Dep't of Correction v. Kitt

OATH Index No. 1829/23 (Aug. 7, 2023), *adopted*, Comm'n Dec. (Sept. 25, 2023), **appended**

Petitioner proved that respondent engaged in undue familiarity by passing notes between persons in custody occupying separate holding pens. Petitioner also proved that respondent failed to carry out her duty of care, custody, and control by neglecting to look for the male person in custody when removing the female person in custody from his pen. Finally, Petitioner proved that respondent failed to submit a report regarding sexual contact between the two persons in custody. ALJ recommends termination of employment.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
TAMARA KITT
Respondent

REPORT AND RECOMMENDATION

TIFFANY HAMILTON, *Administrative Law Judge*

Petitioner, the Department of Correction (the "Department"), brought this disciplinary proceeding against respondent, Correction Officer Tamara Kitt, under section 75 of the Civil Service Law. Petitioner alleged that on April 17, 2019, at the Donald Cranston Judicial Center ("DCJC"), respondent engaged in misconduct when she: 1) passed notes between a male person in custody ("BL"), and a female person in custody ("TG")[1], who occupied holding pens across the hallway from one another; 2) failed to look inside BL's holding pen when removing TG from that pen approximately 50 minutes later; and 3) failed to submit a report regarding sexual contact between the two persons in custody. Respondent did not deny the alleged conduct but argued that her actions do not warrant termination.

[1] Because the charges involve a rape allegation, the names of the two persons in custody involved have been redacted, pursuant to 48 RCNY 1-49(d).

The trial was conducted via videoconference on June 23, 2023. Petitioner relied on documentary evidence, a surveillance video, a recorded interview, and testimony from two witnesses. Respondent testified on her own behalf and presented documentary evidence.

For the reasons set forth below, I find that petitioner proved most of the charges and recommend termination of respondent's employment with the Department.

ANALYSIS

The salient facts are undisputed. On April 17, 2019, respondent was assigned to the intake area of DCJC, where she was responsible for escorting persons in custody to and from hearings or meetings with their attorneys (Tr. 41). Her work required her to visit Corridor A of the facility, a long hallway with holding pens on either side, each containing a metal door with a window, as well as a larger window in the wall with a view of the corridor (Pet. Ex. 4C). Each window is covered with metal barriers and plexiglass (Pet. Ex. 4C). The holding pens also contain a metal toilet and sink attached to a large white base, and a wooden bench on the opposite wall (Pet. Ex. 1; Pet. Ex. 4F). At approximately 10:25 a.m., respondent walked onto Corridor A and observed BL and TG conversing loudly through the closed doors of their holding pens, which were located across the hallway from one another (Pet. Ex. 1 at 10:25:46, angle 15.56; Tr. 85).[2] BL, who at the time was the sole occupant of pen 14, asked respondent if she could pass a note with his contact information to TG, who was in pen 13 along with six other female persons in custody (Tr. 85). Respondent opened pen 14, handed BL her ballpoint pen, and waited with the door open as he wrote on a piece of paper (Pet. Ex. 1 at 10:26:35). She then took the note from him, closed the door to pen 14, opened the door to pen 13, and passed the note to TG (*Id*. at 10:27:26). Respondent then exited the corridor and continued to carry out her escort duties (*Id*. at 10:27:46).

Approximately five minutes later, respondent re-entered Corridor A and opened pen 13, to let in another female person in custody (*Id.* at 10:31:59 – 10:32:13). BL called out to respondent, told her that he had omitted two digits from his earlier note to TG, and asked her to pass along another note (Tr. 86). Respondent again opened the door to pen 14, provided BL with her ballpoint

[2] The Genetec surveillance video is recorded from multiple camera angles and does not contain any audio recording. Unless otherwise specified, the angle cited is angle 15.56.

pen, waited while he wrote a second note, closed the door, and passed the note to TG in pen 13 (Pet. Ex. 1 at 10:32:15 – 10:33:09; Tr. 68).[3] Respondent then exited the corridor (*Id*. at 10:33:16).

Between 10:33 a.m. and 11:06 a.m., BL and TG continued to converse across the hallway through closed doors (Pet. Ex. 1 at 10:33:16 – 11:06:08, angles 15.48 and 15.49). At 11:11 a.m., Officer Washington entered Corridor A and BL immediately crouched behind the toilet in pen 14, out of sight of the surveillance camera (*Id*. at 11:11:12, angles 15.49 and 15.56; Tr. 26). Officer Washington opened the door to pen 13 and TG stepped out, with toilet paper in her hand (Pet. Ex. 1 at 11:12:52). Officer Washington then placed her in pen 14, where BL was hiding. Once inside the pen, TG wet the toilet paper and used it to cover the video camera (*Id*. at 11:14.27, angle 15.49).

At 11:18 a.m., Officer Cofield entered Corridor A and walked past pen 14, which now held both persons in custody. He looked in the direction of the pen door, turned around, and exited the corridor (*Id*. at 11:18:22).

Respondent re-entered Corridor A at 11:25 a.m. and opened pen 13, looking for TG in order to escort her to her attorney (*Id*. at 11:25:40; Tr. 88). The occupants of pen 13 informed her that TG was using the bathroom across the hall in pen 14 (Tr. 88). Respondent closed the door to pen 13 and started to exit the corridor. TG then called out from pen 14 that she was ready, so respondent turned around and approached the pen door (Pet. Ex. 1 at 11:25:54; Tr. 88). Respondent looked in the direction of pen 14 and appeared to react to something, by taking two quick steps to the right, away from the pen door, and briefly covering her face with the papers in her hand (Pet. Ex. 1 at 11:25:58). Respondent then walked toward the pen door and unlocked it, looking down Corridor A as she did so (*Id*. at 11:26:03, angle 15.56). The door opened outward into the hallway. Respondent did not step into the pen, and did not look inside as TG stepped out (*Id*. at 11:26:07). She locked the door behind TG, stopped in pen 13 so that TG could change her shirt, and proceeded to escort her out of Corridor A to her attorney (*Id*. at 11:26:07 - 11:27:23; Tr 89). BL was still inside pen 14 during this time, although he was not visible on the surveillance camera because it was still covered by toilet paper. At 11:36 a.m., Officer Cofield removed BL from pen 14 (*Id*. at 11:36:38).

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[3] Although the charges reference only one instance of note-passing, respondent's testimony and Genetec surveillance video established that respondent facilitated the passing of two notes. The exact contents of the notes are unclear, as neither party submitted the notes as evidence. In her 600 AR report, respondent stated that BL wrote his "phone number" on the piece of paper (Resp. Ex. A). In her MEO-16 interview, respondent said that the note contained the BL's "booking case number" (Pet. Ex. 2). At trial, respondent used the phrase "contact information" to describe the contents of the note (Tr. 85).

Later that day, a female person in custody whispered to respondent that a sexual encounter had occurred, but provided no details (Tr. 97). It was unclear to respondent exactly what had transpired, and she initially assumed the sexual encounter had occurred between two female persons in custody (Tr. 90). Respondent told Officer Cofield and another officer about the alleged sexual contact and warned them to watch their posts (Tr. 90). Officer Cofield then informed her that Officer Washington "had put the girl in the pen with the guy" (Tr. 90).

TG later reported to the Department that she and BL had engaged in sexual intercourse in pen 14 (Pet. Ex. 6; Tr. 20). She first described the encounter as consensual, but later asserted that BL had raped her (Pet. Ex. 2; Tr. 50).[4]

In an interview conducted pursuant to Mayor's Executive Order Number 16 ("MEO-16"), as well as at trial, respondent was emphatic that she had no role in placing BL and TG together (Pet. Ex. 2; Tr. 90-91). She admitted to the note-passing and to failing to look inside pen 14, but asserted that she was "oblivious" to what had happened (Tr. 91). She stated that "never in a million years" did she think she would be accused of facilitating sexual relations between persons in custody (Tr. 90).

At her captain's request, respondent wrote two interdepartmental memoranda, known as 600 AR reports, on the date of the incident (Pet. Ex. 3; Resp. Ex. A; Tr. 115). Neither report notes a time of submission (Pet. Ex. 3; Resp. Ex. A). In the first report, respondent wrote that at approximately 11:30 a.m. she "took inmate [TG]…out of pen #14 to escort said inmate to the interview room to be interviewed by her lawyer" (Pet. Ex. 3). Later that day, her captain instructed her to write an addendum, because when the first report was written respondent had not viewed the Genetec surveillance video and had limited knowledge about what had taken place in pen 14 (Tr. 116). Respondent submitted the addendum at the end of her tour of duty (Tr. 115). In it, she wrote, "[BL] asked this writer if I can give his long time acquaintance his phone number whom was inmate [TG]…This writer then watched said inmate write his phone number down on a strip of paper and this writer passed the number to inmate [TG] in Pen #13" (Resp. Ex. A). Only one instance of note-passing was mentioned in the addendum. In neither the initial report nor the addendum is a sexual encounter mentioned.

[4] Notwithstanding her initial assertion, a person in custody cannot consent to sexual intercourse, as the Prison Rape Elimination Act (PREA) "strictly prohibits sexual abuse, sexual harassment, and sexual contact (including that of a consensual nature) between inmates" (Pet. Ex. 7; Tr. 21, 34).

Investigator Patricia Marte testified on behalf of petitioner regarding her investigation of the incident. She conducted the MEO-16 interview of respondent on October 20, 2020 (Pet. Ex. 2). She explained that after completing her investigation, which included a review of the Genetec surveillance video as well as the two 600 AR reports, she wrote a closing memorandum finding that respondent, along with the other officers involved, had engaged in misconduct (Tr. 19).

Captain Deloris McDonald, a captain in the Training and Development Division of the Department of Correction, also testified on behalf of petitioner. Captain McDonald is responsible for conducting training sessions for correction officers on various topics related to their job duties (Tr. 61). She testified that all officers are required to take a course on undue familiarity (Tr. 62). The training emphasizes the boundaries that must be kept between officers and persons in custody, and makes it clear that favors of any kind are prohibited (Tr. 63-64). Respondent completed the training program for undue familiarity on September 9, 2011 (Tr. 65; Pet. Ex. 5).

In 2011, respondent also received training on writing reports (Tr. 61-62). The training covered various types of reports, including 600 AR reports and incident report forms, and was designed "to give [recruits] the foundation of how to write reports from when they're assigned to a facility" (Tr. 61-62).

I found that petitioner's two witnesses gave straightforward, credible testimony. I also found respondent's testimony mostly credible. She generally accepted responsibility for her actions, acknowledging that she "went wrong" but nonetheless asserting that the note-passing and sexual misconduct were "separate incidents" (Tr. 91).

The Charges

Petitioner charged respondent with three specific categories of misconduct: 1) facilitation of note-passing between BL and TG; 2) failure to look inside pen 14 when removing TG; and 3) failure to report sexual contact between BL and TG.[5]

[5] The disorganized manner in which the petition is written merits some discussion. The charges are a maze of specific and general allegations, with only one specification comprised of a six-paragraph narrative, followed by a list of rules and directives. The Administrative Law Judge is thus tasked with matching the conduct to the rules and regulations listed after the narrative. A more effective petition would have linked each charge with an alleged act of misconduct, and then cited the rule that act allegedly violated. A clear, well-organized petition contributes to the overall efficiency of the adjudicative process. *See Dep't of Education v. Logan,* OATH Index No. 494/19 (August 19, 2019) at 18; *Dep't of Education v. Kingston*, OATH Index No. 1642/19 at 8 (Sept. 16, 2019), *adopted in part, rejected in part, modified on penalty*, Chancellor's Dec. (Nov. 12, 2019)**,** *aff'd*, NYC Civ. Serv. Comm'n Case No. 2019-1171 (Dec. 1, 2020).

As a preliminary matter, although not raised by the parties, an amendment of the petition is required. 48 RCNY § 1-22 provides that a petition must "identify the law, rule, regulation, contract provision, or policy that was allegedly violated and provide a statement of the relief requested." The rule ensures that a respondent receive adequate notice of the charges in order to properly prepare a defense. *See Dep't of Correction v. Hamil & Villodas*, OATH Index Nos. 1213/18, 1215/18 (July 9, 2018), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2018-1174 (Mar. 14, 2019) (citing *Block v. Ambach*, 73 N.Y.2d 323, 333 (1989)).

Here, the charges include: failure to efficiently perform duties; engaging in conduct unbecoming a member of service; engaging in conduct of a nature to bring discredit upon the Department; failure to ensure the safety and security of both Departmental staff and inmates to cooperate in maintaining the security and good order of the facility; failure to provide the proper care, custody, control and treatment of inmates; failure to enforce rules regarding sexual abuse, sexual harassment and sexualized behavior of inmates; failure to respond to, investigate…sexual misconduct within all facilities, and failure to strictly prohibit sexual abuse, sexual harassment, and sexual contact (Pet. Ex. 1). The petition does not charge respondent with engaging in undue familiarity and it does not list the undue familiarity rule or directive (Pet. Ex. 1).

48 RCNY § 1-25 permits amendments less than twenty-five days before the commencement of the trial, on consent of the parties or by leave of the administrative law judge on motion. Petitioner did not move to amend the charges. Our cases have found *sua sponte* amendments to be appropriate only where they would result in no prejudice to respondent. *Compare Dep't of Correction v. Bovell,* OATH Index No. 1910/99 at 2, n.1 (Aug. 13, 1999) (ALJ amended the charge *sua sponte* to conform to the proof presented at trial, noting that respondent was given an opportunity to defend the substantive charge); *Dep't of Finance v. Smyth*, OATH Index No. 1285/11 (Mar. 9, 2011), *adopted*, Comm'r Dec. (Mar. 16, 2011) (ALJ amended charge *sua sponte* where respondent was made aware both before and during the hearing that the alleged misconduct consisted of stealing union funds and not merely being arrested for theft), *with Dep't of Correction v. Jenkins*, OATH Index No. 3070/09 (Dec. 16, 2009) (ALJ declined to amend the charges *sua sponte* to conform to the proof, noting that the petition must apprise respondent of the conduct at issue so as to enable her to adequately prepare and present a defense).

Here, both petitioner and respondent conducted the trial as if undue familiarity had been charged. All witnesses discussed undue familiarity at length, and were cross-examined about it.

Petitioner submitted into evidence Directive 01/08: "Undue Familiarity and Prevention of Sexual Abuse of Inmates by Staff and Other Inmates," as well as Rules 3.25.030 and 3.25.040; respondent stipulated to the admission of these documents (Pet. Exs. 7, 8; Tr. 6). Both parties cited case law specifically on the issue of undue familiarity. Petitioner's opening argument included the statement, "Doing favors for people in custody is one of the worst breaches of security that an officer can make" (Tr. 11). Respondent's closing argument included the statement, "I recognize that Officer Kitt stands before you charged with undue familiarity" (Tr. 128). There is no question that respondent was on notice of the charge.

I find that it is appropriate under these limited circumstances to amend the petition *sua sponte* to include the charge of undue familiarity, in order to conform the charges to the proof presented at trial. Doing so does not prejudice respondent, as she acknowledged the charge and presented a defense to it. The petition is therefore amended *sua sponte* to reflect that respondent's alleged conduct violated the Department's directive and rules against undue familiarity.

Petitioner bears the burden of proving the 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 a fact is more probable than its non-existence." *Prince, Richardson on Evidence* § 3-206 (Lexis 2008); *see also Rinaldi & Sons, Inc. v. Wells Fargo Alarm Service, Inc.*, 39 N.Y.2d 191, 196 (1976). Petitioner must also demonstrate that respondent acted either willfully or intentionally, *Reisig v. Kirby*, 62 Misc.2d 632 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008 (2d Dep't 1969), or negligently, *McGinigle v. Town of Greenburgh*, 48 N.Y.2d 949, 951 (1979). Petitioner must meet its burden for each of the three specific categories of misconduct alleged.

Undue Familiarity

Rule 3.25.030 of R&R Chapter 3 provides, "Members of the Department shall not…extend any favor of diet, clothing, or other privilege not common to all inmates…" (Pet. Ex. 8). Rule 3.25.040 provides, "Members of the Department shall not indulge in any undue familiarity with inmates nor shall they permit undue familiarity on the part of the inmates towards themselves. Undue familiarity shall include any behavior that is not directly related to one's work duties

including, but not limited to, accepting gifts or favors, engaging in any sexual act[,] etc." (Pet. Ex. 8).

Undue familiarity thus occurs whenever a member of the Department grants a person in custody a personal favor or engages in another form of preferential treatment. *See Dep't of Correction v. LeConte*, OATH Index No. 788/96 at 9-10 (Jan. 8, 1996). Although some favors may appear harmless, they nonetheless undermine safety in that they "can lead to dissention [sic] and frictions among inmates, pressures on officers, and other problems." *LeConte*, OATH 788/96 at 10; *see also Dep't of Correction v. Murchison-Hunt*, OATH Index 297/10 (Mar. 25, 2010), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD-67-A (Sept. 12, 2011) (undue familiarity found where respondent listened to music on earphones belonging to a person in custody, and danced in front of other persons in custody). All favors are therefore prohibited. "As trivial as it may seem to one outside of the Department, giving an inmate even cold, salty, leftover chicken that would otherwise be thrown in the garbage constitutes a personal favor that breaches the proper wall of separation between the jailers and the jailed." *LeConte*, OATH Index No. 788/96 at 10 (Jan. 8, 1996).

Directive 01/08, issued February 2, 2008, and entitled "Undue Familiarity and Prevention of Sexual Abuse of Inmates By Staff and Other Inmates," discusses the risk to safety imposed by favors:

> Once you accept a gift or favor, introduce a single piece of contraband or single an inmate out for special treatment ---- with the first letter you carry in or out, the first cigarette you provide, the infraction you quash ---- the door is opened for the inmate to control you and influence your further actions. And that becomes a serious threat to the safety of fellow staff and other inmates.

Pet. Ex. 7

Investigator Marte discussed the dangers of favors between officers and persons in custody, calling this incident "a prime example" of what could go wrong (Tr. 33). Because respondent facilitated note-passing between BL and TG shortly before their unlawful sexual contact, "Now it seems as if…[respondent is] involved and she has something to do as to what's going on between the inmates, which led to the inmates having sex. So it…is like a contributing factor as to the incident occurring…and it's just not professional" (Tr. 34).

The evidence established that respondent engaged in undue familiarity with BL and TG by facilitating the writing and passing of personal notes between them. Twice within seven minutes,

respondent opened BL's holding pen, handed her pen to BL to allow him to write a message, and passed the message to TG in the holding pen across the hallway. Respondent offered no defense for passing the notes, explaining that she only did so because she thought that TG was going to be discharged and BL wanted her to have his contact information (Tr. 87, 111).

Respondent expressed remorse for her conduct and stated that she "understands now" the security risk it posed (Tr. 87). Still, it is undisputed that she granted a personal favor by facilitating the passage of notes, playing "the role of an intermediary" (Tr. 125). In doing so, respondent engaged in undue familiarity. This charge is sustained.

Inefficient Performance of Duties

Petitioner alleges that respondent "failed to look inside Pen Number 14 before escorting [TG] back to Intake Pen Number 13," and thus "failed to efficiently perform her duties," in violation of Department Employee Rules and Regulations § 3.05.120 (Pet. Ex. 6).

A correction officer's primary duty is the proper care, custody, and control of a person in custody. *See generally* Department Employee Rules and Regulations § 2.30.010 (Pet. Exs. 6, 8); *see also Dep't of Correction v. Hall*, OATH Index Nos. 155/05 & 156/05 (Aug. 11, 2005), *adopted*, Comm'r Dec. (Oct. 5, 2005). "All aspects of inmate behavior" must be closely monitored to ensure the safety and security of the facility. *Dep't of Correction v. Anonymous,* OATH Index No. 1472/10 at 3 (June 16, 2010), *adopted*, Comm'r Dec. (Aug. 2, 2010). An officer is responsible for the efficient performance of his or her duties and for the proper supervision of persons in custody under his or her direction. *See generally* Department Employee Rules and Regulations § 3.05.120. The inefficient performance of an officer's "care, custody, and control" duties compromises safety and can have disastrous consequences. *See e.g.*, *Anonymous*, OATH 1472/10 at 2 (respondent neglected a basic duty of a correction officer – "the care, custody, and control of inmates," which led to a slashing, about which the officer was unaware); *Dep't of Correction v. Way*, OATH Index Nos. 913/04 & 914/04 (June 25, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD05-49-SA (Aug. 11, 2005) (two correction officers inefficiently performed their care, custody and control duties by failing to detect a violent sexual assault on a person in custody); *Hall*, OATH 155/05 & 156/05 at 7 (two officers neglected their duties by failing to supervise a housing area, resulting in a fatality).

The determination of whether respondent neglected her duties by failing to look inside pen 14 when removing TG requires an assessment of the reasonableness of her actions, taking into consideration her "expertise and knowledge of persons involved and assessment of the situation as it unfolded before [her]." *See Dep't of Correction v. Paul,* OATH Index No. 1712/21 at 40 (Feb. 7, 2022), *adopted*, Comm'r Dec. (Apr. 20, 2022) (citing *Dep't of Correction v. Hwee,* OATH Index No. 1185/04 at 13 (Aug. 10, 2004), *adopted*, Comm'r Dec. (Sept. 28, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-34-SA (Mar. 21, 2006)). In *Hall*, OATH 155/05 & 156/05, two correction officers failed to supervise a housing area, leading to a fatal altercation. The ALJ rejected the "misguided" argument put forth by one of the officers that she was not responsible for closing the gate because someone else had opened it, reasoning, "As a correction officer, her primary duty is the care, custody and control of the inmates in the facility. [She] cannot absolve herself of responsibility by asserting that she did not open the gate. The fact of the matter is, that the gate was open when she arrived and regardless of whether or not she had assumed the post, as a correction officer, she was responsible for ensuring that the area was secure in order to maintain proper custody of the inmates. At a minimum, [the officer] should have inquired why the gate was open." *Hall*, OATH 155/05 & 156/05 at 13.

Similarly, respondent's failure to look inside pen 14 was unreasonable under the circumstances and amounted to neglect of her duties as a correction officer. Asked at trial whether she noted the presence of another person in the pen, respondent replied, "No…all I could do at the moment is just a visual. Not unless I have a reason to go in there and be like, something is going on. I had no knowledge of anything" (Tr. 89). If respondent did "a visual" of pen 14, then it was poorly done; she could have discovered BL's presence with minimal effort. Furthermore, her reaction when she initially looked toward pen 14 - taking two steps away and covering her face with the papers in her hand – calls into question her assertion that she "had no knowledge of anything" (Tr. 89).

Although the evidence did not establish that she was intentionally involved in placing BL and TG together, that she failed to even consider the possibility of suspicious activity in pen 14 is troubling. The Department requires that its officers "consider the context in which they are performing their responsibilities in order to ensure that inmates receive the appropriate level of care." *Dep't of Correction v. Wisher*, OATH Index Nos. 591/14 & 592/14 (May 19, 2014), *aff'd*, NYC Civ. Serv. Case Nos. 2014-1134 and 2014-1135 (Jan. 23, 2015) (officer performed duties

inefficiently when he failed to notify supervisors or medical staff that a person in custody did not receive medication, even though the officer knew that the person had been acting irrationally). The context here included respondent's knowledge that these two "long-time acquaintance[s]" had been communicating from separate holding pens, both verbally and through the two notes, and that less than an hour later TG was in BL's pen (Resp. Ex. A). In addition, respondent testified that pen 13 was "where the females are usually," and thus TG's presence outside of that pen should have at least aroused suspicion (Tr. 88). Although the females occupying pen 13 told respondent that TG was using the bathroom across the hall, respondent should have, at a minimum, questioned this explanation. She should have recalled the communication between BL and TG. She should have asked herself where BL went. Furthermore, a review of the Genetec surveillance video revealed that while BL and TG were conversing across the hall, a female person in custody used the toilet in pen 13, in plain view of her six cellmates (Pet Ex. 1 at 10:27:18 – 10:30:19, angle 15.48). It is unlikely that TG would be afforded the privilege of using the toilet in a private holding pen when her cellmate was not. This discrepancy in treatment is suspicious and unexplained. Under all of these circumstances, a reasonable officer would have looked inside pen 14 more carefully.

Respondent's failure to perform even a cursory inspection of the pen amounts to, at best, an inefficient performance of her duties, and at worst, willful blindness regarding a sexual encounter between persons in custody. Either way, the Department has proven that she performed her duties inefficiently and failed to provide the proper care, custody, and control of a person in custody in her charge. This charge is sustained.

Failure to report

Petitioner alleged that respondent "failed to submit a report regarding…sexual contact [between BL and TG]", in violation of Direction 5000R-A and 5011R-A (Pet. Ex. 6). Although she submitted two 600 AR reports on the date of the incident, neither of the two reports references unlawful sexual conduct (Resp. Exs. A and B).

All members of service are required to file complete and accurate reports (Pet. Ex. 7; Tr. 61-62, 115). Directive 5000R-A requires the "timely and accurate reporting of unusual incidents" and defines an "unusual incident" as "an event or occurrence that may affect or actually does affect the safety, security, and well-being of the Department, its personnel, visitors and volunteers, as

well as the inmates over whom it has custody and control." Sexual abuse or assault (any report, actual and alleged) is considered an unusual incident (Pet. Ex. 7). Directive 5011R-A provides, "[a]ny staff who fails to report sexual abuse or sexual harassment is subject to disciplinary action."

Here, a person in custody informed respondent that two other persons in custody had engaged in sexual relations. When respondent passed that information along to two fellow officers, she was told that an officer had allowed BL and TG to be in the same pen together. Respondent omitted all of this information from her two 600 AR reports. She was also obligated to file an Unusual Incident report and failed to do so, in violation of Directive 5000R-A. Respondent's explanation that she "couldn't write the incident that happened because [she] didn't know what exactly happened," rings hollow (Tr. 115). She had a duty to report what she knew. This duty is not predicated upon absolute certainty of, or direct involvement in, alleged misconduct; such a requirement would compromise the safety and security of the facility by restricting officers from disclosing suspicious activity. *See Paul,* OATH 1712/21 at 20 (respondent engaged in misconduct when he failed to file an unusual incident report after the death of a person in custody, even though he "had nothing to do with the death" and was not present at the time of his passing). It is more likely that respondent omitted the sexual encounter to avoid disclosing her earlier actions. Her failure to report amounts to misconduct. This charge is sustained.

Additional Rule Violations:

I find that the Department proved that respondent's conduct also violated the following Department of Correction Employee Rules and Regulations (Pet. Ex. 6):

3.20.010 "Members of the Department shall present a professional demeanor and as an employee of the City of New York shall act in a dignified manner. While on duty, they shall comport themselves in a manner that will not bring criticism upon themselves or the service which they represent."

4.35.080 "Members of the Department shall cooperate in maintaining the security and good order of the facility. They shall also assist in the rehabilitation of inmates."

4.35.090 "Whenever a member of the Department received information from any source which directly or indirectly concerns the security and good order of any facility of the [D]epartment, the member shall immediately notify the Commanding Officer."

While the charges related to these additional rule violations are sustained, they do not require a separate penalty because they stem from the same acts as the undue familiarity, inefficient performance of duties, and reporting violations. *See Dep't of Transportation v. G.A.*, OATH Index No. 1967/21 at 10 (Nov. 10, 2022), *adopted*, Comm'r Dec. (Dec. 9, 2022) (charges which arise from the same facts may be sustained but require no separate penalty).

I find that petitioner did not meet its burden of proving that respondent "failed to intervene," or "failed to strictly prohibit sexual abuse, sexual harassment, [or] sexual contact" between persons in custody (Pet Ex. 6). Respondent did not place TG in the pen with BL, and no evidence was presented that she could have, but failed to, intervene. Although petitioner proved that respondent failed to look inside the pen 14 when removing TG, at that point the sexual contact between BL and TG had already occurred. Petitioner failed to prove that respondent had prior knowledge of any sexual encounter between the two persons in custody.

FINDINGS AND CONCLUSIONS

1. Petitioner proved that respondent engaged in undue familiarity when on April 17, 2019, she passed two notes from BL to TG, in violation of the Department's Directive 01/08, and its Employee Rules and Regulations §§ 3.25.030 and 3.25.040.

2. Petitioner proved that respondent failed to perform her duties efficiently, and failed to provide the proper care, custody, control, and treatment of persons in custody, when she neglected to look inside pen 14 as she removed TG, in violation of the Department's Employee Rules and Regulations §§ 2.30.010 and 3.05.120.

3. Petitioner proved that respondent failed to submit a report regarding sexual contact between BL and TG, in violation of Directives 5000R-A and 5011R-A.

4. Petitioner proved that respondent, while on duty, failed to comport herself in a manner not to bring criticism upon herself or the service she represents, in violation of Employee Rules and Regulations § 3.20.010.

5. Petitioner proved that respondent failed to cooperate in maintaining the security and good order of the facility, in violation of Employee Rules and Regulations § 4.35.080.

6. Petitioner proved that respondent failed to immediately notify the Commanding Officer when she received information from a source directly or indirectly concerning the security and good order of any facility of the [D]epartment, in violation of Employee Rules and Regulations § 4.35.090 and Directive 5000 R-A.

RECOMMENDATION

After making the above findings, I requested and reviewed a summary of respondent's personnel history, on Departmental form 22R. Respondent has worked for the Department since 2011 and has no prior discipline on record. I have taken her unblemished work history under full consideration. However, I find that respondent's missteps were so egregious, and the consequences so grave, that termination is the only appropriate penalty.

"With rare exception, the penalty for undue familiarity has been termination of employment. This is particularly the case where the undue familiarity is between correction officers and inmates within their care, custody, and control." *Dep't of Correction v. Hernandez*, OATH Index No. 1339/06 at 6 (Oct 4, 2006), *adopted*, Comm'r Dec. (Oct 26, 2006), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 07-46-SA (Apr. 17, 2007). Termination has been deemed appropriate for undue familiarity in various forms, ranging from inappropriate relationships between correction officers and persons in custody to favors involving substantially less contact. S*ee e.g.*, *Paul*, OATH 1712/21 at 23 (termination recommended for officer who engaged in undue familiarity by retrieving and delivering a pair of shorts to a person in custody, after midnight, a few hours before the person in custody died of a drug overdose); *Dep't of Correction v. McNeill*, OATH Index No. 265/22 (Feb. 22, 2022), *adopted*, Comm'r Dec. (June 16, 2022) (termination recommended for correction officer who engaged in a sexual relationship with a person in custody and provided her with contraband); *Dep't of Correction v. Malone*, OATH Index No. 1475/11 (Sept. 2, 2011), *adopted*, Comm'r Dec. (Oct. 12, 2011) (termination recommended where correction officer played cards and dominoes with persons in custody, among other sustained charges); *Dep't of Correction v. Huggins*, OATH Index No. 1854/00 (Oct. 25, 2000), *aff'd*, NYC

Civ. Serv. Comm'n Item No. CD01-49-SA (July 27, 2001) (termination recommended where correction officer received six phone calls from one person in custody who was her ex-boyfriend, and three from another person in custody).

Respondent's seemingly innocuous gesture enabled two persons in custody in separate holding pens to communicate with one another, which may have led, either directly or indirectly, to their unlawful sexual contact and a subsequent rape allegation. That respondent showed genuine remorse is mitigating, as is the lack of evidence showing that she intentionally participated in placing the two persons in custody together. However, this case is unlike undue familiarity cases where the conduct was deemed insufficiently harmful to warrant a penalty of termination. *See e.g. Dep't of Correction v. Carter*, OATH Index No. 171/91 (Feb. 28, 1991), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 93-13 (Mar. 13, 1993) (20-day suspension imposed where officer watched television with persons in custody); *Dep't of Correction v. Booker*, OATH Index No. 337/97 (Oct. 28, 1996) (40-day suspension imposed where officer provided a person in custody with food and drink while on escort duty and for being off-post); *Murchison-Hunt*, OATH 297/10 at 8 (undue familiarity found where respondent listened to music on earphones belonging to a person in custody, and danced in front of other persons in custody).

The undue familiarity finding is aggravated by the fact that respondent neglected her duty to provide for the care, custody, and control of the persons in custody in her charge, and then failed to submit a report that included her knowledge of the sexual encounter. Respondent's conduct, viewed in its totality, demonstrated several fundamental lapses in judgment, an inefficient performance of essential responsibilities, and untrustworthiness. Despite her unmarred disciplinary record, I find that termination is the only appropriate penalty.

Tiffany Hamilton
Administrative Law Judge

August 7, 2023

SUBMITTED TO:

LOUIS A. MOLINA
Commissioner

APPEARANCES:

CHRISTINE SISTO, ESQ.
Attorney for Petitioner

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

NEW YORK CITY DEPARTMENT OF CORRECTION
Louis Molina, Commissioner

Solange Grey, Deputy Commissioner
Trials & Litigation Division
75-20 Astoria Boulevard – Suite 310
East Elmhurst, NY 11370
718-546-0301
Fax 718-278-6526

September 29, 2023

Joseph Caputo
Acting Warden
Donald Cranston Judicial Center/CJB

Re: C.O. Tamara Kitt
Guilty At OATH – DR #357/19

Dear Acting Warden Caputo:

Please be advised that on August 7, 2023, the Office of Administrative Trials and Hearings issued findings on the charges and specifications listed above. The Honorable Tiffany Hamilton found C.O. Tamara Kitt guilty on the specifications. The recommended penalty was termination.

On September 25, 2023, Commissioner Louis Molina accepted the Court's findings and its recommendation as to the penalty. Therefore, C.O. Kitt must be terminated.

Please notify C.O. Kitt by serving her ASAP with a copy of this letter. Upon service of this letter on the subject employee, have her sign below acknowledgment of service. After the employee is served, please fax or scan me a copy of the signed acknowledgment. My fax number is (718) 278-6526.

Yours truly,

[redacted]

Solange Grey,
Deputy Commissioner

Attachments

C: Kat Thomson, Acting Deputy Commissioner, Human Resources
Counsel for Respondent
O.A.T.H.

Served by: _____

Respondent's Signature: _____

Date: _____

NEW YORK CITY DEPARTMENT OF CORRECTION
Louis Molina, Commissioner

Solange N. Grey, Deputy Commissioner
Trials & Litigation Division
75-20 Astoria Boulevard – Suite 310
East Elmhurst, NY 11370

718-546-3132
Fax 718-278-6526

Tamara Kitt
[redacted]

RE: Final Determination
DR #: 0357/19

Dear C.O. Kitt,

After a complete review of the record and the report and recommendation of the Honorable Tiffany Hamilton, 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, 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,

[redacted]

Louis Molina, Commissioner

Date: 9/25/23

CC: 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 Index No. 1879/23
Case No.	DR #0357/2019
Book No.	Page

Correction Officer	Tamara Kitt	7073	DCJC	5/26/2011
Rank or Title	Name	Shield/ID	Facility/Unit	Date Appointed

-By-

Agency Attorney III	Christine Sisto	Office of Trials and Litigation
Rank or Title	Name	Facility/Unit

10/8/2020	6/21/2023	6/21/2023
Date of Charges	Trial Commenced	Trial Concluded

ADJOURNMENTS:

EXAMINED BY: Hon. Tiffany Hamilton

CHARGES

Directives: 5000R-A
5011R-A

Rules: 2.30.010
3.05.120
3.20.030
3.20.300
4.35.080
4.35.090

Other:

FINDINGS AND RECOMMENDATION

DATE: 8/7/2023

ON CHARGES

5000-Guilty
5011-Guilty
2.30.010-Guilty
3.05.120-Guilty
3.25.030-Guilty
3.25.040-Guilty
4.35.080-Guilty
4.35.090-Guilty

SPECIFICATIONS

ON SPECIFICATIONS

DR#0357/2019

1. As revealed to the New York City Department of Correction (hereinafter "Department") during the course of an investigation, Correction Officer Tamara Kitt (hereinafter, "Respondent"), while assigned to Post Intake "D", on April 17, 2019, from on or about and between 1020 hours and 1204 hours at the Facility at Donald Cranston Judicial Center/CJB , engaged in misconduct when she (i) failed to efficiently perform her duties; and (ii) failed to engage in conduct becoming a member of service; and (iii) engaged in conduct of a nature to bring discredit upon the Department; and (iv) failed to insure the safety and security of both Departmental staff and inmates to cooperate in maintaining the security and good order of the facility; and (v) failed to provide the proper care, custody, control and treatment of inmates; and (vi) failed to enforce Rules regarding sexual abuse, sexual harassment and sexualized behavior of inmates; and (vii) failed to respond to, investigate sexual misconduct within all facilities; and (viii) failed to strictly prohibit sexual abuse, sexual harassment and sexual contact (including that of a consensual nature between inmates), when:

   she opened Intake Pen Number 14, inside of which a male inmate known to the Department was placed. The male inmate known to the Department wrote a note and handed the note to the Respondent. The Respondent handed the note to a female inmate known to the Department who was housed inside Intake Pen 13 on the opposite side of the Intake hall.

   Several moments later, another member of service approached Intake Pen Number 14 and also approached Intake Pen Number 13, which was on the opposite side of the Intake hall. The male inmate known to the Department who was placed inside Intake Pen Number 14 crawled underneath the sink of Intake Pen Number 14, crouched underneath the sink and remained there until said other member of service walked away. Said other member of service approached Intake Pen Number 13. Intake Pen Number 13 held approximately seven (7) female inmates known to the Department. Said other member of service opened Intake Pen Number 13 and escorted one of the female inmates known to the Department from Intake Pen Number 13 to Intake Pen Number 14 - where the male inmate was hiding underneath the sink – and allowed the female inmate to enter Intake Pen Number 14.

   The female inmate entered Intake Pen Number 14 and laughed and walked around the cell. The female held the toilet paper that she took with her from Intake Pen Number 13 inside the Intake Pen sink – under which the male inmate was crouched - wet the toilet paper and placed the wet toilet paper over the Departmental Genetec Video Camera, which partially obstructed the view of the cell.

   Several moments later, the Respondent approached Intake Pen Number 14. The female inmate exited Intake Pen Number 14. The Respondent failed to look inside Pen Number 14 before escorting said female inmate back to Intake Pen Number 13.

   The female inmate provided to the Department a brown Departmental institutional shirt, which the female inmate alleged was used by the male to wipe his penis and the female inmate's vagina after the male inmate ejaculated inside Intake Pen Number 14, when the female inmate and male inmate engaged in sexual contact.
   The Respondent failed to intervene and failed to take security measures to control the inmates and failed to notify a supervisor and/or Commanding Officer and failed to submit a report regarding said sexual contact.

1. Guilty

DISPOSITION

TERMINATION [redacted]

DEPUTY COMMISSIONER

ACTION OF THE COMMISSIONER

[redacted]

DATE 9/28/23

COMMISSIONER OF CORRECTION