

Dep't of Correction v. E.B.
OATH Index No. 1879/24 (June 21, 2024)

The Department proved that Respondent engaged in misconduct when she used profanity during an altercation with another correction officer and when speaking to a captain, and activated two personal body alarms when there was no emergency. The Department also proved that Respondent left her post without proper relief. The Department did not prove that Respondent failed to obey an order from an assistant deputy warden to submit a report regarding the incident or that she failed to identify herself to another supervisor when asked to do so. ALJ recommends a 50-day suspension.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
E.B.¹
Respondent

REPORT AND RECOMMENDATION

JOYCELYN McGEACHY-KULS, *Administrative Law Judge*

Petitioner, the Department of Correction (the “Department”), brought this disciplinary proceeding against Respondent, Correction Officer E.B., under section 75 of the Civil Service Law. In its amended complaint, the Department alleged that on March 13, 2023, at the Vernon C. Baines Center (“VCBC”), Respondent engaged in misconduct when she 1) behaved disrespectfully and used profanity towards another correction officer; 2) behaved disrespectfully when she failed

¹ As this Report and Recommendation discusses Respondent’s private medical records, Respondent’s full name is being withheld from publication pursuant to OATH Rule 1-49(d). See 48 RCNY § 1-49(d) (Lexis 2024); *Human Resources Admin. v. M.O.*, OATH Index No. 173/15 at 1 (Nov. 21, 2014) (respondent’s name withheld because report contained sensitive medical and personal information); *Admin. for Children’s Services v. J.M.*, OATH Index No. 3350/09 at 1 n.1 (Apr. 5, 2010).

to promptly identify herself to a captain and used profanity; 3) improperly activated two personal body alarms; and 4) refused a direct order to submit a report about the incident.^{2 3}

During the two-day trial, the Department presented documentary and photographic evidence and testimony from three witnesses. Respondent testified in her own behalf and presented documentary evidence.⁴

For the reasons set forth below, I find that Petitioner proved most of the charges and recommend a penalty of 50 days suspension without pay.

BACKGROUND

This claim arises from allegations that Respondent engaged in misconduct on March 13, 2023, in the housing area of the VCBC facility in the Bronx, NY. The following facts are not in dispute. Respondent, who was assigned to the B-Post, received notice that she was assigned to work overtime. Respondent had medical documentation excusing her from working overtime. At approximately 11:35 p.m., Respondent went to the control room (“A-Station”) to use the restroom because there was no restroom in her assigned post. After Respondent used the restroom, she requested that Officer Lewis open the gate to allow her to leave the housing area because it was the end of Respondent’s shift. Officer Lewis refused to open the gate because Respondent had not been relieved from her post. Respondent then activated two personal body alarms (“PBAs”), prompting responses from Assistant Deputy Warden (“ADW”) Maraj and Captain Sharif. Captain Sharif reported to the A-Station gate and escorted Respondent from the housing area.

ADW Maraj testified that as an assistant deputy warden, she was responsible for the operation of the VCBC facility. She elaborated that she directs the staff in their supervision of the inmate population in addition to running the central operations desk, responding to alarms and unusual incidents that might occur (Tr. 17). When she was a correction officer, ADW Maraj received training on the proper use of PBA and asserted that members of service (“MOS” or “staff”) are trained to activate these alarms when they need assistance during inmate-related incidents (Tr. 18). ADW Maraj referenced the Department’s Operations Order 25/19 (“the Order”)

² The Complaint refers to the four instances of misconduct as Specifications. The Specifications are referred to as Charges in this Report and Recommendation.

³ On February 2, 2024, the Department, with consent of Respondent, filed an amended complaint pursuant to OATH Rule 1-25. The Department amended the complaint to provide specificity to the charges in accordance with OATH Rule 1-22 and to reference Operations Order 25/19.

⁴ Prior to trial, the parties stipulated to the admissibility of the documentary exhibits presented at trial.

that outlined the procedures for response by the probe teams “to alarms and potential and actual inmate related disruptions, emergencies, and disturbances” (ALJ Ex. 2 at I). The Order provides that “[a]ny uniformed staff member may activate a Level ‘B’ response initiating the Probe Team. Level ‘B’ Responses are in response to emergency situations,” including response to a “Personal Body Alarm (PBA)” (*Id.* at III.F.2.a).

ADW Maraj described that staff wear PBAs on their belts and that PBAs are activated by pressing the button on top of the device (Pet. Ex. 1A-G). After a PBA is activated, an alarm sounds throughout the facility and in the central control room. The computer in the central control room displays where the alarm was activated and identifies the MOS whose PBA was activated. All staff then report to the staging area where they don the riot equipment and the tour commander calls the central control room to determine the location of the activated alarm, the nature of the alarm, and which PBA was activated (Tr. 19).

Respondent has been a correction officer for seven years. She worked at the VCBC facility from February 2019 until October 2023. While training to become a correction officer, Respondent learned not to leave an assigned post without relief and received instruction on how to complete reports and the proper use of a PBA. Respondent stated that PBAs are intended to be used to alert the facility of incidents involving inmates and are used for emergencies. She added that MOS are supposed to activate their own PBA and not the PBA of another correctional officer. Respondent was also aware that an activated PBA would set off an alarm throughout the facility and trigger a response from the probe team (Tr. 175, 176).

Respondent was assigned to B-Post on the housing unit floor monitoring approximately 50 persons in custody. As a B-Post officer, Respondent was responsible for monitoring for contraband and intervening to deescalate any interactions between inmates if necessary. She also monitored commissary visits and arranged for medical attention as needed. Respondent testified that she typically worked on the floor alone, with no other officer assigned to the B-Post during her shifts. She described that when B-Post officers need to use the restroom, they knock on the window of the A-Station to be let in to use the restroom. She described this as a common practice adding that “there's never no relief, so we tend to go to the A-Station to use the restroom” (Tr. 134, 136, 137).

Respondent recounted that during her employment at the Department, she began pacing and feeling anxious and that this feeling intensified over time. She ultimately suffered an anxiety

attack at work in March 2022 and was hospitalized for a period of time (Tr. 139, 140). She returned to work under the care of a therapist but subsequently went out on FMLA leave for stress from December 16, 2022, to March 9, 2023 (Resp. Ex. A). In December 2022, the Department determined that Respondent was unfit to carry a personal firearm and documented this restriction on her Employee Performance Service Report⁵ (Resp. Ex. B). Respondent remains under the care of a therapist and has maintained weekly scheduled visits since December 2022. She was also prescribed sertraline and trazadone to treat her depression and anxiety (Tr. 145; Resp. Ex. C).

Respondent was taking the prescribed medication when she returned to work on March 9, 2023, four days before this incident. She noted that the prescribed medications do not affect her ability to discern right from wrong (Tr. 147, 177). Prior to returning to work from her leave, Respondent was notified that her tour had changed from 10:59 a.m. to 7:30 p.m. to 3:00 p.m. to 11:00 p.m. (Tr. 151). She contacted the Department's Equal Employment Opportunity office to inform them of her medical condition and to advise that, due to her prescribed medications and her medication schedule, she would not be able to work overtime. Respondent requested a reasonable accommodation to limit her scheduled hours of work and provided an email supporting this request from her therapist stating that Respondent was diagnosed with "an anxiety disorder and anxiety and depression" and recommended that Respondent "not be assigned overtime duties as it would be detrimental to her ongoing treatment" (Resp. Ex. E). On March 11, 2023, Respondent also notified her tour commander, ADW Maraj, of the requested restriction and provided her with a copy of the email, so that ADW Maraj would not assign Respondent for overtime (Tr. 152, 153).

After returning from her leave, Respondent noticed that she had difficulty adjusting her medication with the new tour schedule and described that it was not "becoming normal." She was working alone on March 13, and testified that at around 7:00 or 7:30 that evening, she felt the medication wearing off (Tr. 158). Respondent said that she was pacing a lot and drank water to calm down. She went to the A-Station to use the restroom "two or three times" during her shift (Tr. 160). At around 8:00 p.m. Respondent received a phone call in the A-Station from the tour captain notifying Respondent that she was scheduled for mandatory overtime. Although Respondent advised the captain that she could not stay for the extra hours, the captain told her that

⁵ This exhibit, included in the parties' stipulation agreement, was redacted to conceal Respondent's disciplinary history and was offered into evidence by Respondent to document the firearm restriction.

she had to work overtime. Respondent did not recall the captain's name and testified that the overtime assignment made her feel more anxious (Tr. 161).

At 11:30 p.m., Respondent went to the A-Station to use the restroom again and to make a phone call about the status of the overtime assignment. Officer Lewis buzzed Respondent into the A-Station where Officer Quiles was also present. Respondent mentioned to them that she was going to "call and use [her] relief" because she needed to leave work to take her medication. She also told them that she was going to have to leave if the supervisors did not find relief for her. After using the restroom, Respondent recounted that Officer Lewis told her that she could not leave and refused to let her out of the A-Station (Tr. 162, 163, 189). According to Respondent, Officer Lewis pushed her away from the phones, preventing her from making a call. Respondent pushed her back. Respondent claimed that because of her anxious state, she was unable to find her PBA so she activated Officer Quiles's PBA while Officer Lewis continued to push her (Tr. 163, 164, 189).

Respondent said she told Officer Lewis to "open the fucking gate" to let her out of the housing area. She said this multiple times and recalled that she felt like she was in a locked cage, as if she were a detainee (Tr. 164, 181). Respondent explained that she activated the PBA because her anxiety was "through the roof" and she wanted supervisors to come immediately and assist her with the situation. She activated the second alarm because there was a "shoving match going on" between her and Officer Lewis and no one responded to the first alarm. Respondent recalled that a supervisor called the A-Station after the second alarm and she grabbed the phone and said, "tell Officer Lewis to open the fucking gate" (Tr. 167, 168, 189). Respondent denied threatening Officer Lewis and explained that she wanted to use the phone to confirm whether she was relieved from her overtime assignment (Tr. 181).

Respondent insisted that she wanted to get out of the A-Station because it was a tight space, and she was feeling anxious. She described that her palms were sweaty and elaborated that during an anxiety attack "you're just like not in the right state of mind" (Tr. 168). Respondent recalled that Captain Sharif came to the control room, directed Officer Lewis to open the gate to the housing area, and escorted her downstairs (*Id.*). Respondent said that she presented ADW Maraj with another copy of the email from her therapist and that ADW Maraj told her to go home. Respondent insisted that no one asked her to write a report about the incident (Tr. 169).

Officer Lewis was assigned to work the 11:00 p.m. to 7:00 a.m. tour in the A-Station on the date of the incident. Officer Lewis's account of the events that evening was largely consistent with Respondent's testimony and she admitted that she told Respondent that she could not leave her post until she was relieved and that she refused to open the gate as Respondent requested (Tr. 77, 94). She recalled that when Respondent entered the control room to use the restroom Respondent seemed normal but became upset when she told Respondent that she could not leave. Officer Lewis testified that Respondent initiated the physical contact and pushed her out of the way to get to the controls for the gate. She testified that Respondent said that she was going to fuck her up if she did not get out of the way and told her "Get out of the way bitch" (Tr. 77, 97). Officer Lewis recounted that Respondent reached over her and activated a PBA. Central control room then called the A-Station to inquire about the incident. Officer Lewis said that Respondent answered the telephone and was "cursing and carrying on" then she hung up the phone. Respondent then activated a second PBA (Tr. 78). After the second alarm, a supervisor [Captain Sharif] reported to the A-Station, told Officer Lewis to open the gate and Captain Sharif escorted Respondent out of the area (Tr. 78, 94).

Officer Lewis has been with the Department for 19 years and is trained in the use of PBAs. She testified that Respondent did not have a valid reason to activate either PBA. She elaborated that a valid reason would be if an inmate was attacking her, or there was a situation that she couldn't control that she needed help in controlling, then it would be appropriate to activate the personal body alarm (Tr. 77, 80).

Following the incident, Officer Lewis submitted a 600AR report, as ordered by Captain Sharif, describing the incident (Pet. Ex. 5). Officer Lewis's report is generally consistent with her trial testimony with two exceptions. First, contrary to her testimony, Officer Lewis wrote that she called the control room during the incident. Second, Officer Lewis did not include in her report that there was a physical altercation between herself and Respondent (Pet. Ex. 5; Tr. 88). She did not address the inconsistency between her testimony and the report regarding who initiated the phone call between the control room and the A-Station. Regarding the physical altercation, Officer Lewis testified that in instances where officers are involved in physical altercations, the officers involved are transferred and that they would also face disciplinary charges. Officer Lewis acknowledged that she did not include the altercation in her report and therefore was not charged for engaging in this conduct (Tr. 88, 89).

Captain Sharif has been with the Department for 12 years and was assigned to VCBC on the date of the incident. At 11:35 p.m., she heard what she described as a Level 'B' alarm. Captain Sharif called each housing area under her supervision to confirm the location of the incident and determine the appropriate response. When Captain Sharif called the A-Station, Respondent answered the phone. Captain Sharif recalled that Respondent identified herself and was cursing (Tr. 103, 104). Captain Sharif went to the A-Station where she heard Respondent yelling "this bitch won't let me out the gate" referring to Officer Lewis (Tr. 105). Captain Sharif instructed Officer Lewis to open the gate and the A-Station door and escorted Respondent out of the area. Other than instructing Officer Lewis to open the gate, Captain Sharif did not have any conversation with her (Tr. 117). Following the incident, ADW Maraj ordered Captain Sharif to order a 600AR report from Officer Lewis. Captain Sharif is not aware of any conversations between ADW Maraj and Respondent (Tr. 115, 117).

After the incident, Captain Sharif submitted a 600AR at the direction of ADW Maraj (Pet. Ex. 6). Although providing more detail, Captain Sharif's 600AR report is consistent with her trial testimony. Captain Sharif stated in her report that Respondent did not initially identify herself when she answered the phone but Respondent identified herself by name and shield number when she requested this information. Captain Sharif also stated that she heard Respondent use profanity (*Id.*).

ADW Maraj was on duty at the time of the incident on March 13, 2023, and testified that she heard a PBA activation alarm and described that "lights were flashing throughout the command." She said that she called the A-Station and spoke with Officer Lewis who denied activating the PBA. ADW Maraj said that she heard Respondent in the background saying, "I'm going to fuck this bitch up, she won't open the gate" (Tr. 26). ADW Maraj determined that there was no inmate-related emergency and "stood down" the alarm. She asked Captain Sharif to check on the situation while she remained at the gate (Tr. 27, 35). Captain Sharif returned to the housing area with Respondent who ADW Maraj described as upset. Respondent explained to ADW Maraj that Officer Lewis would not let her out of the housing area (Tr. 23). ADW Maraj said that she told Respondent that the PBA is not to be misused and instructed Respondent to submit a report to explain what had occurred. ADW Maraj testified that Respondent told her that she did not have time and that she had to leave. ADW Maraj insisted that she did not tell Respondent to depart the

facility but instead instructed Respondent “to submit your report before departing the facility” (Tr. 32, 65).

ADW Maraj questioned whether Respondent had an anxiety disorder but recalled that Respondent had given her an email from her doctor indicating that Respondent was not able to work overtime. ADW Maraj noted that the email did not have “letterhead of any medical doctor, no stamp of any medical doctor.” She characterized the document as an email “from Yahoo saying that [Respondent] couldn't stay for overtime among other things but that is not anything documented or verified by any professional medical person stating any of that information” (Tr. 47, 52). She concluded that the email “was not from a professional.” ADW Maraj disclosed that she did not read it, “just looked at it” (Tr. 53). However, she insisted that she did not disregard the email when Respondent previously gave her a copy and told Respondent on that occasion that if she were unable to work overtime, she could leave (Tr. 53).

ADW Maraj subsequently drafted and submitted a “request for suspension” memorandum recounting this incident (Pet. Ex. 3). This memo is largely consistent with her testimony but states that she ordered 600AR reports from Respondent, Captain Sharif, Officer Lewis and Officer Quiles. This is not consistent with the testimony of Captain Sharif or Officer Lewis’s report both stating that Captain Sharif ordered the report from Officer Lewis. Further, ADW Maraj did not report that she called the A-Station following the alarm although she testified to having done so. ADW Maraj conjectured that “upon her assessment I also made the call too.” She explained that the paragraph describing the actions taken following the alarms “is a combination of what Captain Sharif did and what I did” (Tr. 43). She further offered that because she used the phrase “upon my assessment” this meant that she had assessed the situation and would have spoken with Officer Lewis even though this was not stated in the report (*Id.*).

ANALYSIS

The Department has 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 triers of fact that the existence of the 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). “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.” *Prince* at § 3-206; *see also Rinaldi & Sons, Inc.*, 39 N.Y.2d at 196; *Dep’t of Correction v. Jackson*, OATH Index No. 175/03 at 14-15 (Jan. 30, 2003).

Charge 1 - Petitioner alleged that Respondent inefficiently performed her duties and engaged in conduct unbecoming an officer when she left her assigned post and used profanity toward Officer Lewis.

The Department’s Employee Rules and Regulations (“Department Rules”) 3.05.130 prohibit officers from leaving “their post or place of assignment without the permission of a superior.” Respondent does not deny that she left her post to use the restroom in the A-Station. She testified that officers assigned to the B-Post work alone and that this was “common practice.” Respondent appeared to be relying on the affirmative defense of condonation and waiver. This defense would excuse misconduct if it was a regular practice known to and accepted by supervisors. *See Health & Hospitals Corp. (Bellevue Hospital) v. Olosunde*, OATH Index No. 262/05 at 3 (June 15, 2005) (to prevail on the affirmative defense of waiver and condonation, employee must show that “behavior alleged to be misconduct was a regular practice known to and accepted by his supervisor”); *Dep’t of Correction v. Carnes*, OATH Index No. 2067/24 at 17-18 (Feb. 16, 2024); *Dep’t of Correction v. Frederique*, OATH Index Nos. 1361/22 & 1237/22 at 48-49 (Mar. 15, 2023), *adopted*, Comm’r Dec. (Apr. 12, 2023) (finding under the doctrine of waiver and condonation that officer should not be disciplined for leaving a door unsecured contrary to official policy where there was un rebutted testimony from an assistant deputy warden that it was the established practice of supervisors to ignore the rule). The case law is clear that the common practice alone would not waive or remove Respondent’s responsibility to notify a supervisor that she was leaving her post. Here, there was no evidence that Respondent’s supervisors were aware of and accepted this practice. This part of the Charge is sustained.

Department Rule 3.20.010 prohibits members of service from using “indecent, abusive, or profane language.” It is undisputed that Respondent used profanity toward Officer Lewis, in violation of departmental rules and regulations. While Respondent denied threatening Officer Lewis, she admitted to using the profanity demanding that Officer Lewis “open the fucking gate.” This use of profanity violates Department rules. This part of the Charge is sustained.

Charge 2 – Petitioner alleged that Respondent inefficiently performed her duties and engaged in conduct unbecoming an officer by using profanity when speaking with Captain Sharif and for failing to identify herself to Captain Sharif when asked.

Captain Sharif credibly testified that when she spoke with Respondent on the phone, Respondent used profanity and Respondent did not deny using profanity when speaking to her. Accordingly, this part of the Charge is sustained.

The evidence supporting the Department's allegation that Respondent failed to identify herself to Captain Sharif consisted of ADW Maraj's account in her 600AR. This account was disputed by Captain Sharif's credible testimony, which was supported by her 600AR report that Respondent identified herself by name and shield number when asked to do so. Therefore, this part of the Charge is dismissed.

Charge 3 – Petitioner alleged that Respondent inefficiently performed her duties and engaged in conduct unbecoming an officer when she refused an order from ADW Maraj to complete an 600AR Report.

To establish that Respondent failed to obey a direct order, the Department must show that: an order was communicated to Respondent and Respondent heard the order; the content of the order was not ambiguous; and Respondent willfully refused to obey the order. *Dep't of Correction v. Graham*, OATH Index No. 1380/03 at 16 (Feb. 25, 2004), *modified on penalty*, Comm'r Dec. (Aug. 6, 2004), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 07-83-M (July 27, 2007). ADW Maraj testified that she directed Respondent to submit a 600AR to document the incident. Respondent denied that ADW Maraj asked her to submit a report and offered that she submitted a report about this incident at another time in order to appeal her suspension related to this incident.

In order to determine whether the Department has established that the alleged misconduct occurred, an assessment of the credibility of the witnesses is appropriate. In assessing credibility of testimonial evidence, relevant considerations include demeanor, consistency of testimony, supporting evidence, witness motivation, bias, or prejudice, and whether the testimony comports with common sense and human experience. *See, e.g., Dep't of Sanitation v. Menzies*, OATH Index

No. 678/98 at 2-3 (Feb. 5, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998).

ADW Maraj's testimony was not consistent with her written report and several of her recollections were contradicted by the testimony and reports of other witnesses. ADW Maraj explained that the report of her actions during the incident differed from her testimony because the report was an assessment and reflected a combination of her actions and the actions of Captain Sharif. This integration of recollections was not referenced as such in ADW Maraj's report. In addition, her written account of actions she attributed to Captain Sharif are not consistent with Captain Sharif's testimony or written report. Notably, ADW Maraj reported that Respondent "did not identify herself but instead began to shout and scream" (Pet. Ex. 3). Captain Sharif however testified that when she called the A-Station, Respondent identified herself by name and shield number when asked (Tr. 106; Pet. Ex. 6). In addition, ADW Maraj testified that she called the A-Station and spoke to Officer Lewis and heard Respondent screaming in the background (Tr. 41). However, in her report ADW Maraj did not mention that she spoke with Officer Lewis, instead she stated that she spoke with Officer Quiles who advised her that Respondent had activated his PBA and that she heard Respondent arguing with Officer Lewis (Pet. Ex. 3). ADW Maraj also testified that she ordered Officer Lewis to submit the 600AR report although Officer Lewis's testimony and report indicate that Captain Sharif ordered the report. Based on these inconsistencies and her uncorroborated account of events, I do not credit ADW Maraj's testimony regarding the disputed conduct.

Respondent, on the other hand, testified in a candid and straightforward manner. She admitted that she activated the PBAs as alleged. She also admitted that she used profanity when speaking with Captain Sharif and Officer Lewis. These admissions are against her interest and lend credibility to her denial of the misconduct alleged in this Charge. This Charge should be dismissed.

Charge 4 - Petitioner alleged that Respondent inefficiently performed her duties and engaged in conduct unbecoming an officer when she improperly activated two personal body alarms.

The Department established through credible and undisputed evidence that Respondent activated two PBAs when there was no emergency. This Charge is sustained.

FINDINGS AND CONCLUSIONS

1. Petitioner established that Respondent left her post without proper relief and used profanity during an altercation with Officer Lewis as alleged in Charge 1.
2. Petitioner established that Respondent used profanity when speaking to Captain Sharif. Petitioner did not establish that Respondent failed to identify herself to Captain Sharif as alleged in Charge 2.
3. Petitioner did not establish that Respondent refused a direct order from ADW Maraj to submit a 600AR report as alleged in Charge 3.
4. Petitioner established that Respondent improperly activated a personal body alarm two times when there was no inmate-related emergency as alleged in Charge 4

These findings of fact are final pursuant to section 1046(e) of the New York City Charter. Charter § 1046(e) (Lexis 2024).

RECOMMENDATION

After making the above findings, I requested and reviewed a summary of Respondent's personnel history. Respondent has been with the Department since December 2016. In May 2022, Respondent received a Unit Citation Award. In 2019, Respondent was suspended for seven days without pay for failing to investigate a use of force incident. Respondent was placed on a 30-day pre-trial suspension without pay for the present charges.

At trial, the Department requested a penalty of 60 suspension days consisting of 15 days for each PBA activation and 30 days for the remaining charges. The Department proved that Respondent used profane language toward Officer Lewis and Captain Sharif and that Respondent activated two PBAs when there was no inmate-related emergency. The Department did not prove that Respondent refused an order to submit a 600AR report or that Respondent refused to identify herself to Captain Sharif. Because the Department did not prove all of the charges, a lesser penalty is appropriate.

Among the factors to be considered in determining the appropriate penalty for sustained charges are: "the seriousness of the misconduct; the employee's background, including length of

service; disciplinary history; the impact of the misconduct on the agency's mission; the penalty imposed on others for similar misconduct; the presence of mitigation, such as provocation or unusual stress; and the adequacy of the penalty to deter similar misconduct by the employee or others." *Dep't of Correction v. Sinacore*, OATH Index No. 1244/18 at 16-17 (May 4, 2018), *modified on penalty*, Comm'r Dec. (May 24, 2018), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2018-0468 (Sept. 5, 2018).

Regarding the profanity charges, this tribunal has recommended combined penalties in the range of ten to 15-days suspension where correction officers have been discourteous or used profanity and engaged in other misconduct. *See Dep't of Correction v. Bryan*, OATH Index No. 839/14 at 11 (Apr. 29, 2014), *adopted*, Comm'r Dec. (Mar. 18, 2016) (15-day suspension recommended where correction officer with a clean disciplinary record was disrespectful to her supervisor by using inappropriate and profane language and submitted an inaccurate report regarding the incident); *Dep't of Correction v. Aquino*, OATH Index No. 188/07 at 7-9 (Dec. 15, 2006), *modified on penalty*, Comm'r Dec. (Feb. 22, 2007), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD07-93-M (Sept. 25, 2007) (ten-day penalty imposed where officer with a clean disciplinary record twice addressed a superior in a profane and aggressive manner, disobeyed an order to leave the area, and submitted a misleading report about these events); *Dep't of Correction v. Buford*, OATH Index No. 388/02 (June 17, 2002), *adopted*, Comm'r Dec. (Aug. 15, 2002), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 03-49-SA (June 12, 2003) (ten-day suspension for officer with a lengthy tenure and minor discipline who failed to obey an order to assume post, failed to submit an ordered report, and used profanity towards and threatened a supervisor).

Respondent testified in detail about her anxiety disorder, sharing that she is taking medication for anxiety and depression and sees a therapist weekly. Her medical condition was corroborated by the correspondence from her therapist and was not disputed. Respondent's counsel requests that her medical condition be taken into account, arguing that her behavior was the result of a manic episode that the Department provoked or exacerbated. Respondent's counsel asserts that the "apathy" of ADW Maraj and the stress of being assigned overtime, combined with being detained in the A-Station aggravated Respondent's anxiety disorder resulting in the misconduct. Respondent's counsel opined that a reprimand would be an appropriate penalty. While this record might offer some basis for mitigating her penalty, Respondent did not offer

evidence that her anxiety is a disability for which she is entitled to assert a defense to the charged misconduct.

In *McEniry v. Landi*, 84 N.Y.2d 554 (1994), the court held that a disability may form the basis of an affirmative defense in an employee disciplinary action. However, in order to establish this defense, Respondent must prove that the alleged misconduct was caused by the disability and that due to the disability, Respondent lacks the intent necessary to establish misconduct. In *Transit Authority v. D.S.*, OATH Index No. 1003/15 at 15 (Mar. 31, 2015), this tribunal held that in order to establish a defense under *McEniry*, an employee must prove that the alleged misconduct was caused by the disability, since conduct caused by a disability lacks the willfulness needed to establish misconduct. See also *Human Resources Admin. v. Griffin*, OATH Index No. 941/12 at 11 (May 10, 2012), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 12-52-SA (Oct. 26, 2012); *Health & Hospitals Corp. (Lincoln Medical & Mental Health Ctr.) v. Bruce*, OATH Index No. 138/10 at 3-4 (Dec. 4, 2009) (dismissal of long-term AWOL charges recommended where employee's wife presented credible evidence that employee suffered from mental illness and was "totally incapacitated" due to uncontrolled diabetes); *Human Resources Admin. v. Barnes*, OATH Index No. 228/08 at 1, 3-5, 8 (Nov. 15, 2007), *adopted and remanded*, Comm'r Dec. (Jan. 29, 2008) (dismissal of charges recommended where alleged misconduct, including intimidation, threats, AWOL, and insubordination, was most likely due to mental disability; evidence showed that Respondent had been involuntarily committed, petitioner's psychiatrist reported that the employee "reveals paranoid delusional thinking," and petitioner's lay witnesses described her as "erratic," "paranoid," and "depressed").

Here, there was evidence that Respondent suffers from and is being treated for anxiety and depression. However, unlike *Barnes* (OATH 228/08) or *Bruce* (OATH 138/10), Respondent failed to meet her burden of proving that she lacked the intent to commit misconduct and Respondent did not present testimony from a medical professional that she was not capable of working overtime. See *D.S.*, OATH 1003/15 at 8-10, 16-17 (finding sufficient mitigation, ALJ recommended 30-day suspension rather than termination, where Respondent with a disciplinary record made threatening comments to a supervisor, however employee suffered from a major depressive episode and anxiety following the death of his wife, he had been receiving bereavement counseling, and he had been treated with anti-depressants). In *Transit Authority v. Anonymous*, OATH Index No. 484/21 (May 3, 2021), the tribunal recommended a 60-day suspension in lieu of

termination where Respondent, who was diagnosed with a psychological disorder, panicked and activated a fire alarm and threw an ashtray and a stanchion, which nearly hit another worker.

In the cases cited above, sufficient evidence of a medical condition was presented to support a penalty less than termination, citing the disability as a mitigating factor. Here, Respondent's medical condition is not disputed, and the Department has not requested termination for this serious misconduct. The tribunal finds that the requested penalty sufficiently reflects mitigation based on Respondent's condition.

For Respondent's proved misconduct of activating two personal body alarms, using profanity, and leaving her post without proper relief, I recommend a 50-day suspension with credit for the 30-day pre-trial suspension already served.

Joycelyn McGeachy-Kuls
Administrative Law Judge

June 21, 2024

SUBMITTED TO:

LYNELLE MAGINLEY-LIDDIE
Commissioner

APPEARANCES:

NATALIE MICELI, ESQ.
JAMES MATTONE, ESQ.
Attorneys for Petitioner

ADRIAN LAURIELLO, ESQ.
Attorney for Respondent