking her duties.

Specifications 74 and 76 pertained to emails that respondent sent to Ms. Rienton on March 8, 2019, in response to another email reminding her to obtain pre-approval for overtime. In one email, respondent wrote, "From now I will leave work for the next day, and don't send me any policies regarding time and leave *because it seems it is the only policy you know*" (Pet. Ex. 24; Tr. 297) (emphasis added). In another email, respondent wrote "You are not my immediate supervisor, so you cannot say anything to me about my time. I don't have to request a tour change from you or get an approval for a tour change from you" (Pet. Ex. 24; Tr. 299-300, 365). Respondent denied sending the emails and insisted that she did not know what the emails were about, but she also repeated the substance of the email by claiming that she only had to report to Dr. Ebose (Tr. 366-67). The substance and tone of respondent's emails, which she sent several managers, improperly undermined Mr. Rienton's authority. That was discourteous.

Failing to include supervisors on emails

Petitioner alleges that on ten occasions from October 2018 to September 2019 respondent failed to include her supervisors on emails, despite repeated instructions to do so (ALJ Ex. 2, specifications 18, 33, 44, 46, 54, 63, 64, 66, 68, 82). These specifications should be sustained. *See Smith*, OATH No. 667/13 at 31-33 (upholding misconduct charges where employee failed to follow instructions regarding communication with supervisors).

On July 22, 2015, in response to complaints that respondent failed to include supervisors on official correspondence, she received a written directive ordering her to include her supervisor on correspondence and that failure to do so could lead to disciplinary action (Pet. Ex. 38). Petitioner proved that respondent violated that order on ten occasions (Pet. Exs. 8-10, 39-42).

For example, on October 9, 2018, respondent sent an email to Dr. Richards regarding HIV testing in the Microbiology Department (Pet. Ex. 39). Dr. Richards asked respondent why she did not copy Dr. Ebose on the email (Pet. Ex 39). Respondent replied, "I don't know what

this is about" (Pet. Ex. 39). On December 21, 2018, respondent sent an email regarding scheduling changes and Dr. Richards again asked why a copy was not sent to Dr. Ebose (Pet. Ex. 41). On September 9, 2019, respondent sent an email regarding a "critical report" for a patient to Dr. Richards and others (Pet. Ex. 40). Dr. Richards asked respondent why she failed to include Dr. Ebose on this "very important matter" (Pet. Ex. 40).

Respondent offered no credible defense to any of these specifications. Though respondent acknowledged that Dr. Ebose was her direct supervisor, she denied receiving instructions to include him on emails and could not recall sending the emails (Tr. 244, 288, 309). I found petitioner's documentary evidence more persuasive than respondent's vague denials. She received a specific written directive, she was warned that it could lead to discipline, and she was repeatedly reminded to include Dr. Ebose. Despite those reminders, respondent continued to disobey the directive. This was not an isolated error in judgment; it was deliberate misconduct.

Changing shifts without approval and false statement to supervisor

Specifications 8 and 73 alleged that respondent changed her work schedule on August 1, 2018, and March 8, 2019 without authorization (Tr. 294-95). Specification 9 alleged that respondent made a false statement to a supervisor about the August 1 shift change. These specifications should be sustained.

In an email exchange beginning August 10, 2018, Dr. Ebose notified respondent that she had incorrectly reported her work hours for August 1. Respondent wrote on her time sheet that her shift began at 11:00 a.m. that day followed by a "code 13" entry, indicating a shift change. Dr. Ebose stated that respondent had not received prior approval for that change and, thus, she was 40 minutes late for work. Respondent replied that she had documentation to show that Ms. Rienton had approved the shift change. Ms. Rienton denied respondent's allegations and insisted that she had not approved any shift change. According to Ms. Rienton, respondent arrived late for work and then reported that she had changed her shift (Pet. Ex. 34).

During the week ending March 9, 2019, "code 13" was entered for two dates on respondent's timesheet, indicating that the start of her shift had been changed from 9:00 to 9:30 (Pet. Ex. 20). In an email exchange that began March 7, Ms. Rienton also noted that on a monthly schedule respondent's start time had been changed from 9:00 a.m. to 9:30, without any record of an approval for a shift change (Pet. Ex. 24). Ms. Rienton advised respondent that her

shift began at 9:00 a.m. as indicated on her pre-printed timesheet, which she had to follow. Dr. Ebose confirmed that respondent's shift began at 9:00 a.m., she had not requested or received approval for a change, and she needed to obtain such approval from Ms. Rienton who was her immediate supervisor (Pet. Ex. 24).

In reply to Ms. Rienton and Dr. Ebose's March 2019 emails, respondent stated that this was never an issue before and she provided a copy of a schedule from August 2018, which indicated that she started work at 9:30 a.m. (Pet. Ex. 24). Respondent also claimed that she did not have a set schedule and her work hours were based on the needs of the Microbiology Laboratory (Pet. Ex. 24). At trial, respondent claimed that whenever she needed a shift change, she notified her supervisor, who adjusted respondent's schedule by writing "code 13" on her timesheet, which respondent signed at the end of the week (Tr. 295-96).

Respondent's claims were inconsistent and implausible. At first, she claimed that she had documentation for the August 1 shift change, but she never produced it. For March 9, respondent initially claimed in her email that her shift began at 9:30. Later, she wrote that she did not have a set schedule. At trial, she testified that her supervisors had approved her shift change. Petitioner's evidence, including supervisors' emails and the pre-printed timesheets, showed that respondent's shift started at 9:00 a.m. and that she had not received approval for either shift change. Thus, petitioner proved that respondent changed her shifts without approval. The evidence further showed that respondent falsely told Dr. Ebose that Ms. Rienton had approved the August 1 shift change.

Working overtime without approval

Petitioner alleges that respondent worked overtime on 16 occasions from July 2018 to March 2019 without obtaining required pre-approval (ALJ Ex. 2, Specifications 4, 19, 23, 27, 32, 42, 43, 50, 52, 53, 61, 62, 65, 67, 71, 72). Petitioner did not prove specifications 27, 52, 53, 71, and 72. However, the remaining 11 specifications should be sustained because petitioner showed that respondent worked overtime without obtaining required pre-approval. *See Smith*, OATH No. 667/13 at 35-36 (sustaining charge of failure to follow overtime procedures and rejecting employee's claim that policy requiring pre-approval was selectively imposed upon her).

Ms. Mody credibly testified that due to staffing shortages and the impact of overtime on department budgets, employees were required to obtain pre-approval for overtime (Tr. 168, 185-

86, 201). Petitioner presented emails to show that respondent was repeatedly instructed that overtime had to be pre-approved (Pet. Exs. 1, 33). Respondent denied any wrongdoing, said that she worked overtime due to staffing shortage, and claimed, without credible supporting evidence, that she received necessary approvals (Tr. 281, 287). One of her witnesses, Ms. Campbell, a long-time employee who was supervised by respondent, recalled that in the past employees needed permission to work overtime, Dr. Ebose changed that policy in 2017, and employees simply entered their overtime on their timesheets (Tr. 318, 321-22). Respondent offered no documents to support this claim.

Based on Ms. Mody's testimony, corroborated by documentary evidence, I did not credit respondent's defense that employees could work overtime without approval. The evidence showed that respondent was repeatedly directed to obtain pre-approval for overtime and she failed to do so.

For example, on July 23, 2018, Dr. Ebose sent respondent an email advising her that the overtime she claimed on her timesheet for July 16 was unauthorized (Pet. Ex. 33; ALJ Ex. 2, specification 4). Dr. Ebose emphasized, "All overtime must be preauthorized" (Pet. Ex. 33). In an email reply, respondent complained that Dr. Ebose had attached her timesheet to an email, but she did not dispute his claim that she worked overtime without the necessary approval (Pet. Ex. 33). At trial, respondent again failed to dispute the claim that she worked overtime without approval; instead, she claimed that someone had crossed off her overtime on her timesheet without following proper procedures (Tr. 235; Resp. Ex. A). Even crediting respondent's testimony, it is not a defense to the charge. Specification 4 should be sustained.

Specification 19 alleges that respondent worked overtime without prior authorization on October 23, 2018. In an email on October 24, Ms. Rienton noted that respondent had requested overtime, which needed to be justified, and if respondent did not document the urgency of the work, overtime would not be approved (Pet. Exs. 1, 13; Tr. 90-91). At trial, respondent could not recall the email exchange, but she maintained that she had worked overtime and had notified Dr. Ebose via email (Tr. 248). I did not credit respondent's defense. She did not produce a copy of the email that she supposedly sent to Dr. Ebose and even if she had provided notice that does not mean that she received pre-approval as required. Specification 19 should be sustained.

Specification 23 alleges that respondent worked overtime without approval on November 8, 2018. Shortly after 6:00 p.m. that day, respondent notified Ms. Rienton via email that she had

stayed an extra hour to perform urgent work and she requested one hour of overtime (Pet. Exs. 2, 14). Ms. Rienton replied that overtime had to be pre-approved, noted that respondent requested the overtime more than one hour after her regular shift had ended, and asked respondent to document the work performed (Pet. Exs. 2, 14). Five days later, Ms. Rienton reminded respondent that she had not provided the requested information (Pet. Ex. 2). Though respondent testified about each specification, she did not address this one (Tr. 251-53). Based on the emails initiated by respondent on November 8, specification 23 should be sustained.

Specification 27 alleges that respondent worked on a holiday (Veteran's Day), November 12, 2018, without approval. In an email exchange that began shortly before 5:00 p.m. on November 12, respondent wrote that she worked that day because the Microbiology Department was short staffed. Ms. Rienton replied that she needed to know in advance what work respondent was doing to justify working on a holiday and "moving forward" respondent had to provide advance notice of who was working on holidays (Pet. Ex. 3). Respondent wrote that she had to work due to a colleague's illness and she added, "Furthermore, to whom do you have to justify me working a holiday to. I thought you were in charge" (Pet. Ex. 3). At trial, respondent did not recall anything about this incident and asked "What type of holiday" November 12 was (Tr. 258-59). Because it was not clear that respondent had received a prior order to give Ms. Rienton notice of who was working on holidays, specification 27 should be dismissed.

Specification 32 alleges that respondent worked overtime without approval on November 15, 2018. Petitioner presented email evidence to show that on November 15 at 7:40 p.m., more than two hours after her regular shift ended, respondent notified Ms. Rienton and others that she worked an hour and a half overtime that day because the Microbiology Department was short staffed (Pet. Ex. 3). At trial, respondent did not claim that she received approval prior to working overtime on this date. Initially, she claimed that she did not work overtime, but she also noted that her timesheet had a "code 29" entry, indicating that she worked overtime from 5:00 to 6:00 p.m. (Tr. 263-65). Finally, respondent claimed that if Dr. Ebose had not approved the overtime, he would have crossed out the entry (Tr. 265). There was no credible support for respondent's claim that Dr. Ebose's failure to cross off an overtime entry could be deemed approval of her overtime. Because petitioner proved that that respondent was repeatedly told to obtain pre-approval for overtime and she ignored that order, specification 32 should be sustained.

Specifications 42, 43, and 50 allege that respondent worked overtime on December 3, 4, and 5, 2018, without approval. In an email exchange beginning on December 5, Ms. Rienton thanked respondent for putting in extra hours, but insisted that she had to obtain pre-approval for overtime. When respondent replied that she was short staffed on December 5, Ms. Rienton disputed that claim and noted that there were four other people working in the Microbiology Department that day. Ms. Rienton stated that respondent's overtime would no longer be approved, and respondent threatened to report Ms. Rienton for violating labor laws (Pet. Ex. 5). In reply, Ms. Rienton provided recommendations for improving workflow to avoid overtime and reminded respondent that she was only asking her to obtain pre-approval (Pet. Ex. 6). At trial, respondent claimed that she had documented that she worked overtime and never received a response (Tr. 276).

Respondent's claims are unsupported by any credible evidence, belied by the email exchanges in evidence, and not a defense to the specifications. Even if respondent had offered documents to show the need for overtime, that is not the same as receiving pre-approval. Petitioner proved that respondent worked overtime without approval on three days, beginning December 3, 2018. Thus, specifications 42, 43, and 50 should be sustained.

Specifications 52 and 53 allege that respondent worked overtime on December 19 and 20, 2018, without prior approval. Petitioner presented timesheets and emails to show that respondent worked overtime on December 19 and had a "shift change" on December 20 (Pet. Exs. 16). There is a post-it on the timesheet stating that the shift change and overtime were not pre-authorized (Pet. Ex. 16). It is not clear who wrote the post-it or when it was written. Respondent claimed that she let Dr. Ebose know that she worked overtime on December 19 and denied that she worked overtime on December 20 (Tr. 281-12). Unlike other specifications, supported by contemporaneous emails, petitioner offered no similar evidence to show that respondent failed to obtain necessary approvals for December 19 and 20. At trial, petitioner claimed that Exhibit 6 refers to those dates. But that document is an email exchange that occurred on December 10 regarding staffing needs and does not show that respondent failed to obtain approval for overtime later in the month. Specifications 52 and 53 should be dismissed.

Specification 61 alleges that respondent worked overtime on January 22, 2019, without prior approval. Her timesheet showed a "code 29" for overtime on that date had been crossed out by Ms. Rienton (Pet. Ex. 17). In a January 28 email, Ms. Rienton noted that respondent has

worked overtime on January 22 without obtaining prior approval and asked respondent for documentation before the overtime would be approved (Pet. Ex. 7). At trial, respondent stated that she had authorization to work overtime on January 22 and wrote "code 29" on the timesheet, but she did not know who crossed off the entry (Tr. 286-87). Even if respondent wrote "code 29" on her timesheet, that does not prove that she received pre-approval to work overtime. Specification 61 should be sustained because the evidence showed that respondent worked overtime without approval.

Specifications 62 and 65 allege respondent worked overtime without approval on February 4 and 6, 2019. On February 4 respondent sent an email after 6:00 p.m. stating that she had to stay an extra hour to finish her work (Pet. Ex. 8). On February 6 she sent an email shortly before 5:00 p.m. stating that she came in early that day to attend training (Pet. Ex. 9). In reply, Ms. Rienton asked respondent why she had not copied Dr. Ebose on her emails, because he was her direct supervisor who had to approve her overtime (Pet. Exs. 8, 9). At trial, respondent testified that she had no recollection of either date (Tr. 288-89). Specifications 62 and 65 should be sustained because the evidence showed that respondent failed to obtain her supervisor's prior approval for overtime.

Specification 67 alleges that respondent worked a holiday, President's Day, February 18, 2019, without authorization. Shortly after 3:00 p.m. on February 18, respondent sent an email to Dr. Richards and others, stating that she had worked that day (Pet. Ex. 10). Dr. Richards asked respondent why her email was not sent to her supervisor, Dr. Ebose, who could approve her request. Respondent replied, "What are you talking about?" (Pet. Ex. 10). At trial, respondent denied any wrongdoing and said that if she worked the holiday, she had asked Dr. Ebose for prior approval (Tr. 290). Specification 67 should be sustained because contemporaneous records showed that respondent worked on a holiday without prior approval and respondent's general, unsupported denials lacked credibility.

Specifications 71 and 72 allege that respondent worked overtime on March 4 and 6, without prior approval. On March 7 respondent sent an email to Ms. Rienton stating that she had worked overtime on March 4 and 6 (Pet. Ex 11). The handwritten words "OT w/o approval" are written on a post-it attached to the email, but there was no evidence to show who wrote the post-it or when it was written (Pet. Ex. 11). Respondent insisted that she did not work without authorization (Tr. 294). These specifications should be dismissed because there was no

evidence, such as a contemporaneous email from a supervisor, stating that respondent had failed to receive approval for overtime.

Falsifying timesheets

Ms. Mody testified that respondent and other employees entered their time by writing on their timesheets when they arrived for work (Tr. 155). Petitioner alleges that respondent falsified timekeeping records on 11 occasions from July 2018 to January 2019, when she arrived for work late but wrote on her timesheet that she was on time (ALJ Ex. 2; specifications 5, 6, 10, 20, 21, 26, 35, 38, 40, 41, 55). To prove these specifications, petitioner relied primarily on respondent's timesheets and contemporaneous emails from supervisors who reported that respondent was not at work after 9:00 a.m., when they went on their morning rounds.

Respondent insisted that she was at work on time and that she never saw anyone coming around to check whether employees in her department were there on time (Tr. 248). For example, respondent testified that she correctly wrote on her timesheet that she reported to work on time on November 9 and she protested that somebody later changed the timesheet to indicate that she had an unexcused lateness (Tr. 255). She further testified that there were times when she arrived at work at 9:00 a.m. and was not at her desk because she went to get coffee, spoke with colleagues in the laboratory, or was in the bathroom (Tr. 271-73).

Mr. Artis, a long-time co-worker, testified that he worked across the hall from respondent, she was there all the time, she did not go away from her workstation for long periods of time, and supervisors "very infrequently" made rounds to see who was working (Tr. 338). However, Mr. Artis conceded that employees were supposed to note on their timesheets when they were late for work and he never saw respondent's timesheets (Tr. 350-51).

These specifications should be sustained, in part. For two dates, July 17 and 18, 2018, petitioner alleges that a supervisor went on rounds once between 9:00 and 9:30 a.m. and respondent was not seen by staff or found by a supervisor during rounds (ALJ Exhibit 2, specifications 5, 6). Petitioner relied on an email from Dr. Ebose stating that when he made his rounds on between 9:00 and 9:30 a.m., "none of your staff saw you and you were not in your office (July 17) and "you were not found and no one" saw you (July 18) For a third date, January 3, 2019, the petition alleges that respondent falsified her timesheet by writing that she was at work at 9:00 a.m., but she was "not seen or found by staff or a supervisor" at 9:30 a.m.

when Ms. Rienton went on her rounds (ALJ Ex. 2, specification 55). Allegations that respondent was not at her worksite at the precise time that a supervisor made one visit to the location, do not prove that respondent falsified her timesheet. Despite testimony from Ms. Mody that it was uncommon for employees to get coffee or go the bathroom shortly after arriving at work at 9:00 a.m., it is plausible that respondent happened to be away from her desk at the precise time that a supervisor visited her work site (Tr. 182). Assertions that "no one" saw respondent, do not make up for the deficiency of proof because petitioner did not prove who the supervisors talked to, when they talked, or what they said. Specifications 5, 6, and 55 should be dismissed.

For the remaining dates, petitioner's evidence was more persuasive. There is a contemporaneous report from Dr. Ebose who saw respondent arriving 40 minutes late on August 3, 2018 (Pet. Ex. 34). For October 24, October 26, November 9, November 19, November 21, November 26, and November 27, 2018, petitioner presented contemporaneous reports from Ms. Rienton noting that respondent was not in her office or the laboratory at two separate times between 9:00 and 9:30 a.m. on each date (Pet. Exs. 35-37). Under these circumstances, it is less likely that respondent happened to step away from her desk and the laboratory twice within the span of 30 minutes when a supervisor went looking for her. It is more likely that respondent was not at work. Respondent's general denials and claims that supervisors never made rounds, were not credible. *See, e.g., Dep't of Finance v. Zindel*, OATH Index No. 1310/07 at 12 (June 22, 2007) (evidence that colleagues went looking for employee, but could not find her, sufficient to prove that employee was not at work); *Admin. for Children's Services v. Camara*, OATH Index No. 285/04, at 13-14 (Feb. 2, 2004), *modified on penalty*, Comm'r Dec. (May 20, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-117-SA (Nov. 14, 2006) (misconduct found where employee away from desk without authorization for at least 20 minutes).

Petitioner proved that respondent wrote on her timesheet, on eight occasions, that she arrived for work at 9:00 a.m., but she was not at her worksite at that time. Thus, respondent falsified each timesheet and specifications 10, 20, 21, 26, 35, 38, 40, and 41 should be sustained.

Removing timesheet from a designated area without approval

Petitioner alleges that respondent removed her timesheet from a designated area without permission on one occasion (ALJ Ex. 2, specification 80). Ms. Mody testified that timesheets were kept in a central location where employees could sign in or out (Tr. 155). On September 6, 2019, respondent's new supervisor, Mr. Jibowu, sent her an email reminding her of a discussion they had regarding removal of her timesheet and the need to document her arrival time correctly. Mr. Jibowu noted that during the previous day he noticed that respondent's timesheet was missing and at the end of her tour he saw her returning the timesheet to its proper place (Pet. Ex. 51). Respondent generally denied the allegations (Tr. 306). Specification 80 should be sustained. Ms. Mody's testimony and credible contemporaneous documentary evidence proved that the timesheet was supposed to remain in a specific location, a supervisor discussed that procedure with respondent, and she violated that procedure.

AWOL

Petitioner alleges that respondent left her worksite without approval on April 22, 2019 (ALJ Ex. 2, specification 79). This specification should be dismissed. The evidence showed that respondent refused to run a flu test as ordered on April 22; she put in a request to take three hours annual leave that afternoon, which was not approved; she was relieved of duty without pay; and she was directed to report to petitioner's Office of Labor Relations the next day (Tr. 300, 305; Pet. Ex. 32; Resp. Ex. D; ALJ Ex. 2, specification 77). Based on this evidence, petitioner failed to prove that respondent was AWOL.

The petition also alleges that respondent was AWOL on August 7, 8, and 10, 2019 (ALJ Ex. 2, specification 83). This specification should be dismissed. Respondent testified and offered documentary evidence to show that she was out sick on those dates and had notified her laboratory (Tr. 309-12; Resp. Ex. E). Though petitioner presented timesheets with "code 06," indicating that respondent was "absent without pay" on each of the dates at issue, there was no other testimony or documents offered to show that she did not call in or that she was AWOL.

Excessive lateness and absenteeism

The petition alleges that respondent was excessively late on 25 occasions for a total of 922 minutes from July 2018 to March 2019 (ALJ Ex. 2, specification 84). To prove the charge,

petitioner relied primarily on emails, respondent's timesheets, and Operating Procedure 20-2, which defines excessive lateness as more than three occasions or more than 30 minutes in a month (Pet. Exs. 13-17, 20-21, 44; Tr. 135). Respondent denied the allegations (Tr. 312).

This specification should be sustained, in part. The evidence showed the respondent was excessively late in the months of August, October, November, and December 2018. In each of those months, respondent was either late on more than three occasions or late more than 30 minutes. As noted, respondent arrived two hours late on August 1, 2018, because she changed her shift without prior approval and her supervisor saw her arrive 40 minutes late on August 3, 2018. Respondent was a total of 50 minutes late in October 2018, when she falsified her times sheets on two occasions; and she was late on seven occasions, for a total of more than 120 minutes, when she falsified her timesheets in November 2018. Petitioner also presented timesheets that showed respondent was late on three occasions for a total of 80 minutes in December 2018 (Pet. Ex. 14-16; Tr. 117, 120, 123-24, 126).

Petitioner failed to prove that respondent was excessively late in July and September 2018 or in January or March 2019, as alleged in the petition. For each of those months, petitioner did not offer relevant timekeeping records or show that respondent falsified her timesheets (Pet. Exs. 20, 53).

The petition alleges that respondent was excessively absent on 11 occasions for 15 days from December 2018 to November 2019 (ALJ Ex. 2, specification 85). This specification should be sustained, in part. Petitioner's Operating Procedure 20-10 states that a supervisor may conduct counseling with an employee who has three unscheduled absences, or two such absences before or after a regular day off, within six months, and if the employee fails to take corrective action a warning letter may be issued (Pet. Ex. 45). However, in more serious cases, disciplinary charges may be brought without counseling or a warning letter (Pet. Ex. 45).

Here, petitioner proved that during the last six months of 2019, respondent took six unscheduled days off (July 17, July 22, August 11, September 20, November 5, and November 8) and each of those absences was before or after a regularly scheduled day off (Pet. Ex. 53).[3]

[3] The petition includes a schedule of other days that respondent was supposedly absent, but petitioner failed to prove those additional allegations (ALJ Ex. 2, Schedule C). For example, the list of alleged absences includes nearly all the days that respondent was late for work, which were previously addressed in specification 84 (ALJ Ex. 2, Schedule B). The list includes three dates in January 2019 for which no timesheets were offered.

Respondent argued that she never received required counseling. However, as noted, petitioner has discretion to impose discipline where there is a serious attendance problem. Respondent had three times the number of unscheduled absences deemed excessive under petitioner's policy. Because all those absences occurred before or after a regularly scheduled day off, petitioner had discretion to treat this as misconduct. Specification 85 should be sustained.

Failure to provide certificate of dispositions for two arrests

The petition alleges that respondent failed to provide a certificate of disposition regarding arrests that occurred on March 3 and 26, 2018 (ALJ Ex. 2, specifications 59, 60). These specifications should be dismissed.

Ms. Mody testified that petitioner receives automatic notifications when employees are arrested and despite repeated requests, respondent failed to provide certificate of dispositions for arrests that occurred on March 3 and 26, 2018 (Tr. 162-63). According to Ms. Mody, when she asked respondent about the arrests, respondent replied by asking how that information had been obtained and denying that she had been arrested (Tr. 163). In response to a January 15, 2019, email requesting more information about two docket numbers, respondent replied that she did not have any information about any incident in March 2018 (Pet. Ex. 23). At trial, respondent testified that she did not know anything about any March 2018 arrests (Tr. 285-86).

There is no dispute that employees are required to notify petitioner of any arrests and provide documents regarding the disposition of those arrests (Tr. 162-63; Pet. Ex. 48). To show that an employee violated that rule, an agency must prove that the employee was arrested. *See Dep't of Environmental Protection v. Rodriguez*, OATH Index No. 1438/08 at 6 (Apr. 29, 2008), *modified on penalty*, Comm'r Dec. (May 15, 2008) (failure to report an arrest charge sustained based on unrebutted testimony of investigator who arrested employee); *Transit Auth. v. Middleton*, OATH Index No. 258/05 at 5 (Jan. 13, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD06-26-SA (Feb. 17, 2006) (failure to report arrest proved, in part, based on records from Office of Court Administration). Petitioner cited to two docket numbers but did not present any other evidence to prove that respondent had been arrested. Indeed, Ms. Mody conceded at trial that she had no further details regarding the arrests that respondent allegedly failed to report (Tr. 164-65). Under these circumstances, petitioner did not meet its burden of proving that respondent failed to report an arrest.

FINDINGS AND CONCLUSIONS

1. Respondent committed misconduct by repeatedly failing to perform tasks that were assigned to her, as alleged in specifications 1, 2, and 3.

2. Respondent committed insubordination when she refused to perform assigned tasks as alleged in specifications 30, 36, 56, 69, 77, and 78.

3. Respondent repeatedly disobeyed orders to obtain pre-approval for overtime and holidays, as alleged in specifications 4, 19, 23, 32, 42, 43, 50, 61, 62, 65, and 67.

4. Respondent repeatedly falsified timesheets when she indicated that she arrived at her regularly scheduled time of 9:00 a.m., but the evidence showed that she was late for work, as alleged in specifications 10, 20, 21, 26, 35, 38, 40, and 41.

5. Respondent committed misconduct when she removed her timesheet from its designated area without approval, as alleged in specification 80.

6. Respondent committed misconduct when she changed her shift without prior approval, and made false statements to a supervisor, as alleged in specifications 8, 9, and 73.

7. Respondent committed misconduct when she sent discourteous emails to supervisors, as alleged in specifications 25, 31, 34, 57, 58, 70, 74, and 76.

8. Respondent committed misconduct when she repeatedly failed to include supervisors on emails, as alleged in specifications 18, 33, 44, 46, 54, 63, 64, 66, 68, and 82.

9. Specifications 84, which alleged that respondent was excessively late, should be sustained in part.

10. Specification 85, which alleged that respondent was excessively absent, should be sustained in part.

11. Petitioner failed to prove the remaining specifications, which should be dismissed.

RECOMMENDATION

After finding that respondent committed misconduct, I requested and received her disciplinary history and recent performance evaluations. Petitioner hired respondent in November 2013. In April 2018, respondent accepted a 60-day penalty for the record, which included a 30-day suspension for multiple acts of misconduct, including falsification of timesheets, insubordination, and discourteous emails. Respondent's recent performance evaluations are uneven. Though she received high ratings for her knowledge of procedures and ability to operate laboratory equipment, she received ratings of "needs improvement" for teamwork, professionalism, and punctuality.

Petitioner now seeks termination of respondent's employment. That is appropriate. Respondent has the qualifications and experience to work in a laboratory. She has a master's degree in Health Care Administration, is licensed by New York State to work as a laboratory technologist, and she has worked at two other hospitals (Tr. 221-22). However, petitioner has shown that it can no longer trust respondent to work in its laboratories.

The evidence established that respondent committed more than 50 acts of misconduct over the span of 16 months beginning in July 2018. Respondent failed or outright refused to perform tasks assigned to her; repeatedly arrived late for work; was excessively absent; falsified timesheets; ignored orders to obtain approval for shift changes or overtime; and treated supervisors with disdain by refusing to include them on emails or insulting them in other emails. Moreover, respondent recently served a substantial penalty for nearly identical misconduct. At trial, respondent showed no inclination to change. Instead, she continued to make baseless allegations against supervisors.

The hospital's mission is to care for patients. To fulfill that mission, petitioner needs reliable employees who can interact with their colleagues in a professional manner. Under similar circumstances, where a hospital employee demonstrates an intractable refusal to perform fundamental job duties and an unwillingness to acknowledge supervisors' authority, this tribunal has consistently held that termination of employment is appropriate. *See Health & Hospitals Corp. (Bellevue Hospital Ctr.) v. Tanvir*, OATH Index No. 797/10 at 8-9 (Dec. 17, 2009) (termination of employment recommended where employee refused assignments and was absent without authorization); *Health & Hospitals Corp. (Coler-Goldwater Specialty Hospital & Nursing Facility) v. Ramsey*, OATH Index No. 1248/05 at 22 (Nov. 9, 2005) (termination of

employment recommended, noting that employee "appeared indifferent that his behavior was insubordinate or had negative ramifications on the workplace"); *see also Health & Hospitals Corp. (Queens Health Ctr.) v. Whitaker*, OATH Index No. 486/18 at 12 (May 11, 2018) (termination of employment recommended where employee with a prior disciplinary record was discourteous to patients and instigated an altercation with a co-worker).

In sum, based on respondent's pervasive acts of misconduct and prior, recent history of similar misconduct, I recommend termination of her employment.

Kevin F. Casey
Administrative Law Judge

April 21, 2021

SUBMITTED TO:

EBONÉ M. CARRINGTON,
Chief Executive Officer and Chief Operating Officer

APPEARANCES:

JADE EDWARDS, ESQ.
Attorney for Petitioner

RICARDO AQUIRRE, ESQ.
Attorney for Respondent

NYC
HEALTH+
HOSPITALS

OFFICE OF CHIEF EXECUTIVE OFFICER
Facility: HARLEM

May 18, 2021

Via Certified and First Class Mail
Jouy Stephens
[redacted]

RE: Health + Hospitals (Harlem Hospital Center) v. Jouy Stephens, Clinical Lab Technologist / OATH Index No. 2053/20

Dear Ms. Stephens:

As the designee of Ebone Carrington, Chief Executive Officer Harlem Hospital Center, I have reviewed New York City Office of Administrative Trials and Hearings ("O.A.T.H.) Administrative Law Judge Kevin F. Casey's trial Report and Recommendation regarding the administrative hearing, held in connection with the disciplinary charges preferred against you, together with the entire record. I have also reviewed the Fogel response letter submitted in accordance with *Fogel v. Board of Education*, from your representative attorney Ricardo Aguirre in opposition to Judge Casey's Recommendation.

Based on my review of the aforementioned documents, I accept Judge Casey's findings of fact.

Given the numerous substantiated charges of misconduct and/or incompetence that demonstrates your pervasive acts of misconduct, I agree that the only appropriate penalty is termination. Consequently, I hereby adopt Judge Casey's recommendation of termination from your position as a Clinical Lab Technologist Level-5 with the Facility, effective May 18, 2021.

Sincerely,

[redacted]

Keesha Nedd
Director of Human Resources

C: Ebone Carrington - CEO
Hon. Kevin F. Casey – New York City O.A.T.H.
Jade Edwards, Esq.
Ricardo Aguirre, Esq. – Respondent's Representative
Labor Relations File