

Dep't of Correction v. Thomas

OATH Index No. 2212/22 (Aug. 8, 2022), *adopted*, Comm'r Dec. (Sept. 29, 2022), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2022-0682 (Jan. 17, 2023), **appended**

Petitioner established that respondent was absent without leave on several occasions, made two false timesheet entries, and acted disrespectfully and disobediently toward a supervisor. Petitioner did not prove that respondent made a third false timesheet entry or that respondent failed to submit a required report or to report to his assigned post after a late arrival. Petitioner further established that respondent used unnecessary force against an inmate, submitted a false or misleading report regarding the incident, and possessed a fraudulent duplicate departmental shield. ALJ recommends that respondent's employment be terminated.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
JAMES THOMAS
Respondent

REPORT AND RECOMMENDATION

MICHAEL D. TURILLI, *Administrative Law Judge*

Petitioner, the Department of Correction, brought this employee disciplinary proceeding against respondent, Correction Officer James Thomas, under section 75 of the Civil Service Law. Petitioner alleged that respondent engaged in time and leave related misconduct on seven occasions, including failing to report for scheduled tours of duty and making false timesheet entries. Petitioner further alleged that respondent used excessive force against an inmate, submitted a false or misleading use of force report, and possessed a fraudulent duplicate shield.¹

A nine-day trial was held before me on May 24, 2022 through June 24, 2022. Due to the COVID-19 pandemic, the proceedings were held remotely via Webex videoconference. Petitioner

¹ At petitioner's request, and without objection by respondent, seven other charges were severed from this case and withdrawn without prejudice prior to the commencement of trial (Tr. 9-10).

relied upon documentary, video, audio, and photographic evidence, and the testimony of seven witnesses. Respondent testified on his own behalf and offered documentary evidence, as well as the testimony of one other witness, Captain Yolanda Faulks. For the reasons set forth below, I find that petitioner proved most of the charges and recommend that respondent's employment be terminated.

ANALYSIS

The charges against respondent arise from incidents that occurred while he was assigned to work at the George R. Vierno Center ("GRVC") between November 2018 and September 2020. Petitioner alleged that respondent: 1) failed to report for his scheduled tour of duty on November 17, 2018, failed to timely report for his scheduled tour of duty on November 18, 2018, falsely reported the time of his arrival on the timesheet for November 18, 2018, and failed to submit required reports regarding his late arrival; 2) failed to report for his scheduled tours of duty on December 29 and 30, 2018, failed to timely report for his first scheduled tour of duty on December 31, 2018, failed to report for his second scheduled tour of duty on December 31, 2018, and engaged in unprofessional, disobedient, and disrespectful conduct toward Captain Dymita Harper on December 31, 2018; 3) failed to timely report for his scheduled tours of duty on February 17 and May 5, 2019, and made false entries on the timesheets regarding his late arrivals; 4) used unnecessary and impermissible force with his poly carbon body shield against inmate Gallishaw on April 10, 2019, and submitted a false or misleading use of force report regarding the incident; and 5) failed to surrender his Department-issued shield while suspended from duty on August 6, 2020, and possessed a "fraudulent/duplicate shield . . . obtained outside of approved channels" (Pet. Exs. 1, 23, 36, 53, 63).

Respondent denied the time and leave related charges and suggested that those charges were brought in retaliation for filing sexual harassment complaints against Captain Harper in November 2018. Respondent also denied the use of force related charges and maintained that his use of force was justified under the circumstances and that his report was accurate. Respondent admitted to possessing a duplicate shield and failing to surrender his Department-issued shield while suspended from duty.

Petitioner has the burden of proving these charges by a preponderance of the credible evidence. *See Dep't of Correction v. Hall*, OATH Index No. 400/08 at 2 (Oct. 18, 2007), *adopted*,

Comm'r Dec. (Nov. 2, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 08-33-SA (May 30, 2008). Preponderance has been defined as “the burden of persuading the trier[] of fact that the existence of the fact is more probable than its non-existence.” *Prince, Richardson on Evidence* § 3-206 (Lexis 2008). “If the evidence is equally balanced, or if it leaves the [trier of fact] in such doubt as to be unable to decide the controversy either way, judgment must be given against the party upon whom the burden of proof rests.” *Id.*; see *Rinaldi & Sons, Inc. v. Wells Fargo Alarm Service, Inc.*, 39 N.Y.2d 191, 196 (1976). Petitioner has satisfied its burden with respect to most of the charges.

Retaliation

As a preliminary matter, respondent suggested that the time and leave related charges were brought in retaliation for his filing of sexual harassment complaints against Captain Harper in November 2018 (Tr. 33-34, 1133-36, 1145). It is well-established that “a defense of retaliation is not available before this tribunal.” *Human Resources Admin. v. Ali*, OATH Index No. 2380/09 at 3 (July 20, 2009); see *Dep't of Correction v. LaSonde*, OATH Index No. 2526/11 at 21 (Aug. 18, 2011) (“[I]t is well settled that a selective enforcement or retaliation claim is not a proper defense in an administrative proceeding.”); *Dep't of Finance v. Rodriguez*, OATH Index No. 430/10 at 2 (Mar. 5, 2010), *aff'd*, 102 A.D.3d 594 (1st Dep't 2013) (OATH does not have jurisdiction to hear respondent's claim that disciplinary charges were brought in retaliation for filing federal employment discrimination lawsuit). “The evidence that a witness bears some bias against a party is permissibly adduced to show that the petitioner's factual allegations are untrue, not to defeat the charges regardless of their truth.” *Dep't of Education v. Kielbasa*, OATH Index No. 658/05 at 5 (July 11, 2005); *Dep't of Sanitation v. Yovino*, OATH Index No. 1209/96 at 3-4 (Oct. 9, 1996), *aff'd in part, rev'd in part*, NYC Civ. Serv. Comm'n Item No. CD 97-109-O (Dec. 4, 1997). Thus, “an employee defending administrative charges may adduce evidence to show that no misconduct was committed but may not adduce evidence to show that any misconduct resulted in administrative charges only because of misconduct by the employer.” *Kielbasa*, OATH 658/05 at 5; see *LaSonde*, OATH 2526/11 at 21 (“[A] retaliation defense does not apply if the employer has an independent basis for disciplinary action.”).

Respondent specifically claimed that Captain Natasha Cofield, Captain Harper, Captain Yvette Wynn, and Captain Elana Miller brought disciplinary charges against him between

December 10, 2018 and May 6, 2019 in retaliation for respondent's filing of sexual harassment complaints against Captain Harper on November 7 and 15, 2018.² The first two disciplinary charges involved respondent's alleged conduct shortly thereafter on November 17 and 18, 2018 (Pet. Exs. 4, 8). However, the overwhelming weight of the evidence does not support a finding that respondent filed those two discrimination complaints. It is undisputed that respondent filed two other complaints alleging sexual harassment and retaliation with petitioner's Office of Equal Employment Opportunity ("EEO"). Respondent filed a Complaint of Discrimination with EEO on May 10, 2019 regarding alleged retaliation by Captain Wynn and amended the complaint on June 10, 2019 to include allegations of retaliation by Captain Harper (Resp. Ex. K; Pet. Exs. 78, 83). On July 20, 2020, after making an earlier inquiry by telephone, respondent filed a second Complaint of Discrimination with EEO regarding alleged sexual harassment and retaliation by Captain Harper (Pet. Ex. 77; Tr. 1091, 1118-19).

The credible evidence failed to establish that respondent filed a complaint with EEO prior to May 10, 2019. Respondent testified that starting in mid-2018 he was subjected to sexual harassment by Captain Harper, including sexual comments and unwanted touching, and that he filed a complaint against Captain Harper with EEO in November 2018 (Tr. 604-06, 811-12). Respondent offered a complaint dated November 15, 2018, which stated the following under the Description of Alleged Unlawful Discrimination:

Captain Harper has made sexual advances toward me on several occasions making me feel uncomfortable. I have tried to stay away from her and avoid interaction on every level but she has tried to grab my penis when she standing by sign in area. I complain about this to several people only to be retaliated against and harassed by her friend Captain When [*sic*]. She stops me at the front gate and threaten [*sic*] write me up because I am filing complaint on captains. While Captain Harper tells me I am making it hard on myself, I need to stop acting up and give her this dick.

(Resp. Ex. B; Tr. 605-12). The complaint dated November 15, 2018 was presented as a one-page document consisting only of this narrative description of the alleged unlawful discrimination. Unlike the two-page Complaint of Discrimination dated May 10, 2019, the single page complaint

² Captain Cofield brought charges against respondent through the command discipline process on December 10, 2018 and January 6, 2019 (Pet. Exs. 4, 8, 27, 31). Captain Harper brought charges against respondent through the command discipline process on January 1, 2019 (Pet. Ex. 35). Captain Wynn brought charges against respondent through the command discipline process on February 26, 2019 (Pet. Ex. 41). Captain Miller brought charges against respondent through the command discipline process on May 6, 2019 (Pet. Ex. 49). The Commanding Officer referred all of these matters for formal disciplinary charges (Pet. Exs. 4, 8, 27, 31, 35, 41, 49).

dated November 15, 2018 did not bear any date stamp and did not include the first page of the form, which would indicate the person who allegedly engaged in discrimination, when and where the alleged discrimination occurred, and the basis of the alleged discrimination (Resp. Exs. B, K). Respondent testified that after filing the complaint, Captains Harper and Wynn treated him with hostility, withheld timesheets from him, wrote him up on the weekends when his supervisor was not present, and told him “we don’t care what you file, it’s not going to go anywhere” (Tr. 612-15).

On petitioner’s rebuttal case, Attorney Investigator Anastasia Chin testified that there is no complaint or inquiry recorded in EEO’s database from respondent in 2018 and there is no record of the November 15, 2018 complaint having been filed with EEO (Tr. 1096-1103). According to the Final Determination letter dated November 30, 2020, which Attorney Investigator Chin drafted, EEO closed respondent’s case based upon the unsubstantiated allegations made in the complaints dated May 10, 2019 and July 20, 2020 (Pet. Ex. 83; Tr. 1113). The Final Determination did not reference any complaint dated November 15, 2018. Petitioner also offered the audio recordings from respondent’s three interviews with EEO on June 10, 2019, June 24, 2019, and April 20, 2020, which were part of the EEO investigation into respondent’s complaints (Pet. Exs. 78, 79, 80). Respondent made inconsistent statements during those interviews that undermine his claim that he filed a complaint with EEO on November 15, 2018. Even though respondent’s May 10, 2019 complaint alleged that Captains Wynn and Harper retaliated against him for filing a complaint, respondent did not mention the November 15, 2018 complaint during those interviews. At his June 10, 2019 and June 24, 2019 interviews, respondent specifically stated that he had been subjected to retaliation for filing workplace violence complaints, as opposed to EEO complaints, against Captains Harper and Wynn (Pet. Ex. 78 at 4:20-5:00, 11:18-12:18, 22:21-23:05; Pet. Ex. 79 at 10:34-11:49). He also stated that, before filing the May 10, 2019 complaint and excluding a complaint brought against him, he had never participated in an EEO investigation (Pet. Ex. 78 at 19:00-19:14).

The credible evidence also failed to establish that respondent filed a workplace violence complaint against Captain Harper on November 7, 2018 alleging sexual harassment. Respondent testified that he filed four workplace violence complaints from 2018 to the end of 2019, some of which were against Captains Harper and Wynn (Tr. 943). Respondent claimed to have filed a workplace violence complaint against Captain Harper in November 2018 and offered a Workplace

Violence Incident Report Form dated November 7, 2018 (Resp. Ex. A; Tr. 600-01). The complaint was not date stamped and no other workplace violence complaints were offered into evidence. The workplace violence complaint alleged that Captain Harper approached respondent in an “unprofessional manner” near the sign-in sheets on November 5, 2018, and made statements to him that were “sexual in nature” (Resp. Ex. A).³

Captain Harper, who has been a control room captain at GRVC since 2017, denied engaging in any sexual harassment or making any sexual comments toward respondent (Tr. 420, 429-32). She was aware that respondent filed a workplace violence complaint against her, and she was interviewed by petitioner’s Workplace Violence Division in response to the complaint (Tr. 475-76). However, according to Captain Harper, she was not notified regarding the complaint or interviewed by the Workplace Violence Division in 2018 or early 2019 (Tr. 493).

On its rebuttal case, petitioner did not offer any evidence regarding respondent’s workplace violence complaints from the division where such complaints are filed. Attorney Investigator Chin testified that EEO is not responsible for processing workplace violence complaints, but they had requested information from respondent regarding his workplace violence complaints as part of the investigation into his retaliation complaint (Tr. 1121, 1126-27). During his prior EEO interviews in June 2019, respondent made inconsistent statements that cast serious doubt as to whether he in fact filed the Workplace Violence Incident Report Form dated November 7, 2018. When asked about the basis for his workplace violence complaints against Captains Harper and Wynn, respondent claimed that they would harass him by making derogatory comments about him and by writing him up (Pet. Ex. 78 at 16:34-18:45; Pet. Ex. 79 at 17:08-19:15). Respondent did not mention any alleged sexual harassment by Captain Harper or claim that the workplace violence complaint filed against Captain Harper involved allegations of sexual harassment (Pet. Exs. 78, 79). Respondent further stated that he first attempted to submit workplace violence complaints against Captains Harper and Wynn in October or December 2018 and was finally able to file a workplace violence complaint in-person in January or February, presumably of 2019 (Pet. Ex. 78 at 11:18-12:18; Pet. Ex. 79 at 19:15-20:50).

³ Captain Faulks, who served as respondent’s direct supervisor at GRVC from 2016 to 2019, offered corroborating testimony of limited probative value. She recalled that respondent filed an EEO or workplace violence complaint against Captain Harper toward the end of 2018 or the beginning of 2019 and that Captain Harper once told her that respondent “can do as many EEO as he want[s], it’s not going to go anywhere” (Tr. 964, 978-79). She did not indicate whether the complaint respondent filed against Captain Harper alleged sexual harassment or identify precisely when the complaint was filed.

In sum, the credible evidence failed to establish that respondent filed a sexual harassment complaint against Captain Harper with EEO on November 15, 2018 or a sexual harassment workplace violence complaint against Captain Harper on November 7, 2018. As the disciplinary charges at issue in this case all pre-date the initial complaint filed with EEO on May 10, 2019, it is logically impossible that such charges were brought in retaliation for filing an EEO complaint. Any workplace violence complaints filed against Captains Harper or Wynn in early 2019 were not made part of the record and the testimony regarding such workplace violence complaints was insufficient to establish when they were filed, what conduct was alleged, or that Captains Harper, Wynn, Miller, or Cofield were aware of those complaints when these disciplinary charges were brought between December 10, 2018 and May 6, 2019.

Time and Leave Incidents

Petitioner charged respondent with engaging in various time and leave related violations on seven days – November 17 and 18, 2018, December 29, 30, and 31, 2018, February 17, 2019, and May 5, 2019 (Pet. Exs. 1, 23, 36).

Petitioner's Employee Rules and Regulations require that correction officers "report to their appointed place of duty at the time scheduled," "not leave before the completion of their tour of duty except, by permission of the Commanding Officer," and "perform the tours of duty scheduled by the Commanding Officer" (ALJ Ex. 1). Employee Rules and Regulations §§ 3.05.100, 3.05.110, 3.10.030. When they are late for duty, correction officers are required to "without delay complete and submit an Employee's Late Report (Form #15) through channels to the Commanding Officer." *Id.* at § 3.10.060. "Unexcused late arrival to duty exceeding three (3) hours shall be considered absence without leave (AWOL)," and "[d]isciplinary action shall be initiated when warranted." *Id.* at § 3.10.090. The rules further require that correction officers "sign-in their name and the exact time of arrival and departure on the time sheet," and prohibit officers from making "any false entries or notations . . . concerning the business of the Department." *Id.* at §§ 3.10.010, 4.30.020; *see also Id.* at § 3.20.030(5) (officers found guilty of making a false official statement may be dismissed from the Department).

Petitioner's Operations Order No. 12/00, effective August 16, 2000 and entitled Late Reports and Emergency Time Due (the "Operations Order"), requires correction officers to call the control room if they "cannot report on time for a scheduled tour of duty, as a result of

extenuating circumstances” (Pet. Ex. 76). “The Tour Commander may at their discretion, grant the request contingent upon the presentation of valid documentation” (*Id.*). When a personal emergency is granted, an entry is required to be made in the personal emergency logbook documenting the time of the personal emergency call, the amount of time granted, and whether documentation was received (*Id.*).

In support of its time and leave related charges, petitioner principally relied on GRVC time records, still photographs made from Genetec surveillance video, and the testimony of four control room captains – Captains Cofield, Wynn, Harper, and Miller. The control room captains testified that their responsibilities at GRVC include maintaining the “legal schedules,” ensuring that correction officers report for their scheduled tours by conducting roll calls and reviewing timesheets, assigning overtime to cover posts when correction officers do not report to work, and completing tour certifications (Tr. 42-45, 59, 223-24, 282-84, 422-23). The legal schedules document which correction officers are assigned to particular tours and posts, the timesheets record when each correction officer signed in and out, and the tour certifications reflect which correction officers were absent (including AWOL), arrived late, worked overtime, or were excused from duty (Pet. Exs. 5, 6, 7, 9, 10, 11, 24, 25, 26a, 28, 29, 30a, 32, 33, 34a, 37, 38, 39, 46, 47, 48). The tour certification is prepared by the control room captain and submitted to the tour commander, who reviews it and signs it as well (Tr. 59; Pet. Exs. 38, 47). According to the control room captains, the entries on section B of the tour certification entitled “Lateness” reflect the officers who submitted a late report upon their arrival (Pet. Exs. 7, 10, 25, 29, 33, 38, 47; Tr. 140, 255, 262-63, 268-69, 294-95, 455-56). Entries on section D of the tour certification entitled “Time Due Granted or Excusals from Duty” include “PE,” which means a personal emergency, and “10X,” which means time off or due to ensure 10 hours between tours (Pet. Exs. 7, 10, 25, 29, 33, 38, 47; Tr. 132, 311). According to the control room captains, requests for personal emergencies are not only recorded on the tour certification, but also on the legal schedule, a specific form, and the personal emergency logbook in the control room (Tr. 58-59, 111, 292-93).

November 17, 2018

Petitioner charged respondent with failing to report for his scheduled tour of duty on November 17, 2018 (Pet. Ex. 1 at Spec. 1).

On November 17, 2018, respondent was scheduled to work the 5:00 a.m. to 1:31 p.m. tour on the corridor security post at GRVC (Pet. Ex. 6). Respondent was not present for the roll call conducted by Captain Wynn at the beginning of the 5:00 a.m. tour on November 17, 2018 (*Id.*; Tr. 290, 347). Respondent never signed in or out on the timesheet for November 17, 2018 (Pet. Ex. 5). After respondent did not arrive within three hours of his scheduled 5:00 a.m. tour, Captain Cofield marked respondent as AWOL on the legal schedule and assigned another officer to work overtime to cover respondent's corridor security post (Pet. Ex. 6; Tr. 50-52). She also marked respondent as AWOL on the tour certification (Pet. Ex. 7). The tour certification does not state that respondent was granted time due or excused for a personal emergency on November 17, 2018 (*Id.*). Both Captain Wynn and Captain Cofield testified that respondent did not call the control room regarding any personal emergency or lateness (Tr. 154-55, 291-92).

Respondent testified that the axle on his car broke on the way to work on November 17, 2018, he called the control room, and the tour commander approved his request for a personal emergency (Tr. 618-19). Respondent did not speak to Captain Cofield, who was not in the control room at the time he called (Tr. 630). Respondent initially testified that he came to work that day after his car was towed and provided the tour commander with a copy of the receipt from the towing company (Tr. 620-21). The receipt from Xpert Towing and Collision Inc. reflects that respondent's car was towed from Exit 13 on Interstate 95 to the collision shop on Schofield Street in the Bronx on November 17, 2018 (Resp. Ex. C). After reviewing the timesheet for November 17, 2018, respondent corrected his testimony, stating that he did not make it to work that day and filed the receipt the following day (Tr. 626-27).

It is undisputed that respondent failed to report for his scheduled tour of duty on November 17, 2018. Respondent's claim that the tour commander excused his absence and granted his request for a personal emergency is unsubstantiated by the tour certification and not credible. As set forth above, the tour certification is prepared by the control room captain but reviewed and signed by the tour commander. The tour certification for November 17, 2018 does not state that respondent was approved for any personal emergency, but rather shows him as AWOL. Notably, other officers that day were excused from duty for personal emergencies and another officer was assigned to work overtime for six hours on respondent's post due to his AWOL, which was not recorded as a personal emergency. Although the personal emergency logbook was not produced

at trial, the tour certification, legal schedule, and timesheet established that respondent did not report to work and was not excused for a personal emergency on November 17, 2018.

Despite his testimony to the contrary, respondent failed to follow the procedures required under the Operations Order for requesting emergency time due and failed to establish a justifiable excuse for his absence on November 17, 2018. *See Dep't of Correction v. Shark*, OATH Index Nos. 1668/02 & 1828/02 at 45-46 (July 3, 2003) (sustaining AWOL charge where officer failed to follow the required procedures for emergency time due and the documentation lacked sufficient detail to corroborate his claim of an emergency). Even crediting that respondent experienced car trouble on his way to work, it is unclear on this record when the car was towed to the repair shop and why respondent was unable to report to work anytime thereafter. *See Dep't of Correction v. Luke*, OATH Index No. 2058/06 at 5 (Jan. 12, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD07-61-SA (June 12, 2007) (sustaining AWOL charge for officer's failure to report to work after an approved two-hour personal emergency where the documentation submitted at trial regarding a traffic accident was "insufficient to explain his absence for the two hours, let alone his entire tour").

Accordingly, this charge is sustained.

November 18, 2018

Petitioner charged respondent with failing to timely report for his scheduled tour of duty on November 18, 2018 (Pet. Ex. 1 at Spec. 2). Petitioner further charged respondent with falsely reporting his time of arrival on the GRVC timesheet, failing to submit an Employee's Late Report, and failing to submit a 600AR report ordered by Captain Cofield (*Id.* at Specs. 3, 4).

On November 18, 2018, respondent was also scheduled to work the 5:00 a.m. to 1:31 p.m. tour on the corridor security post at GRVC (Pet. Ex. 9). Respondent was not present for the roll call conducted by Captain Wynn at the beginning of the 5:00 a.m. tour on November 18, 2018 (*Id.*; Tr. 297). After respondent did not arrive within three hours of his scheduled 5:00 a.m. tour, Captain Wynn marked respondent as AWOL on the legal schedule and another officer was assigned to work overtime to cover respondent's corridor security post (Pet. Exs. 9, 15; Tr. 297). As reflected on her intradepartmental memorandum dated November 19, 2018, Captain Wynn informed Captain Cofield upon being relieved that she had not seen respondent that morning (Pet. Ex. 3). Captain Cofield later marked respondent as AWOL on the tour certification and in the

control room logbook (Pet. Exs. 10, 14; Tr. 80, 111). The tour certification does not state that respondent was granted time due, excused for a personal emergency, or that respondent submitted an Employee's Late Report (Pet. Ex. 10). Both Captain Wynn and Captain Cofield testified that respondent did not call the control room regarding any personal emergency or lateness (Tr. 75, 111, 212, 299).

Captain Cofield observed respondent in the facility on the security camera around noon on November 18, 2018, and requested that respondent report to the control room, but he did not do so (Tr. 80-81, 85-86, 156). Since she did not observe respondent entering through the front gate that morning, Captain Cofield sought permission from the tour commander to review video surveillance as part of her investigation into how respondent entered the facility (Tr. 86-87). Captain Cofield viewed the entirety of the Genetec video and created photographs from the video (Tr. 206-07). As captured on still photographs from Genetec video, respondent entered GRVC through a door on the loading dock at approximately 11:40 a.m. with the assistance of Officer Straker who had keys to the door, and walked through the kitchen into a corridor (Pet. Exs. 16, 17, 18, 19, 20, 21; Tr. 95-96, 206). Captain Cofield testified that these photographs showing respondent entering the facility through the loading dock and kitchen between 11:34 a.m. and 11:43 a.m. included all of respondent's actions recorded on the entire Genetec video (Tr. 207). According to teletype order HQ-00653-0 dated March 20, 2013, correction officers are prohibited from entering and exiting Department facilities "via ports of entry and egress other than the front gate/main entrance" (Pet. Ex. 2). According to timesheets stamped by Captain Cofield at 7:20 a.m. and 1:01 p.m., respondent had not signed in to work by those times on November 18, 2018 (Pet. Exs. 11, 12; Tr. 76, 107-08). Sometime thereafter, respondent entered his time on the timesheet as 5:00 a.m. to 1:30 p.m. (Pet. Ex. 13). There is a fainter number one to the left of the boldly written numbers five and zero (*Id.*).

Captain Cofield further testified that she ordered respondent to file a 600AR report regarding his arrival on November 18, 2018 (Tr. 85, 156-57). According the complaint report prepared after the incident, Captain Cofield ordered respondent to submit the report on November 19, 2018 at 12:20 p.m. (Pet. Ex. 8). On November 19, 2018, respondent submitted an intradepartmental memorandum entitled "Signing In" to the warden "through channels," in which he stated that he called for a personal emergency on November 18, 2018 and arrived at the facility at approximately 11:00 a.m. (Pet. Ex. 22). Upon arrival, respondent stated that he "began to prep

the kitchen for the facility's upcoming Thanksgiving event" and at the end of his tour, "mistakenly signed in at 0500 hours" (*Id.*). Captain Cofield acknowledged that respondent submitted this report in accordance with her order (Tr. 193).

Respondent testified that he had to take his daughter to the emergency room in the early morning hours of November 18, 2018 (Tr. 665-66). At approximately 3:30 a.m., he called the tour commander from the hospital and was approved for a personal emergency (Tr. 666). According to a letter from WMCHHealth in Valhalla, New York, which he stated was later provided to the facility, respondent's daughter was registered in the emergency room on November 18, 2018 and discharged that same day (Resp. Ex. G; Tr. 666-67). After the personal emergency, respondent testified that he went grocery shopping in Queens for an upcoming Thanksgiving event as part of his programs post assignment under the supervision of Captain Faulks (Tr. 597, 634-35, 900-01). Respondent explained that the corridor security post reflected on the legal schedule was "not a manned post" and that he was permitted to perform his programs post responsibilities while assigned to that corridor post on weekends (Tr. 633-34). As part of those duties, he purchased groceries and prepared food for holiday events attended by staff members (Tr. 597, 633).

Respondent stated that he went shopping by himself that day at Restaurant Depot or Jethro's, located in Queens about 30 to 40 minutes from GRVC, and purchased "[e]nough to feed 700 to 800 officers" (Tr. 634-35, 643, 901). He did not report to GRVC before going shopping (Tr. 900). Respondent initially testified that another officer used his personal vehicle to transport the groceries to the facility (Tr. 637). He stated: "the officer drove me through the gate. We dropped off the food, we took the food out of the car, transferred the food from the car to the platform. Upon transferring the food, the officer drove back through the gate. He dropped me off, and I transferred the food from inside, from off the platform into the storage facility" (*Id.*). Officer Straker and another mess hall officer assisted respondent with unloading the groceries into the facility (Tr. 643). Respondent later testified on cross-examination that since his car broke down the day before, he borrowed a vehicle to get to work on November 18, 2018, and then "got a ride across the bridge" to get to GRVC (Tr. 896-97). When asked regarding the car used to go shopping, respondent testified: "I actually borrowed an officer's car. They met me at the place. We switched vehicles and they drove and we switched cars" (Tr. 897). When asked regarding the car used to access the sallyport, respondent testified that he borrowed the vehicle of a retired officer with a "gate one pass" (Tr. 902).

Respondent insisted that he arrived at GRVC and started to unload the groceries at approximately 9:30 a.m. (Tr. 643, 767). According to respondent, he was regularly permitted to use the sallyport to deliver food for staff events (Tr. 635-37). Upon reviewing the photographs of him on the loading dock at 11:34 a.m., respondent testified that the vehicle used to transport the food had already left and the food had already been put away by him and Officer Straker (Tr. 641-43). Respondent suggested that Captain Cofield lied about not seeing him unload food on the surveillance video between approximately 9:30 a.m. and 11:30 a.m. because she was promised a position as the programs supervisor (Tr. 781-82).

Respondent testified that he “accidentally signed in at 1500 hours, instead of 1100 hours” on November 18, 2018 (Tr. 640). Upon review of the timesheet, respondent explained that he wrote 1500 hours because his regularly scheduled tour ended at that time (Tr. 640-41). Respondent denied that he signed in at 5:00 a.m. and that he darkened the number 5 on the timesheet and claimed that someone else darkened the number to make it look like he signed in improperly (Tr. 641, 651, 785). Respondent further testified that he called the control room when he arrived at the facility and saw Captain Cofield in the mess hall, where she requested a report on why he came in late (Tr. 639). He claimed that he filed two 600AR reports in response to Captain Cofield’s order (Pet. Ex. 22; Resp. Ex. F; Tr. 650-52). On the handwritten report dated November 18, 2018 and entitled “Reason Why I Was Late,” respondent stated that he called for a personal emergency at 4:00 a.m., went food shopping for an upcoming event, and arrived at the building at approximately 10:00 a.m., at which time he unloaded the food and secured it in the staff kitchen (Resp. Ex. F). Respondent insisted that the report stated that he arrived at 9:00 a.m. as opposed to 10:00 a.m. (Tr. 790). Respondent testified that he submitted the typed report dated November 19, 2018 without having the opportunity to review the timesheet and in response to Captain Cofield’s order to write a report addressing why he signed in at 5:00 a.m. and arrived at 11:00 a.m. (Tr. 640, 650-52, 793-94; Pet. Ex. 22).

Captain Faulks, who served as the programs supervisor in November 2018, explained that respondent and other officers assigned to programs posts were responsible for all shopping, cooking, and decorating for staff events (Tr. 965-66). Captain Faulks explained that some staff were placed on posts such as inmate assignments or corridors to perform programs-related tasks (Tr. 970-71). The deputy warden for programs authorized officers to perform off-site shopping during work hours (Tr. 967). She explained that the food purchased for staff events was always

brought through the mess hall sallyport (Tr. 968-69). Captain Faulks generally recalled that respondent performed shopping for staff events over the three years that they worked together (Tr. 971). However, Captain Faulks did not work on November 18, 2018, did not have any recollection of what happened on that day, and did not specifically recall ordering respondent to go shopping that day (Tr. 972-73, 1064). Captain Wynn confirmed that there were times that Captain Faulks would pull officers, including respondent, from their posts to assist with staff events (Tr. 292, 348, 355-56). Captain Cofield, who served as the programs supervisor after Captain Faulks, confirmed that officers assigned to programs were permitted to go shopping during work hours, but testified that they were required to enter through the front entrance and were not allowed to bring food into the facility through the mess hall sallyport (Tr. 168-69, 210-11).

Petitioner established by a preponderance of the credible evidence that respondent was absent without leave on the morning of November 18, 2018. Despite respondent's claim that the tour commander excused his absence and granted his request for a personal emergency, the tour certification for November 18, 2018 does not state that respondent was approved for any personal emergency, but rather shows him as AWOL. As on November 17, 2018, other officers were excused from duty for personal emergencies on November 18, 2018 and another officer was assigned to work overtime for six hours on respondent's post due to his AWOL, which was not recorded as a personal emergency. Although the personal emergency logbook was not produced at trial, the tour certification and legal schedule established that respondent did not timely report to work and was not excused for a personal emergency on November 18, 2018. Likewise, the tour certification confirmed that respondent did not submit a late report that day.

As on the day before, respondent failed to follow the procedures required under the Operations Order for requesting emergency time due and failed to establish a justifiable excuse for his absence on the morning of November 18, 2018. *See Shark*, OATH 1668/02 & 1828/02. Even assuming that respondent was present in the emergency room with his daughter that night, it is unclear on this record how long they were there, whether any other family member was present, when she was discharged, and when thereafter respondent was able to report to work. Moreover, not even respondent claimed that the emergency room visit prevented him from reporting to work until approximately 11:30 a.m. Rather, respondent claimed that he was able to perform work-related shopping in Queens that morning and arrive at GRVC by approximately 9:30 a.m. The evidence presented by respondent was insufficient to justify his extended absence on the morning

of November 18, 2018. *See Dep't of Correction v. Johnson*, OATH Index No. 1663/19 at 10-11 (Oct. 18, 2019), *adopted*, Comm'r Dec. (Dec. 20, 2019), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2020-0111 (Feb. 10, 2021) (where officer submitted a hospital record indicating that her child was treated in the hospital the night before her tour, “[t]he sparse evidence offered by respondent fell far short of proving that she had a personal emergency that prevented her from reporting to work”).

Although respondent argued that petitioner condoned entry through the sallyport when officers assigned to programs posts delivered food and supplies for staff events, the credible evidence did not establish that respondent went shopping and delivered food to GRVC on November 18, 2018. The photographs captured from Genetec video on November 18, 2018 depict respondent entering GRVC at approximately 11:30 a.m. through the loading dock and the kitchen with the assistance of Officer Straker. It appears that respondent unsuccessfully sought entry at one door on the loading dock, and then was provided entry when Officer Straker arrived on the loading dock approximately five minutes later. Respondent was not unloading or carrying any food or supplies at the time and no vehicle used to deliver the food and supplies was present. Although the surveillance video was not offered into evidence, I credited Captain Cofield's straightforward testimony that she viewed the entirety of the video and it did not show any other actions taken by respondent on the loading dock that morning. Captain Cofield was a credible witness and respondent's accusation of impropriety was baseless. She exhibited no animus toward respondent and appeared to be just doing her job as a supervisor.

In contrast, respondent's testimony regarding shopping on November 18, 2018 was inconsistent, confusing, and not credible, and Captain Faulks's general recollection of respondent's responsibilities while assigned to programs was insufficient to corroborate that respondent in fact performed shopping for the Thanksgiving staff event on November 18, 2018. In particular, respondent's explanation of the vehicles used to go shopping and access the facility was almost incoherent. Respondent also provided contradictory statements regarding the time of his arrival at GRVC. While it is doubtful that unloading groceries from one vehicle would take two hours, respondent testified that he arrived at the facility with the groceries at 9:30 a.m. and finished transferring the food into the facility by approximately 11:30 a.m. He alternatively testified that he “accidentally signed in at 1500 hours, instead of 1100 hours,” and stated in the typed report dated November 19, 2018, which was offered by petitioner at trial and acknowledged by respondent as authentic, that he arrived at the facility at approximately 11:00 a.m. Notably, the

report does not mention any food shopping or unloading that morning, but rather states that respondent “began to prep the kitchen” for an event upon his arrival.

The credible evidence further established that respondent falsely entered his arrival time as 5:00 a.m. on the timesheet. As set forth above, respondent entered the facility through the loading dock and kitchen at approximately 11:30 a.m., and I find no credible evidence that respondent went shopping as part of his programs post responsibilities on November 18, 2018. According to the bold numerals on the timesheet, respondent entered his arrival time as 5:00 a.m. on November 18, 2018. It appears from the document that respondent started to write his entry time with the number one first and then corrected it by writing 500 in bold numerals. At trial, respondent denied that he signed in at 5:00 a.m. and insisted that the timesheet said 1500 hours, noting the fainter number one to the left of the number five. However, it makes no sense that respondent would have accidentally entered his time for the day as 3:00 p.m. to 1:30 p.m. Such an entry is particularly nonsensical given that both times were simultaneously entered as respondent departed GRVC at the end of his 5:00 a.m. to 1:31 p.m. tour. Moreover, such testimony is inconsistent with his typed report dated November 19, 2018, which stated that he “mistakenly signed in at 0500 hours.” Respondent’s attempt to explain away the admission in his report was unconvincing.

In sum, it is more likely than not that respondent attempted to conceal his absence without leave on the morning of November 18, 2018 by entering the facility through the loading dock and kitchen at approximately 11:30 a.m., not submitting a late report, and falsely reporting his arrival time on the timesheet as 5:00 a.m. Accordingly, the charges with respect to respondent being absent without leave, failing to submit an Employee’s Late Report, and falsely entering his time on November 18, 2018 are sustained. However, as the record reflects that respondent submitted one, if not two, 600AR reports regarding his arrival on November 18, 2018 in response to Captain Cofield’s order, the charge with respect to respondent’s failure to submit a required 600AR report is not sustained.

December 29 and 30, 2018

Petitioner charged respondent with failing to report for his scheduled tours of duty on December 29 and 30, 2018 (Pet. Ex. 23 at Specs. 1, 2).

On December 29, 2018, respondent was scheduled to work the 7:00 a.m. to 3:31 p.m. tour on the Building 10 B post at GRVC (Pet. Ex. 24). Respondent was not present for the roll call

conducted by Captain Cofield at the beginning of the 7:00 a.m. tour on December 29, 2018 (*Id.*; Tr. 124-25). Respondent never signed in or out on the timesheet for December 29, 2018 (Pet. Ex. 26a). After respondent did not arrive within three hours of his scheduled 7:00 a.m. tour, Captain Cofield marked respondent as AWOL on the legal schedule and assigned another officer to work overtime to cover respondent's post (Pet. Ex. 24; Tr. 124-25). She also marked respondent as AWOL on the tour certification (Pet. Ex. 25). The tour certification does not state that respondent was granted time due or excused for a personal emergency on December 29, 2018, or that respondent submitted a late report. Captain Cofield testified that respondent did not call the control room regarding any personal emergency on December 29, 2018 (Tr. 125, 135).

On December 30, 2018, respondent was scheduled to work the 7:00 a.m. to 3:31 p.m. tour on the Building 2 control post at GRVC (Pet. Ex. 28). Respondent called that morning regarding a personal emergency and the tour commander instructed respondent to report to work by 9:00 a.m. (Pet. Exs. 28, 31; Tr. 137, 139). After respondent did not arrive by noon, Captain Cofield marked respondent as AWOL on the legal schedule and assigned another officer to work overtime covering respondent's post (Pet. Ex. 28; Tr. 137). She also marked respondent as AWOL on the tour certification (Pet. Ex. 29). Respondent never signed in or out on the timesheet for December 30, 2018 (Pet. Ex. 30a).

Respondent testified that he arrived approximately 40 minutes late on December 29, 2018, and submitted a late report to the control room, but did not communicate with Captain Cofield (Tr. 671-72). Respondent offered a copy of a late report dated December 29, 2018, which appears to be date stamped by the GRVC Control Room at 1:13 p.m. that day (Resp. Ex. D). The late report reflects an arrival time of 5:40 a.m. for the 5:00 a.m. to 1:31 p.m. tour. The reason for his lateness is blank, as is the name and title of the supervisor he reported to. Upon his arrival, respondent was "shocked" to see that he was not assigned to his steady programs area post or the 5:00 a.m. tour (Tr. 669-70, 676). He contacted his union delegate, who spoke to a captain, and they sent him to his programs post that day (Tr. 671). Respondent claimed that the legal schedule, which was published by the personnel office a week before and did not reflect the 5:00 a.m. tour, had been changed by someone (Tr. 826-27). He could not recall what specific post he worked that day but insisted that he saw and spoke to Captain Cofield (Tr. 678, 838, 841). Respondent further testified that he called for a personal emergency on December 30, 2018 and eventually made it to work (Tr. 679-80). He could not recall the circumstances of the personal emergency and did not offer any

documentation regarding the personal emergency (*Id.*). He did not recall what post he worked that day or what time he arrived after the personal emergency (Tr. 682, 852-83).

Upon review of the timesheet for December 29, 2018, respondent testified that “Captain Harper had taken the sign-in sheet and refused to let [him] sign in” (Tr. 677). However, on cross-examination, respondent testified that he did not recall who was the control room captain that morning and was not sure who removed the timesheet (Tr. 828-29, 841-43). Upon review of the timesheet for December 30, 2018, respondent testified that either Captain Harper or Captain Wynn withheld the timesheet and did not permit him to sign in that day (Tr. 681-82). On cross-examination, respondent testified that he could not recall if the timesheet was withheld that day and that he “could’ve forgotten to sign in and sign out” (Tr. 851).

The timesheets, legal schedules and tour certifications establish that respondent did not report to work on December 29 and 30, 2018. Respondent did not sign the timesheets and is recorded as AWOL on the legal schedules and tour certifications. On both days, another officer was assigned to work overtime for six hours on respondent’s post due to his AWOL. Although respondent insisted that he was present at work, his testimony was devoid of details, such as when he arrived, why he was late, or what post he worked, and at odds with all time and leave records maintained by petitioner.

In an attempt to explain his absence on the timesheets, respondent claimed that either Captain Harper or Captain Wynn withheld the timesheets from him. However, there is no credible evidence that either Captain Harper or Captain Wynn withheld timesheets from respondent on December 29 or 30, 2018. Respondent’s testimony on this point was vague and speculative. Although Captain Faulks testified that these captains prevented respondent from signing in on “several occasions,” she could not and did not testify that any such interference occurred on December 29 or 30, 2018, because she was not working on those dates (Tr. 984-85; Pet. Exs. 26a, 30a). Most importantly, the timesheets reflect that Captain Harper did not work at GRVC on either date, and that Captain Wynn did not start work until 11:40 a.m. and 2:20 p.m. respectively on those dates, well after respondent’s alleged arrival times (*Id.*). Respondent’s implausible claim that the control room captains removed the timesheet just for officers with the last name starting with the letter “T” was undermined by the fact that other officers with such last names were able to sign in on that same page between 5:00 a.m. and 7:00 a.m. on December 29 and 30, 2018.

Likewise, I did not find the Employee's Late Report dated December 29, 2018 to be convincing and therefore afforded it little weight. The report is at odds with the notations on the contemporaneous legal schedule and tour certification, which made no mention of respondent's lateness that day and recorded the latenesses of other officers. The late report and respondent's testimony that he worked that day are also at odds with the timesheet, which was not signed by respondent and not withheld from him, as noted above. The Employee's Late Report dated December 29, 2018 is also inconsistent with the Employee's Late Report submitted by respondent on May 5, 2019. Although the December 29, 2018 late report bears a date stamp from the GRVC control room, that report is missing crucial types of information that respondent included on his late report dated May 5, 2019, such as the reason for the lateness and the captain to whom he reported, and lists the wrong tour (Resp. Exs. D, I). I did not credit respondent's testimony that he reported to work for the 5:00 a.m. tour on a programs post on December 29, 2018, given that the legal schedule was published by the personnel office a week in advance and respondent had filed a grievance just three days earlier regarding being removed from his steady programs post (Resp. Ex. J). Importantly, unlike the record of his December 29, 2018 lateness, information regarding his lateness on May 5, 2019 was noted on the tour certification and legal schedule, and respondent signed the timesheet on May 5, 2019.

In sum, petitioner established by a preponderance of the credible evidence that respondent failed to report for his scheduled tours of duty on December 29 and 30, 2018. Accordingly, these charges are sustained.

December 31, 2018

Petitioner charged respondent with failing to timely report for his first scheduled tour of duty on December 31, 2018, engaging in unprofessional, disobedient, and disrespectful conduct toward Captain Harper at approximately 10:00 a.m., and failing to report for his second scheduled tour of duty on December 31, 2018 (Pet. Ex. 23 at Specs. 3, 4, 5, 6).

On December 31, 2018, respondent was scheduled to work the 7:00 a.m. to 3:31 p.m. tour on the Building 2 control post at GRVC (Pet. Ex. 32). Respondent was not present for the roll call conducted by Captain Harper at the beginning of the 7:00 a.m. tour on December 31, 2018 (Tr. 436-37). Captain Harper marked respondent as AWOL on the legal schedule and assigned another officer to work overtime to cover respondent's post (Pet. Ex. 32; Tr. 436, 438). Captain Harper

testified that respondent did not call the control room regarding any personal emergency or lateness (Tr. 437). She first saw respondent in the facility after 10:00 a.m. when he responded to an alarm (Tr. 439-40, 442; Pet. Ex. 75). Respondent had not reported to the control room upon his arrival or submitted a late report to the control room (Tr. 439, 441). Captain Harper went to speak with him about his arrival time and respondent replied in a “disrespectful and nasty” manner (Tr. 442-43). According to the complaint report drafted by Captain Harper on the following day, respondent told her, “Don’t you see me now responding to a fucking alarm, shut ya ass up and sit the fuck down” (Pet. Ex. 35). When she ordered him to report to his post and relieve the officer working overtime, respondent replied, “Fuck you I’m not going” (*Id.*). She informed the tour commander to avoid further confrontation and respondent complied with the tour commander’s instruction to assume his post (Tr. 443, 454). Captain Harper marked respondent as AWOL on the tour certification for the 7:00 a.m. to 3:31 p.m. tour (Pet. Ex. 33). The tour certification does not state that respondent was granted time due or excused for a personal emergency on December 31, 2018 (*Id.*). The timesheet reflects that respondent signed in at 9:10 a.m. on December 31, 2018 (Pet. Ex. 34a). Captain Harper reviewed surveillance video and created photographs from the video with the tour commander’s assistance (Tr. 465-66). As captured on a still photograph from the Genetec video, respondent entered GRVC through the front gate at approximately 9:08 a.m. (Pet. Ex. 74).

On December 31, 2018, respondent was also scheduled to work the 3:00 p.m. to 11:31 p.m. overtime tour on the Building 1 control post at GRVC (Pet. Ex. 32). The timesheet reflects that respondent signed out of GRVC at 4:40 p.m. on December 31, 2018 (Pet. Ex. 34a). Captain Harper marked respondent’s departure time on the legal schedule and assigned another officer to work overtime to cover respondent’s post (Pet. Ex. 32; Tr. 451-52). Captain Harper testified that she saw respondent as he was leaving the facility and told him that he was scheduled to work the overtime tour, but he walked past her and did not reply (Tr. 453-54). Captain Harper was not aware that respondent had a medical appointment on December 31, 2018 (Tr. 482). She explained that if respondent had a scheduled appointment, “he should have notified Personnel [and] [t]hat way, he wouldn’t have been scheduled for overtime” (Tr. 482-83).

Respondent testified that he arrived to work approximately two hours late on December 31, 2018 (Tr. 685-87). He called the tour commander regarding his lateness and filed a late report, although no late report was offered into evidence and he did not recall why he was late (Tr. 687,

874-75). On cross-examination, respondent testified that he requested a personal emergency from the tour commander on December 31, 2018 (Tr. 855, 859-60). He did not recall the circumstances of the personal emergency and no documentation of any emergency was offered into evidence (Tr. 855). He insisted that he checked in with Captain Harper that morning and denied that a tour commander was required to order him to assume his post (Tr. 861, 863). Respondent initially acknowledged that “there was an exchange of words” with Captain Harper and that a deputy warden had to intervene in the confrontation (Tr. 863). However, he later testified that he did not recall any interaction with Captain Harper that morning, or that Captain Harper had to call a tour commander for his refusal to assume his post (Tr. 875). He recalled speaking with Captain Harper in the middle or end of his tour regarding his overtime tour, explaining that he had a physical therapy appointment scheduled and could not stay (Tr. 688-89, 882). He denied ignoring Captain Harper when he left the facility that day and testified that he provided the control room with documentation regarding his appointment on the following day (Tr. 690-92). According to a letter from North Shore Medical Rehabilitation in Woodside, New York, respondent was seen for a physical therapy appointment on December 31, 2018 (Resp. Ex. E). Respondent explained that the Health Management Division notified the command regarding his authorized ongoing physical therapy, he notified the command regarding the specific appointment dates, and he was “supposed to be taken off the schedule” (Tr. 689, 865-66).

It is undisputed that respondent reported to work approximately two hours late on December 31, 2018. Respondent’s claim that he either submitted a late report or was granted a personal emergency on December 31, 2018 is uncorroborated by any documentation submitted, unsubstantiated by the tour certification, and not credible. The tour certification for December 31, 2018 does not state that respondent was approved for any personal emergency or excused for any lateness, but rather shows him as AWOL that morning. Other officers on the same tour were excused for lateness and another officer was assigned to work overtime on respondent’s post for over three hours due to his AWOL, which was not recorded as a lateness or personal emergency. Although the personal emergency logbook was not produced at trial, the tour certification, legal schedule, and timesheet established that respondent did not timely report to work and was not excused for a personal emergency on December 31, 2018. Respondent failed to present any evidence of a personal emergency that justified his absence on the morning of December 31, 2018.

Petitioner further established by a preponderance of the credible evidence that respondent engaged in unprofessional and disrespectful conduct toward Captain Harper on December 31, 2018, in violation of departmental rules. *See* Employee Rules and Regulations §§ 3.20.010 (requiring officers to “present a professional demeanor” and “not use indecent, abusive, or profane language”), 3.20.180 (prohibiting officers from “behav[ing] with disrespect toward a supervisor”), 3.20.190 (prohibiting officers from “act[ing] disrespectfully in language or demeanor toward a supervisor”). As Captain Harper testified and as contemporaneously recorded in her complaint report, respondent replied to her inquiry with disrespect and profanities. Respondent did not testify on direct examination about his interaction with Captain Harper that morning and provided inconsistent testimony on cross-examination. After initially acknowledging a verbal altercation with Captain Harper that required the intervention of a deputy warden, he later denied any recollection of the interaction. I credited Captain Harper’s testimony and detailed contemporaneous report over respondent’s vague denial at trial. Moreover, Captain Faulks’s testimony that Captain Harper disliked respondent and sought to “write the blood out of him” (Tr. 987, 1021) did not undermine her credibility or her account of respondent’s actions that day. The demeaning tone and substance of respondent’s words as well as his use of profanity amounted to misconduct. *See Dep’t of Correction v. Bryan*, OATH Index No. 839/14 at 9 (Apr. 29, 2014), *adopted*, Comm’r Dec. (Mar. 18, 2016) (finding that an officer’s “aggressive stance,” “challenging tone of voice,” and use of profanity were sufficient to conclude that she was being disrespectful to a supervisor).

Lastly, petitioner established by a preponderance of the credible evidence that respondent departed prior to the completion of his scheduled overtime tour, without the permission of a commanding officer and in contravention of Captain Harper’s order. On December 31, 2018, Captain Harper told respondent that he was scheduled for overtime, of which he was already aware from the legal schedule published earlier in the week, yet, nonetheless, he departed the facility without permission at 4:40 p.m. The documentation submitted by respondent at trial did not identify the time of his appointment and respondent did not explain what efforts, if any, he made earlier in the week to be relieved from his scheduled overtime tour. Even assuming that respondent had an appointment in the evening on New Year’s Eve, his regularly scheduled physical therapy appointment did not excuse his unauthorized departure and did not amount to a medical emergency under the health and safety exception to the “obey now/grieve later” principle. *See* Employee

Rules and Regulations §§ 3.10.030 (prohibiting officers from “leav[ing] before the completion of their tour of duty except, by permission of the Commanding Officer”), 3.20.070 (requiring officers to “promptly obey all lawful orders of their supervisors”), 3.20.190 (prohibiting officers from “willfully disobey[ing] a lawful order of a supervisor”); *Dep’t of Correction v. Blount*, OATH Index No. 1054/04 at 10-11 (Jan. 20, 2005), *modified on penalty*, Comm’r Dec. (May 12, 2005) (finding that “pursuant to the obey now, grieve later princip[le], respondent was required to obey the order to assume the new post and file a grievance later”); *Dep’t of Correction v. Keyes-Alston*, OATH Index No. 468/05 at 5 (Feb. 1, 2005) (finding that officer’s refusal to obey a captain’s order to work overtime was misconduct and that officer failed to prove that any medical emergency existed to satisfy the health and safety exception to the “obey now/grieve later” principle); *Dep’t of Correction v. Clayton*, OATH Index No. 1067/03 at 13 (Dec. 31, 2003) (finding that correction officer refused the lawful order of a supervisor to stay for an overtime assignment and was AWOL from her assigned overtime post).

Accordingly, these charges are sustained.

February 17, 2019

Petitioner charged respondent with failing to timely report for his scheduled tour of duty on February 17, 2019, failing to report to his assigned post between approximately 10:40 a.m. and 12:38 p.m., and making a false entry on the GRVC timesheet by entering “TD” or time due next to his arrival time (Pet. Ex. 36 at Specs. 1, 2, 3).

On February 17, 2019, respondent was scheduled to work the 7:00 a.m. to 3:31 p.m. tour on the intake post at GRVC (Pet. Ex. 37). Respondent was not present for the roll call at the beginning of the 7:00 a.m. tour on February 17, 2019 (*Id.*; Tr. 311). After respondent did not arrive within three hours of his scheduled 7:00 a.m. tour, Captain Wynn marked respondent as AWOL on the legal schedule and the control room logbook (Pet. Exs. 37, 40; Tr. 312). She also marked respondent as AWOL on the tour certification (Pet. Ex. 38). At approximately 12:30 p.m. on February 17, 2019, Captain Wynn observed respondent responding to an alarm on the surveillance camera (Tr. 318, 357). Since she did not see respondent earlier that day, Captain Wynn reviewed video surveillance to determine what time he came to work and created photographs from the video (Tr. 318, 358). As captured on a still photograph from the Genetec video, respondent entered GRVC through the front gate at approximately 10:40 a.m. (Pet. Ex. 42). According to a timesheet

stamped by Captain Wynn at 12:09 p.m., respondent had not signed in to work by that time on February 17, 2019 (Pet. Ex. 39; Tr. 313). Sometime thereafter, respondent entered his time on the timesheet as 10:40 a.m. to 5:00 p.m. (Pet. Ex. 45a). The letters TD are noted next to his name, which means time due (*Id.*; Tr. 323). The tour certification does not state that respondent was granted time due or excused for a personal emergency on February 17, 2019 (Pet. Ex. 38). According to an intradepartmental memorandum dated November 21, 2019, the personnel office was unable to locate any time due or 600AR reports submitted by respondent for February 17, 2019 (Pet. Ex. 51). Captain Wynn testified that she did not grant respondent any time due on February 17, 2019 (Tr. 323-24).

As captured on another photograph from the Genetec video, respondent walked past the control room and into main intake at approximately 12:38 p.m. (Pet. Exs. 43, 44). Captain Wynn did not know where respondent was from 10:42 a.m. to 12:38 p.m. and stated that the only time that he responded to intake that morning was the “time that you see him in the camera, that I know of” (Tr. 321-22). Captain Wynn acknowledged that she did not review the Genetec video to determine respondent’s whereabouts from 10:42 a.m. to 12:38 p.m., and that it was possible that respondent was responding to other alarms within the facility during that time (Tr. 360). Respondent never signed in on the intake post logbook on February 17, 2019 (Pet. Ex. 40).

Respondent testified that on February 16, 2019, he worked until approximately 1:00 a.m. or 1:30 a.m. in the early morning of February 17, 2019 (Tr. 694). Upon review of the timesheet for February 16, 2019, he first stated that he signed out at “23 or 2100” hours and then insisted upon 2300 hours and stated that “I don’t see clearly the 1” on the document (Pet. Ex. 45; Tr. 877-78). After acknowledging that there are more than 10 hours between 11:00 p.m. and 10:40 a.m., respondent added that he responded to an alarm after signing out (Tr. 879). On re-direct examination, he changed his testimony, claiming that the timesheet reflected that he signed out at 2:00 a.m. (Pet. Ex. 45; Tr. 947). He testified that he submitted a request for time due to ensure 10 hours before the start of his next tour, arrived at 10:42 a.m. for his 7:00 a.m. tour, and noted time due on the timesheet (Tr. 694-95, 698). He denied spending until 12:38 p.m. in the locker room and insisted that he responded to an alarm as soon as he arrived that day and then responded to another alarm at 12:38 p.m. (Tr. 695-97). Respondent explained that officers assigned to an intake post “have a duty to respond to every alarm in the building” (Tr. 598).

It is undisputed that respondent arrived at approximately 10:40 a.m. for his scheduled 7:00 a.m. tour on February 17, 2019, and entered a notation for time due on the timesheet. Respondent claimed that he timely arrived for his scheduled tour on February 17, 2019 after working overtime on his previous tour and properly noted time due on the timesheet next to his 10:40 a.m. arrival time. However, the credible evidence established that respondent was not entitled to time due for overtime worked on February 16, 2019, and made a false entry on the timesheet when he entered the notation for time due. The tour certification prepared by Captain Wynn does not state that respondent was granted time due for a "10X," or time off or due to ensure 10 hours between tours, and a memorandum from the personnel office confirmed that no documentation regarding time due for February 17, 2019 could be found. Notably, three other officers on the 7:00 a.m. to 3:31 p.m. tour were granted time due for a "10X," but not respondent. Moreover, the timesheet for February 16, 2019 did not substantiate respondent's assertion that he was entitled to over three and a half hours of time due on February 17, 2019. Although the numbers on the timesheet are not perfectly clear, it appears that respondent wrote "2100," with the two zeros in bolder typeface over pre-existing numbers three and zero (Pet. Ex. 45). He did not write over the numbers two or one. Respondent provided inconsistent and unconvincing testimony regarding the departure time noted in his own handwriting on the timesheet, first stating that it could be 2100 or 2300 hours, then insisting it was 2300 hours, and finally testifying that it said 2:00 a.m. Based on respondent's own entries on the timesheets and the lack of any documentation indicating that respondent was granted time due to ensure ten hours between his tours, it is more likely than not that respondent worked until 9:00 p.m. on February 16, 2019, was not entitled to any time due on February 17, 2019, and falsely noted time due on the timesheet when he arrived over three and a half hours late on February 17, 2019. The record further supports a finding that respondent entered the notation to create the appearance that he was entitled to arrive late on February 17, 2019.

However, petitioner did not prove by a preponderance of the credible evidence that respondent failed to report to his assigned intake post between 10:40 a.m. and 12:38 p.m. on February 17, 2019. The three photographs recorded from the Genetec video at 12:38 p.m. establish that respondent reported to his intake post at least by that time even though he did not sign in on the intake logbook at any point during the day. Petitioner suggested that respondent had been in the locker room for the entirety of the previous two hours. However, petitioner did not produce any witnesses who observed respondent in the locker room for the two-hour period and did not

offer the surveillance video of the two-hour period into evidence. In stark contrast with Captain Cofield's investigation with respect to respondent's late arrival on November 18, 2018, Captain Wynn testified that she did not review the video at the time to determine respondent's whereabouts. Captain Wynn's testimony that respondent did not assume his intake post until 12:38 p.m. was speculative and she acknowledged that it was possible that respondent had responded to alarms as part of his intake duties during that time, as maintained by respondent.

Accordingly, these charges are sustained in part.

May 5, 2019

Petitioner charged respondent with failing to timely report for his scheduled tour of duty on May 5, 2019, and making a false entry on the GRVC timesheet by entering 7:00 a.m. instead of his actual time of arrival at approximately 9:26 a.m. (Pet. Ex. 36 at Specs. 4, 5.)

On May 5, 2019, respondent was scheduled to work the 7:00 a.m. to 3:31 p.m. tour on the intake post at GRVC (Pet. Ex. 46). Respondent was not present for the roll call conducted by Captain Miller at the beginning of the 7:00 a.m. tour on May 5, 2019 (*Id.*; Tr. 224, 228-29). Captain Miller observed respondent entering the front door and marked respondent on the legal schedule as arriving late at 9:30 a.m. (Pet. Ex. 46; Tr. 227, 232). As captured on a still photograph from the Genetec video, respondent entered GRVC through the front gate at approximately 9:30 a.m. (Pet. Ex. 50). The tour certification prepared by Captain Meli, who worked as of 6:30 a.m. on May 5, 2019, listed respondent as late and noted that respondent had telephoned regarding a MTA delay of 40 minutes (Pet. Exs. 47, 48; Tr. 260). Captain Miller, who worked until 12:01 p.m. on May 5, 2019, testified that respondent did not call her regarding his lateness but that the lateness notation in the tour certification meant that respondent called the control room and submitted a late slip, albeit not to her (Pet. Ex. 48; Tr. 230, 237-38, 255, 262, 266-69). According to the timesheet for May 5, 2019, respondent entered his time as 7:00 a.m. to 11:00 p.m. (Pet. Ex. 48).

Respondent testified that he arrived approximately two hours late on May 5, 2019 due to "another issue with my daughter and her medical problems" (Tr. 699). Respondent did not provide any further details regarding his inability to report to work on time or offer any corroborating documentation of the health-related emergency. According to respondent, he called the facility regarding his lateness and spoke to a deputy warden (Tr. 699, 885). Upon arrival, respondent

submitted a late report to the control room (Tr. 743-45). Respondent offered a copy of a late report dated May 5, 2019 (Resp. Ex. I). The late report reflects an arrival time of 9:45 a.m. for the 7:00 a.m. tour, states childcare as the reason, and notes that he reported to Captain Miller on that day. The late report does not bear any date stamp from the GRVC control room. Upon review of the timesheet for May 5, 2019, respondent acknowledged that he did not arrive at 7:00 a.m. and stated that he mistakenly wrote the wrong time when he signed in later that day (Tr. 701-02). He noted that the correct time of his arrival was noted on his late report (*Id.*).

It is undisputed that respondent arrived late at approximately 9:30 a.m. for his scheduled 7:00 a.m. tour on May 5, 2019, in violation of departmental rules. *See* Employee Rules and Regulations §§ 3.05.100 (“Members of the Department shall report to their appointed place of duty at the time scheduled.”), 3.10.030 (“All employees of the Department shall report for duty punctually at the time directed . . .”). However, petitioner failed to establish by a preponderance of the credible evidence that respondent intentionally made a false entry on the timesheet when he entered 7:00 a.m. as his arrival time. The record reflects that respondent called the facility regarding his lateness and submitted a late report upon his arrival, which indicated that he was two hours and forty-five minutes late. Although there are discrepancies between the lateness notation on the tour certification and respondent’s late report, Captain Miller acknowledged that according to the tour certification, respondent called the control room and submitted a late report. The intradepartmental memorandum dated November 21, 2019 does not address whether respondent submitted an Employee’s Late Report on Form 15C for May 5, 2019 (Pet. Ex. 51). The fact that no officer was assigned to work overtime to cover respondent’s post that morning, as on prior occasions when respondent was AWOL, also tends to support the conclusion that respondent called regarding his lateness and submitted a late report. In sum, respondent communicated with the facility regarding his late arrival time, submitted a late report, and made no deliberate effort to conceal the time of his arrival. Under these circumstances, it is more likely than not that respondent made an honest mistake when he entered 7:00 a.m., or the exact start of his scheduled tour, on the timesheet. As such, respondent did not engage in misconduct by making a false entry on the timesheet. *See Dep’t of Sanitation v. Chaudhuri*, OATH Index No. 1231/07 at 3-4 (May 3, 2007) (To establish the falsification of a timekeeping record, “it is not enough to show that respondent’s statements were inaccurate. Petitioner must prove that respondent made false statements with the intent to deceive.”).

Accordingly, these charges are sustained only in part.

Use of Force Incident on April 10, 2019

Petitioner charged respondent with using unnecessary and impermissible force with his poly carbon body shield during the extraction of inmate Gallishaw on April 10, 2019 (Pet. Ex. 63). Petitioner also charged respondent with submitting a false or misleading use of force report regarding the incident (*Id.*). Petitioner alleged that respondent made a false or misleading statement regarding the force he used with his shield against the inmate (Tr. 33).

Petitioner principally relied upon Genetec video of the incident, specifically camera angle 78.36 of the inside of intake pen 14, and handheld video recorded by one of the members of the extraction team (Pet. Exs. 70, 71).⁴ The relevant Genetec video begins by showing an inmate, identified at trial as inmate Gallishaw, lying down on the floor in the corner of a cell (Pet. Ex. 70, 78.36 at 10:29:56-10:44:30; Tr. 522). The inmate is wearing white plastic hand restraints on his right wrist only. There is a metal bench on the left wall of the cell and a metal toilet and sink on the right wall. The inmate stands up, walks to the opposite corner of the cell, and sits down on the edge of the metal bench with a blanket draped over his lap and legs (Pet. Ex. 70, 78.36 at 10:44:30-10:50:09). He reaches for a toilet paper roll on the metal bench, wipes his buttocks three times with toilet paper, and drops the blanket to the floor, which reveals that his pants and underwear are pulled down to above his knees (*Id.* at 10:50:10-10:51:03). He stands up, pulls up his pants, and walks to the cell door, leaving a small pile of feces and toilet paper in the corner near the metal bench (*Id.* at 10:51:04-10:51:12). The inmate uses paper towels to pick up all the feces from the corner and brings the soiled paper towels toward the cell door, during which time he appears to be talking to someone on the other side of the door (*Id.* at 10:52:10-10:55:27). The inmate then throws a wet paper towel at the surveillance camera on the ceiling, and nothing is visible inside the cell for the next hour (*Id.* at 10:58:35-11:59:23).

After the inmate removes the obstruction from the surveillance camera, he walks to the cell door, stands there for almost 30 seconds, and walks across the cell to the back wall (*Id.* at 11:59:23-12:00:00). He appears to be talking to someone on the other side of the cell door as he walks to the wall. As the cell door opens, the inmate is facing the back wall and his hands are behind his lower back with his palms facing out (*Id.* at 12:00:01). He is standing about a foot from the wall

⁴ Genetec video is recorded from multiple camera angles and does not contain any audio recording.

at a slight angle, with his left foot and left shoulder farther from the wall. The camera angle does not depict the inmate's head. Approximately two feet from the inmate's left foot are several pieces of toilet paper and a paper towel, which were not there an hour before. They are in the same place where the feces had been before the inmate picked it up. No fecal matter is visible on the paper. Carrying a clear plastic shield almost the same size as his body and immediately followed by another officer, respondent rushes into the cell toward the inmate (*Id.* at 12:00:01-12:00:02). As respondent approaches him, the inmate turns his left shoulder away from the wall and moves his left forearm from behind his back to perpendicular at his side (*Id.*). Respondent pushes the inmate against the wall with his shield and holds him against the wall for about a second (*Id.* at 12:00:03-12:00:04). Respondent and the other officers push the inmate to the floor in the back right corner of the cell and the inmate disappears underneath five officers (*Id.* at 12:00:04-12:01:55). All members of the extraction team are wearing black padded vests over white Tyvek body suits, black helmets with plastic visors and grating, and purple gloves. The officers then remove the inmate, now in restraints, from the cell (*Id.* at 12:01:57-12:02:12).

The handheld video begins with Captain Taylor stating that inmate Gallishaw has refused to go to the housing area, has been throwing feces, and has not complied with several direct orders to stop (Pet. Ex. 71 at 00:01-00:26). The extraction team approaches the inmate's cell and there is toilet paper scattered on the floor immediately outside the cell (*Id.* at 00:40-00:55). No fecal matter is evident on the toilet paper, but there appear to be pieces of feces on the floor in the hallway outside the cell. The cells bars and door are covered with plexiglass. There is a rectangular slot in the cell door and a brown item of clothing is stuffed into the slot. Without saying a word to the inmate in the cell or to the other officers, Captain Taylor opens the cell door with his keys (*Id.* at 00:42-01:17). Respondent is positioned right outside the cell door carrying a plastic shield. As the door opens and as respondent enters the cell with the shield facing forward, the inmate is standing still, facing the back wall with both hands behind his back (*Id.* at 01:17-01:19). Followed by the other officers, respondent rushes into the cell toward the inmate (*Id.* at 01:19-01:20). Due to the camera angle, the moment of impact cannot be seen. The extraction team brings the inmate down to the floor and several officers are on top of him (*Id.* at 01:22-01:45). The officers direct the inmate to "stop resisting" and the inmate responds, "I'm not resisting" (*Id.*). The inmate cannot be seen but he is heard screaming, moaning, and sobbing (*Id.* at 01:58-02:52). The officers restrain the inmate, remove him from the cell, and escort him to the clinic (*Id.* at

03:08-11:35). While seated in the clinic surrounded by the extraction team, the inmate states that they had flex cuffs on his wrist since the day before, that he made sure that he faced the wall before they came into his cell, and that they did not come to his cell to ask if he wanted to “cuff up” (*Id.* at 17:04-17:35).

Respondent completed his use of force report on the day of the incident (Pet. Ex. 69). Respondent reported that inmate Gallishaw had been throwing feces out of his cell and had refused to comply with verbal commands. Assigned as the shield person on the extraction team, respondent stated: “upon entering the hold pen this writer made contact with the shield allowing the rest of the members to control said inmate” (*Id.*). Respondent noted in his report that he applied force to the inmate’s “upper body with shield” (*Id.*).

Investigator Stephen Barker testified regarding petitioner’s investigation of the incident. Based on his review of the surveillance and handheld videos, Investigator Barker testified that respondent’s use of force against inmate Gallishaw was unnecessary since the inmate was compliant when the extraction team entered the cell (Tr. 514-15, 520, 536). Investigator Barker explained that inmate Gallishaw provided the previously assigned investigator with a statement regarding the incident (Tr. 513). The inmate’s statement was not offered into evidence but was quoted in the Preliminary Review report prepared by the previous investigator (Pet. Ex. 65). According to the report, inmate Gallishaw provided a written statement on April 18, 2019, which stated:

I was in the back pen, and I was throwing stuff out my cell. I stopped throwing things out of my cell finally, and then an hour late[r], they came to extract me. Before they came, I unblocked the camera. They came to extract m[e], but I was not refusing to exit. When they came in, I turned to face the wall, but the shield person hit me with the shield so hard that I hit my head against the wall, hurting my jaw. Then they were hitting and pocking [*sic*] me with keys to my back. Causing bruises to my leg and my back.

(*Id.*) According to the Injury to Inmate Report completed on the day of the incident, inmate Gallishaw sustained an injury to his right jaw and exhibited “tenderness” in that area (Pet. Ex. 72).⁵ Investigator Barker acknowledged that inmate Gallishaw refused to comply with Captain Taylor’s orders before the extraction, that Captain Taylor did not order inmate Gallishaw to back

⁵ Petitioner offered a photograph of inmate Gallishaw in the medical clinic, but the injury to his right jaw is not captured in the picture (Pet. Ex. 73).

up to the cell door to allow himself to be restrained at the beginning of the extraction, and that Captain Taylor did not provide any instructions to the extraction team as they entered the cell (Tr. 548, 550, 565-66, 575-76).

Respondent testified that on April 10, 2019, he was assigned to an intake post at GRVC (Tr. 712). While assigned to the post, he observed inmate Gallishaw throwing feces out of his cell toward the pantry area and at other officers for approximately 30 minutes (Tr. 712-13). He recalled that Captain Taylor and a deputy warden instructed the inmate to stop, but the throwing of feces continued (Tr. 714, 716-17). Captain Taylor assigned respondent to be the shield person during the extraction of the inmate from his cell since he was the biggest member of the team (Tr. 715, 927). When they arrived at the inmate's cell, the inmate threatened the extraction team with a fight and threatened to throw feces on the officers (Tr. 725, 729, 734). Without giving any final orders to the inmate or instructions to the extraction team, Captain Taylor opened the cell door and respondent was the first officer to enter the cell (Tr. 717-18, 736-37, 927). Respondent observed the inmate facing the back wall with his hands behind his lower back and "his left foot cocked" (Tr. 725-26). He testified that the inmate then turned to the left, dropped his hands, and attempted to bend down to reach for the feces in the corner (Tr. 718, 729-31). Respondent, who is a 275-pound former professional football player, maintained that he used "rapid physical force" with his shield to prevent the inmate from reaching the feces in the corner (Tr. 593, 730-31; Pet. Ex. 59). Respondent admitted that he pressed his shield against the inmate's back and shoulder area and "pinned him against the wall" until they all fell onto the floor (Tr. 719, 935). Respondent denied that he "slammed the inmate against the wall" with his shield but acknowledged that "there's a possibility" that he caused an injury to the inmate's jaw with his shield (Tr. 929-30).

Petitioner's Use of Force Directive 5006R-D, effective September 27, 2017 (the "Directive"), expressly prohibits the use of excessive or unnecessary force (Pet. Ex. 64). Directive 5006R-D § (II)(F). A use of force is defined as "any instance where Staff use their hands or other parts of their body, objects, instruments, chemical agents, electronic devices, firearms, or any other physical method to restrain, subdue, or compel an Inmate to act or stop acting in a particular way." *Id.* at § (III). Staff are prohibited from using force "[t]o punish, discipline, assault, or retaliate against an Inmate," "[i]n response to an Inmate's verbal insults, threats, or swearing," or "[a]fter control of an Inmate has been already established." *Id.* at § (V)(B)(1).

The Directive permits reasonable force to be used against an inmate in certain situations, including “[a]s a last resort and where there are no practical alternatives available to prevent physical harm,” “[t]o prevent or stop the throwing or spitting of any liquid substance, including but not limited to saliva, blood, seminal fluid, urine, and feces,” “[t]o enforce Departmental or Facility rules . . . where lesser means have proven ineffective and there is an immediate need for compliance,” or “[a]s a last resort, when an Inmate in restraints is still dangerous.” *Id.* at § (V)(A). “When force is necessary, the amount of force used at any time should be the minimum amount necessary to regain control of the Inmate and/or situation.” *Id.* at § (VI)(B)(1)(e); *see Id.* at § (II)(C) (“When using force, Staff shall always use the minimum amount necessary to stop or control the resistance or threat encountered and it must be proportional to the resistance or threat encountered.”). The Directive sets forth various uses of force “in order of least to greatest degree of force,” but notes that “Staff are not obligated to start at the lowest level of force, or to exhaust every lesser level in escalating to an effective level.” *Id.* at §§ (VI)(B)(1)(f), (VI)(A)(1). “The need for physical force is established by considering all elements of the situation confronting Staff and by the type and amount of resistance exhibited by the Inmate and applying an objective ‘reasonableness’ standard.” *Id.* at § (VI)(B)(1)(b). The reasonableness of the force used “must be judged from the perspective of a reasonable Staff Member on the scene at the time of the incident.” *Id.*

The video evidence established that respondent rapidly entered the cell, struck a compliant inmate in the back and left shoulder with his shield, and pressed him against the wall. When respondent entered the cell carrying a clear plastic shield in front of him, the inmate was standing still, facing the back wall, and had his hands behind his back with his palms facing out. Although earlier the inmate had been throwing feces out of his cell, when the extraction team entered the cell the inmate was no longer engaged in such behavior and was not resisting the extraction team. Respondent’s testimony that inmate Gallishaw threatened to fight and throw feces at the extraction team prior to their entry is unsubstantiated by the audio recording on the handheld video. No threats from inmate Gallishaw can be heard before the extraction team enters the cell and respondent admitted as much on cross-examination (Tr. 925-26). Respondent’s claim that he used “rapid physical force” with his shield and “pinned [the inmate] against the wall” to prevent the inmate from reaching feces in the corner is also unsubstantiated by the video evidence and not credible. According to the handheld video, respondent charged into the cell toward the inmate

before the inmate moved his left forearm. According to the Genetec video, after respondent entered the cell and within one second of impact, the inmate moved his left shoulder away from the wall and his left forearm perpendicular to his left hip. The inmate did not bend over or start to reach with his left arm toward the toilet paper on the floor. The inmate's slight movement before impact cannot reasonably be interpreted as an attempt by the inmate to throw feces at the extraction team. Rather, such movement is consistent with the inmate turning his head over his left shoulder to look at the extraction team entering the cell and using his left arm to brace against the incoming shield.

Given the impact depicted on the video, it is more likely than not that respondent caused the injury to the inmate's right jaw documented on the Injury to Inmate Report. The inmate was standing approximately a foot away from the back wall and turned slightly to the left immediately prior to impact, which would have exposed the right side of his face to the wall. His hands were not in front of him and could not have been used to brace himself against the wall. The video evidence corroborates the portion of the inmate's statement, recorded as double hearsay in the Preliminary Report, that "the shield person hit me with the shield so hard that I hit my head against the wall, hurting my jaw."

The credible evidence established that the degree of force used by respondent with his shield during the extraction was neither the minimum amount necessary under the circumstances nor proportional to the resistance or threat being displayed by the inmate when Captain Taylor opened the door and respondent entered the cell. Although Captain Taylor failed to provide any instructions to the inmate or the members of his extraction team as he opened the cell door, this does not excuse respondent's excessive use of force. Accordingly, this charge is sustained.

The Directive further requires that staff members who employ or witness a use of force "prepare a written report concerning the incident based on their own observations and personal knowledge . . ." Directive 5006R-D § VI(C)(5)(b)(i). The report must include a list of all persons "who participated in, witnessed, or whom the writer observed present at the incident and their actions," as well as "[a] detailed description of the Use of Force Incident, the events preceding the Use of Force Incident, . . . and the reasons for engaging in the Use of Force." *Id.* at § VI(C)(5)(c)(iii). The Directive prohibits staff members from "deliberately submitting a false and/or misleading report regarding a Use of Force incident" and petitioner's rules also prohibit the

making of false official statements and false reports. *Id.* at § (II)(J); Employee Rules and Regulations §§ 3.20.030(5), 4.30.020.

To prove a false statement charge, “petitioner must first establish the facts of the underlying incident which is the basis for the report. Second, petitioner must establish that respondent made material deviations from the actual incident or intentionally misrepresented the events in question.” *Dep’t of Correction v. Ward*, OATH Index No. 2137/18 at 4 (Dec. 31, 2018) (citing *Dep’t of Correction v. Pelle*, OATH Index No. 1410/07 at 6 (May 22, 2007), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD-08-11-SA (Feb. 20, 2008)); *see Dep’t of Correction v. Cantelmo*, OATH Index No. 2562/17 at 5 (Oct. 12, 2017), *adopted*, Comm’r Dec. (Nov. 27, 2017), *aff’d*, NYC Civ. Serv. Comm’n Case No. 2018-0135 (July 23, 2018) (false statement charges proven where correction officer failed to state in his report and MEO 16 interview that captain struck inmate in the face). The use of imprecise language should not be found to be false or misleading if there was no intent to conceal or deceive. *Dep’t of Correction v. Dominguez*, OATH Index Nos. 615/19, 731/19, & 770/19 at 16 (May 21, 2019), *adopted*, Comm’r Dec. (Aug. 12, 2019), *aff’d*, NYC Civ. Serv. Comm’n Case Nos. 2019-0824, 2019-0825 (Feb. 5, 2020); *see Dep’t of Correction v. Galarza*, OATH Index Nos. 348/90 & 433/90 at 23 (June 11, 1990), *adopted*, Comm’r Dec. (July 27, 1990) (statement is not misconduct unless it is due to “some fault, not mere inadvertence or poor drafting”).

Respondent’s use of force report regarding the incident was false or misleading in that respondent stated that he “made contact” with the inmate’s upper body using his shield. As set forth above, the credible evidence established that respondent rapidly entered the cell, struck a compliant inmate in the back and left shoulder with his shield, and pressed him against the wall, causing injury to his jaw. Respondent’s report omitted material facts regarding his use of force. Most importantly, he failed to report that such contact included pressing or pinning the inmate against the wall with his shield. Respondent’s vague description of the high-impact force used is misleading and reflects a deliberate attempt to minimize his actions in a contemporaneous report. Accordingly, this charge is sustained.

Duplicate Shield Incident on August 6 and September 1, 2020

Petitioner charged respondent with failing to surrender his Department-issued shield upon his suspension from duty on August 6, 2020, and instead turning in a “fraudulent/duplicate shield . . . obtained outside of approved channels” (Pet. Ex. 53 at Spec. 1). Petitioner further alleged that respondent appeared in the Investigation Division on September 1, 2020, and was found in possession of his Department-issued shield (*Id.* at Spec. 2).⁶

The material facts regarding respondent’s Department-issued and duplicate shields are not in dispute. On August 6, 2020, respondent surrendered a shield and identification card to petitioner’s Health Management Division (“HMD”) as part of a 10-day suspension from duty on an unrelated matter (Pet. Ex. 55; Tr. 392, 396, 412, 703-04). The shield turned over to HMD was not produced at trial, but a photograph depicts a small metal shield bearing the words City of New York Correction and the number 14187 (Pet. Ex. 59). Respondent’s shield number, as reflected on his Department-issued photo identification, is 14187 (*Id.*). Respondent admitted that the shield turned over to HMD on August 6, 2020 was a “duplicate” purchased outside of approved departmental channels (Tr. 703-04, 944-45, 1077). On September 1, 2020, respondent turned over another shield to Investigator Patrick Brown in petitioner’s Investigation Division (Pet. Ex. 56; Tr. 391-92, 704-05). Respondent admitted that the shield turned over on that day was his official shield issued by the Department (Tr. 704-05, 893). Respondent was summarily suspended for the duplicate shield effective 1:15 p.m. on September 1, 2020 (Pet. Ex. 61).

The parties disputed some of the circumstances surrounding respondent’s possession of the two shields, and each offered facts they claimed were either mitigating or aggravating. Respondent testified that his Department-issued shield fell apart before the COVID-19 pandemic and the shield

⁶ By Charges and Specifications dated January 15, 2021, petitioner alleged that while respondent was suspended from duty on September 1, 2020, he “appeared in the Investigation Division and was found in possession of a duplicate departmental shield” (Pet. Ex. 52). Petitioner prepared Amended Charges and Specifications on May 3, 2022 and served respondent with those charges by mail on May 4, 2022 (Pet. Ex. 53; Tr. 19). Respondent did not consent to the untimely amendment and petitioner sought leave to amend on the first day of trial (Tr. 17-20). *See* 48 RCNY § 1-25 (Lexis 2022) (requiring consent of the parties or leave of the administrative law judge for an amendment less than 25 days before trial). I granted petitioner’s motion to amend as the proposed amendment did not substantially alter the nature of the charges regarding the duplicate shield, respondent had been notified of the proposed amendment over two weeks before trial, and petitioner did not intend to present its case regarding the charge until the second week of trial (Tr. 21). *See Dep’t of Correction v. Hamil*, OATH Index Nos. 1213/18 & 1215/18 at 14 (July 9, 2018), *adopted*, Comm’r Dec. (Oct. 10, 2018), *aff’d*, NYC Civ. Serv. Comm’n Case Nos. 2018-1174 & 2018-1176 (Mar. 14, 2019) (“Where amendment of charges on the day of trial will substantially alter the nature of the proof, amendment is not permitted.”); *Dep’t of Correction v. Jenkins*, OATH Index No. 3070/09 at 13 (Dec. 16, 2009) (“Amendment of charges in administrative proceedings, where pleadings serve only a notice-giving function is freely granted absent irreparable prejudice.”).

room instructed him to take it to a jeweler to be refurbished (Tr. 702-03). Respondent offered an invoice from Stars Jewelry on Metropolitan Avenue in the Bronx dated March 17, 2020 (Resp. Ex. H). The invoice listed respondent as the customer, described the work as soldering and polishing a cracked badge with number 14187, and indicated that the approximate \$150 repair cost had been paid (*Id.*). Respondent further testified that his Department-issued shield was not repaired and retrieved from the jeweler until around September 2020 due to the pandemic (Tr. 706). From March through August 2020, respondent wore the duplicate shield that he purchased after graduating from the Academy to get to work and to HMD, but insisted that he did not use it to obtain any benefit (Tr. 703, 710-11). On September 1, 2020, respondent contended that he went to the Investigation Division to turn in his Department-issued shield recently repaired by the jeweler (Tr. 704-05, 707). Although he claimed that he did not know that having a duplicate shield violated departmental rules, respondent testified that “[w]e went and purchased the shields due to the fact that we were happy that we had the job,” but “[i]t wasn’t spoke[n] about as you couldn’t have a duplicate shield” (Tr. 709-10, 892).

Investigator Brown testified that respondent came to the Investigation Division on September 1, 2020 to retrieve the property that he turned over upon being suspended by HMD in August 2020 (Tr. 391, 397). When Investigator Brown asked respondent if he had any “property” in his possession that day, respondent said he did not (Tr. 392, 408-09). When Investigator Brown further inquired if respondent had a shield in his possession, respondent replied that he did and turned it over (Tr. 392, 408-09). He further testified that officers are required to have Department-issued shields repaired by the vendor United Insignia and that officers are not allowed to have their shields repaired by any other vendor or jeweler (Tr. 400-02, 413, 415). He acknowledged that no rule or regulation specifically required that that specific vendor be used for shield repairs and that he was unaware if respondent furnished the duplicate shield for any illegal benefit (Tr. 410-12).

Petitioner’s rules provide that correction officers “shall neither wear, use, display, possess, make nor cause to be made, a shield, badge, emblem, or other insignia or similar object, resembling in any shape, manner or form, the official shield or any other official insignia of the Department.” Employee Rules and Regulations § 2.35.020. The rules also require that correction officers “placed under suspension shall promptly surrender to the Commanding Officer . . . their shield and identification card and all other departmental property issued to them.” *Id.* at § 3.40.060. Respondent admitted possessing a “duplicate shield” purchased outside approved departmental

channels. Respondent further admitted that he failed to surrender his official, Department-issued shield to HMD when he was suspended on August 6, 2020, and that he was still in possession of his Department-issued shield on September 1, 2020. Indeed, respondent conceded liability on these charges during summation (Tr. 1150, 1152, 1160). As set forth below, I find no mitigation of respondent's liability in the explanations he tendered. Rather, I find that the facts surrounding respondent's possession of two shields reflect poorly on his trustworthiness as a correction officer.

Accordingly, these charges are sustained.

FINDINGS AND CONCLUSIONS

1. Petitioner proved that respondent was absent without leave on November 17, 2018.
2. Petitioner proved that respondent was absent without leave, did not submit a required Employee's Late Report, and made a false entry on the timesheet on November 18, 2018, but did not establish that respondent failed to submit a 600AR report as ordered by Captain Cofield.
3. Petitioner proved that respondent was absent without leave on December 29, 2018.
4. Petitioner proved that respondent was absent without leave on December 30, 2018.
5. Petitioner proved that respondent did not timely report for his tour of duty, engaged in unprofessional, disrespectful, and disobedient conduct toward Captain Harper, and was absent without leave for his scheduled overtime tour on December 31, 2018.
6. Petitioner proved that respondent was absent without leave and made a false entry on the timesheet on February 17, 2019, but did not establish that respondent failed to report to his assigned post from 10:40 a.m. to 12:38 p.m. that day.
7. Petitioner proved that respondent did not timely report for his tour of duty on May 5, 2019, but did not establish that respondent made a false entry on the timesheet for that day.
8. Petitioner proved that respondent used unnecessary force with his poly carbon body shield against inmate Gallishaw on April 10, 2019,

and that respondent submitted a false or misleading report regarding the incident.

9. Petitioner proved that respondent failed to surrender his Department-issued shield upon his suspension from duty on August 6, 2020, and that respondent possessed a duplicate shield obtained outside of approved channels.

RECOMMENDATION

Upon making these findings, I obtained and reviewed respondent's personnel abstract (ALJ Ex. 2). Respondent has been employed by petitioner since January 2013 and has no prior disciplinary record. Petitioner awarded respondent unit citations twice within the last year. Petitioner imposed a 30-day pre-trial suspension upon respondent with respect to the duplicate shield charge (Pet. Ex. 61). Petitioner now seeks the termination of respondent's employment as a penalty for all charges (Tr. 1197). As set forth above, petitioner proved most, but not all, of the charges.

Although this case involved use of force charges, petitioner did not invoke the Disciplinary Guidelines for Use of Force Incidents ("Disciplinary Guidelines") during its summation. Upon my inquiry at the end of summation, petitioner replied that termination was warranted under the Disciplinary Guidelines for respondent's use of force on April 10, 2019 (Tr. 1198). I disagree. The Disciplinary Guidelines, which were developed under a consent judgment and remedial order in *Nunez v. City of New York*, 11 Civ. 5845 (LTS)(JCF) (S.D.N.Y. Oct. 22, 2015), set forth progressive penalty ranges that petitioner is required to seek in use of force cases but permit deviation from the penalty ranges based upon mitigating and aggravating factors. The Disciplinary Guidelines make clear that "certain misconduct may warrant a penalty of termination even on the first instance," and provide for the penalty of termination where the correction officer engaged in "[d]eliberately striking or kicking an inmate in the head, face, groin, neck, kidneys, or spinal column . . . in a manner that is punitive, retaliatory, or designed to inflict pain on the inmate, and constitutes a needless risk of serious injury to an inmate."

Petitioner maintained that respondent's use of force warranted termination under the Disciplinary Guidelines since respondent "injured the inmate's jaw when he slammed him against the wall" (Tr. 1198). Respondent created a needless risk of serious injury to inmate Gallishaw when he used "rapid physical force" to strike him in the back and left shoulder with his poly carbon body shield and press him into the cell wall. The inmate could have sustained more serious head

injuries than he did. However, the evidence does not support a finding that respondent deliberately struck the inmate in the head, face, or spinal column with the body shield during the extraction, or that respondent applied such force in a manner that was punitive, retaliatory, or designed to inflict pain. Indeed, even when prompted to address the Disciplinary Guidelines, petitioner did not argue that respondent's actions were punitive, retaliatory, or designed to inflict pain.

Although unnecessary and excessive under the circumstances, the record reflects that respondent used his body shield to strike the inmate in the back and left shoulder and press him against the wall with the intent to bring him down to the floor so that the other members of the extraction team could restrain him. In doing so, respondent caused an injury to the inmate's head. Captain Taylor had ordered respondent to serve as the shield person during the extraction, opened the door for respondent to lead the extraction team into the cell, and failed to provide any new instructions to the extraction team when it became apparent prior to their entry that the inmate had assumed a compliant posture against the wall. Although there is no video evidence from inside the cell in the hour before the extraction, it appears that the inmate only became compliant, facing the wall with his open hands behind his back, in the seconds before the extraction team entered the cell.

On this record, termination is not warranted under the Disciplinary Guidelines for respondent's excessive use of force alone. *See Dep't of Correction v. Bernard*, OATH Index No. 1686/21 at 29 (Jan. 10, 2022), *adopted*, Comm'r Dec. (Mar. 18, 2022) (finding termination unwarranted under the Disciplinary Guidelines for an officer's deliberate strike to the inmate's head where the evidence was insufficient to establish that the officer's use of force was punitive, retaliatory, or designed to inflict pain); *Dep't of Correction v. Fontane*, OATH Index No. 694/21 at 14 (June 18, 2021), *adopted*, Comm'r Dec. (Mar. 22, 2022) (same); *see also Dep't of Correction v. Black*, OATH Index No. 231/21 at 11 (June 22, 2021), *adopted*, Comm'r Dec. (Oct. 19, 2021) (“[P]enalties for excessive use of force against an inmate have ranged from a 15-day suspension to termination, depending on the ‘employee’s disciplinary record, the extent of force, the degree of provocation, if any; and the extent of any subsequent deception.’”) (quoting *Ward*, OATH 2137/18 at 6). Rather, the Disciplinary Guidelines provide for a 10-day minimum suspension for the first substantive use of force violation and a 30-day minimum suspension for the first occurrence of deliberately “providing materially false information in a Use of Force Report.”

Alternatively, and primarily, petitioner requested the termination of respondent's employment based on the "repeated pattern of deceit and fraud perpetrated by Officer Thomas" (Tr. 1187, 1197). This is appropriate. "Typically, this tribunal applies the principles of progressive discipline which aim to achieve employee behavior modification through increasing penalties for repeated or similar misconduct." *Dep't of Correction v. Ramos*, OATH Index No. 1283/21 at 22 (Oct. 6, 2021), *adopted*, Comm'r Dec. (Dec. 14, 2021). "In determining whether to apply the principle of progressive discipline, the key issue is 'whether a penalty short of termination will change the respondent's behavior.'" *Ward*, OATH 2137/18 at 8 (quoting *Dep't of Housing Preservation and Development v. Ray*, OATH Index Nos. 1460/00 & 2135/00 at 31 (Sept. 14, 2000), *adopted*, Comm'r Dec. (Oct. 27, 2000), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 01-84-SA (Dec. 28, 2001)).

"This tribunal has found that acts involving of fraudulent conduct deserve the severe penalty of termination" and has recommended termination for fraudulent conduct even where the employee has little to no disciplinary history. *Dep't of Correction v. Cortes*, OATH Index No. 1230/06 at 13 (June 16, 2006); *see Dep't of Correction v. Murray*, OATH Index No. 737/17 at 3-4 (Mar. 1, 2017), *adopted*, Comm'r Dec. (June 30, 2017) (recommending termination of correction officer with minor disciplinary record who submitted three fraudulent medical notes); *Health & Hospitals Corp. (Harlem Hospital Ctr.) v. Manning*, OATH Index No. 1480/10 at 19-21 (May 26, 2010) (recommending termination of special officer with no disciplinary record who on three occasions abandoned her post, failed to perform her duties, and engaged in fraudulent conduct including falsifying time sheet and memo book entries); *Dep't of Correction v. Roman*, OATH Index Nos. 1026/05 & 1296/05 at 29-30 (Feb. 10, 2006) (recommending termination of correction officer with minor disciplinary record who participated in housing fraud, submitted altered documents during an investigation, and provided false or misleading testimony during an MEO 16 interview); *Dep't of Education v. Matos*, OATH Index No. 214/04 at 19 (Feb. 13, 2004), *modified on penalty*, Chancellor's Dec. (Apr. 2, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD05-17-SA (Apr. 15, 2005) (terminating employment for falsification of time sheets on three occasions despite longevity of service and lack of prior disciplinary record).

I have fully considered respondent's clean record over his nine-year career as a correction officer and his recent, favorable unit citations. Despite the lack of prior discipline, termination of respondent's employment is appropriate based on the deceitful and fraudulent conduct underlying

some of the sustained charges and his lack of candor at trial. I find, on this record, that penalizing respondent with even the maximum suspension permitted under section 75 of the Civil Service Law is unlikely to change his behavior going forward. Respondent engaged in several fraudulent acts over a two-year period, including the falsification of timekeeping records, the possession of a duplicate shield, and the submission of a false or misleading use of force report. Such conduct “is inimical to his obligations as a correction officer and gives the Department reason to doubt his integrity.” *Roman*, OATH 1026/05 & 1296/05 at 29.

The most egregious conduct involved the false timesheet entry on November 18, 2018, and the possession of a duplicate shield. The credible evidence established that respondent arrived to work at approximately 11:30 a.m. for his 5:00 a.m. tour on November 18, 2018, and attempted to cover up his late arrival by entering the facility through the loading dock and falsely entering his arrival time as 5:00 a.m. on the timesheet. Instead of accepting any responsibility for his actions on that day, respondent presented confusing and uncorroborated testimony of shopping for a Thanksgiving staff event and an absurd denial of the time recorded on the timesheet in his own handwriting. While it is possible that respondent could not timely report to work at 5:00 a.m. on November 18, 2018 due to a genuine emergency involving his daughter’s health, he did not offer this explanation to justify his 11:30 a.m. arrival that day and, even if his assertions at trial concerning his daughter were true, such an emergency in no way excuses his subsequent cover-up and falsification of the timesheet. *See Health & Hospitals Corp. (Kings County Hospital Ctr.) v. Alexander*, OATH Index No. 0074/22 at 5 (Nov. 12, 2021), *adopted*, CEO Dec. (Jan. 3, 2022) (“Falsifying timesheets is a serious form of misconduct for which the recommended penalty is, invariably, termination of employment.”).

Respondent conceded liability for possessing a fraudulent duplicate shield and failing to surrender his official shield upon suspension. As stated above, I find no mitigation in the explanations offered by respondent regarding the duplicate shield. Although there was no evidence of any off-duty misuse of the duplicate shield by respondent, respondent did not assert any legitimate work-related purpose in possessing an unofficial shield and no such purpose is apparent on this record. I did not believe that respondent thought it was permissible to possess a duplicate shield and respondent acknowledged as much when he stated that officers’ purchases of duplicate shields “wasn’t spoke[n] about as you couldn’t have a duplicate shield” (Tr. 709). Knowing that duplicate shields were not allowed, it is troubling that respondent wore the duplicate

shield for work-related purposes for several months in 2020. The record further reflects that respondent sought to conceal his possession of an unofficial, duplicate shield and used the duplicate shield to avoid turning over his official shield upon suspension. There is no credible evidence that respondent told Deputy Warden Calloway or anyone else at HMD on August 6, 2020 that the shield in his possession was a duplicate not issued by the Department and that his Department-issued shield was being repaired at the jeweler. Even crediting that respondent brought his official shield to be repaired at a local jeweler in March 2020 at the beginning of the pandemic, it is more likely than not that respondent was in possession of his official shield when he was suspended almost five months later. The invoice from the jeweler did not identify when the repair was completed and therefore did not corroborate respondent's claim that his official shield was not repaired until approximately September 2020. On this record, it is doubtful that such a relatively minor repair would not have been completed by early August 2020. It is also more likely than not that respondent went to the Investigation Division on September 1, 2020 to recover his duplicate shield and identification and not to surrender his Department-issued shield. By that time, respondent's suspension had ended and there was no need to turn over his shield. By possessing a fraudulent duplicate shield, surrendering the duplicate shield upon suspension, and retaining possession of his official shield while suspended, respondent engaged in conduct unbecoming of an officer. *See Police Dep't v. Shea*, OATH Index No. 136/90 at 18 (Dec. 21, 1989), *aff'd*, 177 A.D.2d 253 (1st Dep't 1991) (terminating employment of police officer who was "found to have possessed a bogus Department shield while on suspension and to have displayed the shield to a court officer, egregious behavior for a law enforcement officer").

Respondent's fraudulent conduct is further aggravated by his general lack of candor and unwillingness to accept responsibility for his actions. *See Dep't of Correction v. Ortiz*, OATH Index No. 986/07 (June 25, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD08-22-A (May 9, 2008) ("Respondent's failure to accept responsibility is an aggravating circumstance in assessing the appropriate penalty."). During the trial, respondent spun conspiratorial tales, presented myriad excuses, and appears to have invented the filing of sexual harassment complaints against his supervisor to manufacture a retaliation defense to legitimate charges of misconduct against him. Respondent's evasive and incredible testimony exacerbated the multiple instances of deceitful conduct proved by petitioner. He has demonstrated a fundamental lack of integrity and has thereby lost the trust placed in him by petitioner.

Accordingly, I recommend that respondent's employment be terminated.

Michael D. Turilli
Administrative Law Judge

August 8, 2022

SUBMITTED TO:

LOUIS A. MOLINA
Commissioner

APPEARANCES:

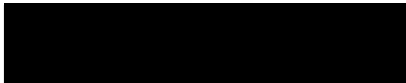
TINA GRILLO, ESQ.
NICOLE BENITEZ, ESQ.
Attorneys for Petitioner

JOEY JACKSON LAW, PLLC
Attorneys for Respondent
BY: PETER TROXLER, ESQ.



NEW YORK CITY DEPARTMENT OF CORRECTION
 Louis A. Molina, Commissioner
 Solange N. Grey, Deputy Commissioner
 Trials & Litigation Division
 75-20 Astoria Boulevard – Suite 310
 East Elmhurst, NY 11370
 718-546-0404
 Fax 718-278-6526

C.O. James Thomas



RE: Final Determination

DR #s: B1198/2018; B0057/2019; B1068/19; B1459/20;
 B1264/20

Dear Officer James Thomas:

After a complete review of the record and the report and recommendation of the Honorable Michael Turilli, Administrative Law Judge, duly designated to conduct a disciplinary hearing on the charges and specifications listed above, I find you guilty as reflected in the report and recommendation. A copy of the report and recommendation is enclosed.

The sanction imposed upon is:

TERMINATION OF EMPLOYMENT EFFECTIVE FORTHWITH.

Under the provision of Section 76 of the Civil Service Law, you are entitled to appeal from this determination by application either to the Civil Service Commission or to a court in accordance with the provisions of Article 78 of the Civil Practice Law and Rules. If you elect to appeal to the Commission such appeal must be filed in writing within twenty (20) days of receipt of this determination. A decision of the Commission is final and conclusive.

Sincerely,



Louis A. Molina, Commissioner

Date: 9/29/22

C: Office of Administrative Trials and Hearings

Employee's Signature: _____ Date: _____
 Print & Sign Name

Witness Signature: _____ Date: _____
 Print & Sign Name

**THE CITY OF NEW YORK
DEPARTMENT OF CORRECTION**

**Findings and Recommendations of
Charges and Specifications**

AGAINST

File No. OATH 22-2212

Case Nos. DR# B1198/18; B0057/19;
B1068/19; B1459/20; B1264/20

Book No. **Page**

Correction Officer

James Thomas

14187

GRVC

1/3/13

Rank or Title

NAME

Shield/I.D.

Facility/Unit

Date Appointed

-By-

Agency Attorney

Tina Grillo

Trials & Litigation

Rank or Title

NAME

Facility/Unit

01/24/2019 (B1198/18)
02/20/2019 (B0057/19)
11/18/2019 (B1068/19)
09/22/2020 (B1459/20)
05/03/2022 (B1264/20)

5/24/2022
Trial Commenced

6/24/2022
Trial Concluded

Date of Charges

TRIAL DATES: 5/24, 5/27, 5/31, 6/6, 6/13, 6/14, 6/23
and 6/24 of 2022

EXAMINED BY:

Judge Michael Turilli

CHARGES:

Directive: 5006R-D
Rules: 2.30.010; 2.30.020; 2.35.020; 3.05.010; 3.05.100;
3.05.110; 3.05.120; 3.10.030; 3.10.060; 3.10.090; 3.20.010;
3.20.030; 3.20.070; 3.20.300; 3.40.060; 4.30.020.

SPECIFICATIONS

DR #1198/18:

#1—Said Officer, on or about November 17, 2018, was inefficient in performance of duty and engaged in conduct unbecoming an officer, that he failed to report for his scheduled tour of duty, without permission or authority and failed to notify his command why he failed to report for duty.

FINDINGS AND RECOMMENDATIONS OF CHARGES AND SPECIFICATIONS

DATE: 8/8/22

SUSTAINED

#2—Said Officer, on or about November 18, 2018, engaged in behavior threatening the good order and discipline of the Department, arrived late for duty and was considered AWOL in that he failed to punctually report to his 0500x1331 scheduled tour of duty at GRVC, and instead arrived at approximately 1134 hours, as reflected in Department surveillance footage.

SUSTAINED

#3—Said Officer, on or about November 18, 2018, was inefficient in performance of his duties and filed false report concerning the business of the Department and failed to sign his exact time of arrival on the GRVC sign-in sheet, in that he logged in a 0500 hours arrival time, when Department surveillance captured said officer entering GRVC, via the Mess Hall Sally Port, at approximately 1134 hours. Said Officer also failed to complete and submit and Employee's Late Report (Form #15C), as required.

SUSTAINED

#4—Said Officer, on or about November 19, 2018, was unprofessional, disobeyed a lawful order, and failed to submit a report as required, in that he was ordered by Capt. Natasha Cofield to submit a 600AR report detailing when he arrived at the facility, how he got into the facility, and why he never reported to Captain Cofield on November 18, 2018; Respondent did not submit the ordered report.

SUSTAINED

DR #0057/19:

#1—Said Officer, on or about December 29, 2018, at approximately 0700 hours in GRVC, engaged in conduct unbecoming and failed to efficiently perform his duties in that he failed to report for his scheduled post #010B. Said Officer also failed to notify the command as to why he failed to appear for duty.

SUSTAINED

**THE CITY OF NEW YORK
DEPARTMENT OF CORRECTION**

**Findings and Recommendations of
Charges and Specifications**

AGAINST

File No. OATH 22-2212
Case Nos. DR# B1198/18; B0057/19; B1068/19; B1459/20; B1264/20
Book No. Page

<u>Correction Officer</u> <small>Rank or Title</small>	<u>James Thomas</u> <small>NAME</small>	<u>14187</u> <small>Shield/I.D.</small>	<u>GRVC</u> <small>Facility/Unit</small>	<u>1/3/13</u> <small>Date Appointed</small>
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-By-

<u>Agency Attorney</u> <small>Rank or Title</small>	<u>Tina Grillo</u> <small>NAME</small>	<u>Trials & Litigation</u> <small>Facility/Unit</small>
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<u>01/24/2019 (B1198/18)</u>	<u>5/24/2022</u>	<u>6/24/2022</u>
<u>02/20/2019 (B0057/19)</u>	<small>Trial Commenced</small>	<small>Trial Concluded</small>
<u>11/18//2019 (B1068/19)</u>		
<u>09/22/2020 (B1459/20)</u>		
<u>05/03/2022 (B1264/20)</u>		

Date of Charges
TRIAL DATES: 5/24, 5/27, 5/31, 6/6, 6/13, 6/14, 6/23
and 6/24 of 2022

EXAMINED BY: Judge Michael Turilli

#2—Said Officer, on or about December 30, 2018, at approximately 1201 hours, in GRVC, engaged in conduct unbecoming and failed to efficiently perform his duties in that he failed to report to his scheduled 0700x1531 hours tour, despite being granted two hours for a personal emergency and approved for a 0900 hours arrival.	SUSTAINED
#3—Said Officer, on or about December 31, 2018, at approximately 0700 hours, engaged in conduct unbecoming and failed to efficiently perform his duties in that he failed to timely report to his assigned #002C-2 Control post.	SUSTAINED
#4—Said Officer, on or about December 31, 2018, at approximately 0908 arrived late to the facility and never reported to Control Room Captain D. Harper, #1159, for the 0700x1531 tour.	SUSTAINED
#5—Said Officer, on or about December 31, 2018, at approximately 1000 hours, engaged in conduct unbecoming , was unprofessional, disobedient, and disrespectful toward a supervisor in that, after he arrived late for his tour of duty he responded to an alarm and was asked by Control Room Captain D. Harper #1159, why he failed to report to the control room. Said Officer responded to the Captain with words to the effect of “don’t you see me now responding to a fucking alarm, shut your ass up and the sit the fuck down.”	SUSTAINED
#6—Said Officer, on or about December 31, 2018, at approximately 1500 hours, GRVC, engaged in conduct unbecoming and failed to efficiently perform his duties in that he failed to report for his scheduled 1500x2331 hours, overtime post #001A-Control, despite being informed about it by Captain D. Harper. Said Officer also failed to notify the command why he failed to appear for duty.	SUSTAINED
DR # 1068/19: #1—Said Officer, on or about Sunday, February 17, 2019, at approximately 0700 hours, in GRVC, engaged in conduct unbecoming and failed to efficiently perform his duties in that he failed to report for his scheduled 0700x1531 hours tour, and instead arrived late for duty at approximately 1040 hours.	SUSTAINED
#2—Said Officer, on or about Sunday February 17, 2019, from approximately 1040 hours to 1238 hours, was inefficient in his duties and engaged in conduct unbecoming and behavior threatening the good order and discipline of the Department, in that after arriving late to the GRVC facility, never reported to the Control Room Captain for the 0700x1531 hours tour, failed to timely report to his assigned post and his whereabouts where unknown to the Control Room Supervisor.	UNSUSTAINED

**THE CITY OF NEW YORK
DEPARTMENT OF CORRECTION**

**Findings and Recommendations of
Charges and Specifications**

AGAINST

File No. OATH 22-2212

Case Nos. DR# B1198/18; B0057/19;
B1068/19; B1459/20; B1264/20

Book No. **Page**

Correction Officer

James Thomas

14187

GRVC

1/3/13

Rank or Title

NAME

Shield/I.D.

Facility/Unit

Date Appointed

-By-

Agency Attorney

Tina Grillo

Trials & Litigation

Rank or Title

NAME

Facility/Unit

01/24/2019 (B1198/18)
02/20/2019 (B0057/19)
11/18//2019 (B1068/19)
09/22/2020 (B1459/20)
05/03/2022 (B1264/20)

5/24/2022
Trial Commenced

6/24/2022
Trial Concluded

Date of Charges

TRIAL DATES: 5/24, 5/27, 5/31, 6/6, 6/13, 6/14, 6/23
and 6/24 of 2022

EXAMINED BY:

Judge Michael Turilli

<p>#3—Said Officer, on or about Sunday, February 17, 2019, was inefficient in the performance of his duties and made a false entry concerning business of the Department in that he signed in at 1040 hours and entered “TD” next to his sign-in time, when said Officer never submitted a “time due” nor was a time due approved for said officer to report to work at 1040 hours.</p>	<p align="center">SUSTAINED</p>
<p>#4—Said Officer, on or about Sunday May 5, 2019, in GRVC, engaged in conduct unbecoming and failed to efficiently perform his duties in that he failed to report for his scheduled 0700x1531 hours tour of duty, and instead arrived late for duty at approximately 0926 hours.</p>	<p align="center">SUSTAINED</p>
<p>#5—Said Officer, on or about Sunday, May 5, 2019, in GRVC, was inefficient in the performance of his duties and made a false entry concerning business of the Department in that he signed in at 0700 hours, instead of his actual time of arrival at approximately 0926 hours.</p>	<p align="center">UNSUSTAINED</p>
<p>DR #1264/20: #1—Said Officer, on or before August 6, 2020, at the Health Management Division, failed to adhere to rules and regulations, engaged in fraudulent conduct, engaged in conduct unbecoming an officer, and engaged in conduct of a nature to bring discredit upon the Department, in that Respondent failed to surrender his Department-issued shield to the Health Management Division. Rather, said officer turned in a fraudulent/duplicate shield to the Health Management Division, which was obtained outside of approved channels, upon his suspension from duty (Teletype #HQ01694-0).</p>	<p align="center">SUSTAINED</p>
<p>#2—Said Officer, on or before, September 1, 2020, while suspended from duty, engaged in conduct unbecoming an officer and of a nature to bring discredit upon the Department, in that Respondent, appeared at the Investigation Division to collect the shield and Identification Card that he turned over to the Health Management Division on August 6, 2020, and was found to be in possession of his Department-issued shield.</p>	<p align="center">SUSTAINED</p>
<p>DR #1459/20: #1—Said Officer, on or about April 10, 2019, while assigned to the George R. Vierno Center (GRVC), did engage in conduct unbecoming an officer and of a nature to bring discredit upon the Department and failed to efficiently perform his duties, in that said Officer, as the shield operator for the Extraction Team, used unnecessary and impermissible force against Inmate Thomas Gallishaw (B/C# #1411803640), with the use of the poly carbon shield.</p>	<p align="center">SUSTAINED</p>

**THE CITY OF NEW YORK
DEPARTMENT OF CORRECTION**

**Findings and Recommendations of
Charges and Specifications**

AGAINST

File No. OATH 22-2212	
Case Nos. DR# B1198/18; B0057/19; B1068/19; B1459/20; B1264/20	
Book No.	Page

<u>Correction Officer</u> Rank or Title	<u>James Thomas</u> NAME	<u>14187</u> Shield/I.D.	<u>GRVC</u> Facility/Unit	<u>1/3/13</u> Date Appointed
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-By-

<u>Agency Attorney</u> Rank or Title	<u>Tina Grillo</u> NAME	<u>Trials & Litigation</u> Facility/Unit
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<u>01/24/2019 (B1198/18)</u>	<u>5/24/2022</u>	<u>6/24/2022</u>
<u>02/20/2019 (B0057/19)</u>	Trial Commenced	Trial Concluded
<u>11/18//2019 (B1068/19)</u>		
<u>09/22/2020 (B1459/20)</u>		
<u>05/03/2022 (B1264/20)</u>		


Date of Charges
TRIAL DATES: 5/24, 5/27, 5/31, 6/6, 6/13, 6/14, 6/23
and 6/24 of 2022

EXAMINED BY: Judge Michael Turilli

<p>#2—Said Officer, on or about April 10, 2019, while assigned to the George R. Vierno Center (GRVC), did engage in conduct unbecoming an officer and of a nature to bring discredit upon the Department and failed to efficiently perform his duties in that said Officer, as a member of the Extraction Team, submitted a false, and/or inaccurate, and/or misleading and/or incomplete Use of Force Report.</p>	<p>SUSTAINED</p>
	<p>DISPOSITION: Guilty at OATH: Turilli recommends termination of Respondent's employment with the Department.</p> <p style="text-align: center;">  DEP UTY COMMISSIONER </p>

ACTION OF THE COMMISSIONER

DATE 9/29/22


 COMMISSIONER OF CORRECTION

**THE CITY OF NEW YORK
CIVIL SERVICE COMMISSION**

In the Matter of the Appeal of

JAMES THOMAS

Appellant

-against-

DEPARTMENT OF CORRECTION

Respondent

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

CSC Index No: 2022-0682

DECISION

JAMES THOMAS (“Appellant”) appealed from a determination of the Department of Correction (“DOC”) finding Appellant guilty of incompetency and/or misconduct and imposing a penalty of Termination following disciplinary proceedings conducted pursuant to Civil Service Law (“CSL”) Section 75.

The Civil Service Commission (“Commission”) requested written arguments from the parties on November 3, 2022. Appellant’s brief was received on November 15, 2022. DOC’s brief was received on December 6, 2022.

The Commission has reviewed the record below, which we incorporate by reference into this decision, as well as arguments submitted on appeal, and find that there is sufficient evidence to support the final determination and that the penalty imposed is appropriate.

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

SO ORDERED.

Dated: January 17, 2023