

Dep't of Correction v. Malone

OATH Index No. 882/06 (Jan. 11, 2007), *aff'd sub nom Malone v. Horn*, 2008 N.Y. Misc. LEXIS 8225 (Sup. Ct. N.Y. Co. Jan. 14, 2008), **appended**

Absent evidence representative had appeared for respondent before agency for same matter, ALJ denied agency's motion to preclude appearance based on City Charter post-employment provision. Motion to preclude witnesses for testimony about compliance with internal procedures granted; witnesses had no knowledge of charged incidents. Respondent's motion to dismiss proceeding for alleged lack of jurisdiction is denied. Five of six specifications relating to one incident involving insubordination, physical assault on supervisor, officer being out of uniform and the submission of a false report sustained. ALJ recommends sixty-day suspension without pay.

On appeal, court rejected respondent's claim that OATH lacked jurisdiction to conduct his disciplinary hearing. The court found then-Commissioner's letter, dated May 19, 1992, designating OATH to conduct disciplinary and disability hearings, remained in effect. Further, directive 7502 provides for disciplinary hearings to be heard at OATH.

The court also rejected respondent's claim that he should have been disciplined in accordance with the department's early intervention program (directive 7510) or command discipline (directive 4257). The department has discretion under 7510 to invoke formal discipline when appropriate and respondent was offered a penalty pursuant to command discipline but he refused the offer and requested a formal hearing.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION

Petitioner

- against -

TERRANCE MALONE

Respondent

REPORT AND RECOMMENDATION

DONNA R. MERRIS, *Administrative Law Judge*

This employee disciplinary proceeding was referred by the Department of Correction ("Department") pursuant to section 75 of the Civil Service Law. Respondent, Correction Officer Terrance Malone, is charged with misconduct in six specifications arising out of an incident which occurred on February 4, 2005.

Hearings on the allegations were conducted before me on June 5, 2006 and June 26, 2006. The record remained open for post-hearing submissions until July 12, 2006, at which time the record was closed. Petitioner presented four witnesses and submitted relevant documents. Respondent did not present any witnesses nor did he testify, however he presented some documentation.

For the reasons stated below, I find that five of the six specifications were sustained by a preponderance of the credible evidence and recommend that respondent be suspended for sixty days without pay.

Preliminary Issues

Appearance of Mr. Wayne Tatum as representative for respondent

By application dated April 4, 2006, with an addendum dated April 6, 2006, petitioner moved to disqualify Mr. Tatum as respondent's representative in the instant proceeding on the ground that his representation constituted a conflict of interest prohibited by New York City Charter sections 2604 (d)(2) and (d)(4). Petitioner's application was based on the assertion that, while Mr. Tatum was employed by the Department as a correction officer, he served as a delegate for the Correction Officers Benevolent Association ("COBA") until his employment was terminated on November 22, 2005. As a COBA delegate, Mr. Tatum participated as a representative for correction officers during the Department's informal disciplinary proceedings referred to as "command disciplines." The Department proceedings occurred while Mr. Tatum was on duty as a correction officer without loss of Department compensation to Mr. Tatum pursuant to Department rules 3.60.010 through 3.60.050 (Pet. April 4, 2006 submission, p. 2). The respondent in the instant proceeding appeared at a command discipline proceeding the subject of which was the respondent's conduct that is presently before this tribunal. Petitioner asserted that Mr. Tatum appeared at that command discipline proceeding as respondent's

representative. Respondent refused the command discipline and the charges and specifications which gave rise to the instant proceeding were prepared and served on respondent.

On April 7, 2006, Mr. Tatum responded to petitioner's application and asserted that, contrary to petitioner's statement that he personally participated in respondent's command discipline proceeding on June 14, 2005, Mr. Tatum was not scheduled to work on that day nor did he appear on behalf of respondent at the Department proceeding.

By memorandum decision dated April 10, 2006, this tribunal ruled that Mr. Tatum was precluded from representing respondent in the instant proceeding prior to the one-year anniversary of Mr. Tatum's separation from the Department pursuant to New York City Charter Conflict of Interest post-employment restrictions. *Dep't of Correction v. Malone*, OATH Index No. 882/06, mem. dec. (Apr. 10, 2006). New York City Charter section 2604 (d)(2) provides, in pertinent part:

"No former public servant shall, within a period of one year after termination of such person's service with the city, appear before the city agency served by such public servant."

To "appear" means to make any communication for compensation, other than those involving ministerial matters. 'Ministerial matter' means an administrative act . . . which does not involve substantial personal discretion." Charter § 2601 (4), (15).

In *Department of Health v. Mall Deli Corp.*, OATH Index No. 213/01 (Nov. 1, 2000), a former Department of Health employee who left the agency five months before the hearing at which he attempted to appear on behalf of the respondent, was precluded from that representation. Judge Spooner held that an appearance before OATH on a license revocation matter constituted an appearance before the Department because the transcript along with the OATH administrative judge's recommendation would be forwarded to the Health Commissioner for final decision. The facts in the instant case were analogous to those in *Mall Deli*. Mr. Tatum was not separated from the Department for one year prior to the commencement of the instant proceeding. In the instant case, the record of the proceeding, along with my report and recommendation will be forwarded to the Correction Commissioner for final decision. Thus, it was ruled that an appearance by Mr. Tatum on behalf of a correction officer would constitute an appearance before the Department, thereby precluding him from appearing on behalf of a

correction officer before this tribunal prior to the one-year anniversary of his separation from the Department.

However, I did suggest that Mr. Tatum could seek guidance from the New York City Conflicts of Interest Board ("the Board"), as a waiver of the restriction has, on occasion been granted by the Board. In order to avoid violating the Charter's post-employment restrictions, the former employee is required to seek and obtain a waiver from the Board prior to engaging in the prohibited activity. *See* Conflicts of Interest Board Advisory Opinion 96-01. *Dep't of Correction v. Malone*, OATH Index No. 882/06, mem. dec. at 4 (Apr. 10, 2006).

On June 2, 2006, Mr. Tatum provided a copy of a letter from the Conflicts of Interest Board to this tribunal and to counsel for petitioner. The letter opinion, dated May 25, 2006, advised Mr. Tatum that:

. . . based on your representation, . . . your continued representation of Mr. Malone before OATH would not violate Chapter 68, **provided that** you receive no compensation for your service to Mr. Malone; that you had no involvement at DOC in this dispute between Mr. Malone and DOC (this means, for example and without limitation, that you did not attend the subject command discipline proceeding concerning Mr. Malone); and that you do not disclose or use for private advantage any confidential information gained from public service which is not available to the public. See Charter Sections 2604(d)(2), (d)(4), and (d)(5).

May 25, 2006 letter at 3 (emphasis in original).

On June 5, 2006, the first scheduled day for the hearing in the instant proceeding, Mr. Tatum appeared with respondent and provided an affidavit in which he affirmed that respondent asked Mr. Tatum to represent in him in the instant proceeding and that he agreed with Mr. Malone to the representation without compensation. In addition, respondent submitted an affidavit stating that he and Mr. Tatum agreed that the representation would be without compensation.¹

Counsel for respondent objected to Mr. Tatum's representation of respondent at the hearing and argued that the ruling in the April 10, 2006 memorandum decision should stand as the opinion from the Conflicts of Interest Board was advisory only. Counsel reiterated the

¹ These documents are incorporated as part of the record in the instant proceeding.

argument that the post-employment provisions of the Charter should apply to the instant matter (Tr. 4-6).

In ruling from the bench, I considered OATH's rules of practice section 1-11 which provides that a party may appear in person, by an attorney, or by a duly authorized representative. 48 RCNY § 1-11 (a). The rule thus provides that respondents may be represented by a person of their choice so long as it is lawful. Moreover, the opinion from the counsel of the Conflicts of Interest Board that, pursuant to Charter section 2604 (d)(2) that the Board would take the position that so long as there is no compensation for Mr. Tatum's representation of this respondent, his appearance here would not violate Chapter 68 of the Charter must be accorded significant weight. Therefore, absent evidence that Mr. Tatum represented respondent at the agency in this particular matter, Mr. Tatum was allowed to represent respondent in the instant proceeding (Tr. 6-7).

Respondent's request for certain witnesses to be heard

On March 31, 2006, respondent's representative, as instructed by this tribunal, offered justification for the production of several witnesses at the scheduled hearing in this matter. Counsel for petitioner responded to the application in opposition on March 31, 2006. Respondent's representative provided supplemental information to this tribunal on April 3, 2006. By letter dated April 3, 2006, I denied respondent's application and ruled that the proposed witnesses were precluded. The questions proposed for the witnesses sought to elicit information about the technical procedures followed by Department personnel in bringing the allegations against respondent. However, whether or not the Department procedures articulated in the application were followed is not an issue properly before this tribunal. The issues of fact to be determined at the scheduled disciplinary proceeding here are defined by the alleged actions engaged in by respondent on the date or dates in issue. Pursuant to section 75 of the civil service law, an employee must be sufficiently notified of the alleged misconduct to allow him to defend those allegations. It is undisputed that petitioner did so throughout these proceedings and respondent had ample opportunity to prepare for the instant hearing. Respondent, in the instant proceeding, received a full, formal due process hearing before an impartial fact finder. Thus, based on the representative's offer of proof, the proposed witnesses were precluded because the

proposed questions would elicit only information pertaining to the internal Department process, not as to matters before this tribunal, nor would the information aid in respondent's defense to the allegations properly before this tribunal²

Respondent's post-trial motion to dismiss

Throughout the instant proceeding respondent has argued that this tribunal has no jurisdiction to hear the allegations against him. At the hearing, in both his opening and closing statements, respondent's representative argued that, pursuant to section 75 of the civil service law, respondent was entitled to have the charges heard by a Department Deputy Commissioner and not by this tribunal. In addition, respondent argued that Department captains are not permitted to invoke disciplinary action independently against correction officers, but are required to notify the facility integrity control officer promptly whenever an employee is deemed to be in noncompliance with Department rules, or when the employee's performance is of substandard nature (Tr. 15, 79-84). Respondent cites Civil Service Law section 75 (2), Department Directive number 7502, Department Directive number 7510, Mayor's Executive Order Number 16, section 5A, as amended by Executive Order number 105 (December 26, 1986), and Charter Chapter 49, section 1116 (a), as authority for his position. Respondent's Closing Memorandum dated July 3, 2006.

Petitioner responded in both its closing statement at the hearing and in a memorandum dated July 7, 2006. Petitioner argues that respondent's assertions are mistaken and that they are founded on incomplete quotation and incorrect analysis of the relevant statutes and rules. In sum, petitioner's arguments are: 1) this tribunal is authorized to conduct disciplinary hearings and to refer the record of the hearings with recommendations to the Commissioner of Correction for review and decision because the Commissioner has authorized OATH to conduct such hearings; 2) the Department's conduct of its informal employee disciplinary process, known as command discipline, including questions whether Correction Captains are authorized to bring

² On April 6, 2006, respondent's representative sent an "Addendum to Revised Witness List," again asking that the same witnesses he proposed on March 31 be produced by the Department at the scheduled hearing. The offer as to the questions he proposed to ask the witnesses sought the identical information requested in the earlier submission. Counsel for petitioner responded, in opposition, dated April 6, 2006 followed by a reply from respondent on April 7, 2006. The preclusion of the proposed witnesses was affirmed in *Department of Correction v. Malone*, OATH Index No. 882/06, mem. dec (Apr. 10, 2006).

charges against Correction Officers, is irrelevant to the instant proceeding before this tribunal (Tr. 88-92; Petitioner's reply to respondent's closing memorandum).

After reviewing the relevant statutes, rules and case law, I agree with petitioner that this tribunal has jurisdiction to conduct the disciplinary hearings when referred by the Commissioner of the Department and to report findings of fact and make recommendations to the Commissioner for final disposition of the matter. In addition, the conduct of the Department as to its internal policies and procedures for instituting and conducting disciplinary actions, absent a showing of having affected a substantial right of the respondent, is not relevant to the conduct of the hearing before this tribunal.

Charter section 1048 provides that this tribunal shall conduct adjudicatory hearings for all agencies of the city unless otherwise provided by law. Civil Service Law section 75 (2) provides, in relevant part:

The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or **other person** designated by such officer or body in writing for that purpose. In case a deputy or other person is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision.

Civil Service Law § 75 (2) (emphasis added).

Here, the Commissioner of Correction, as the officer having the power to remove respondent, has designated OATH as the "other person" to conduct the hearing, make a record of such hearing, and refer that record, with recommendations, to the Commissioner for review and decision. *See, e.g.*, Letter of May 19, 1992 from Commissioner Abate to then Chief Judge McFaul, which states:

Pursuant to the provisions of Sections 71, 72, 73, and 75 of the Civil Service Law, I hereby authorize the Chief Administrative Law Judge or such Administrative Law Judges as he may assign to hold and conduct administrative trials and hearings in disciplinary matters, including discovery motions, bills or (*sic*) particulars, motions to modify or set aside, pretrial suspensions and post-trial matters, and to make such recommendations thereon to me as shall be deemed appropriate.

You are further authorized to conduct such trials and hearings in conformity with Sections 71, 72, 73, and 75 of the Civil Service Law.

Following your analysis of all the testimony and other evidence, you shall submit to me for my review the record of such trial or hearing with your report and recommendation.

The designation is in full force and has not been altered or rescinded. Accordingly, this tribunal has jurisdiction to conduct disciplinary hearings and make findings of fact and recommendations to the Commissioner for his consideration and final disposition.

Respondent argues that the Department failed to comply with various orders, directives and rules during the informal process of the instant allegations prior to referring the matter to this tribunal for hearing. Specifically, respondent argues that Captain Davis, with whom respondent interacted on February 25, 2005, the result of which was the filing of the disciplinary action against respondent, was not authorized to invoke disciplinary action against him. Captain Davis, according to the argument, was required pursuant to Departmental Directive Number 7510 and Mayoral Executive Order Number 16 to notify the facility's Integrity Control Officer for further action.

The argument is without merit.

It is well settled that an agency is bound by its own rules and regulations. *Frick v. Bahou*, 56 N.Y.2d 777, 452 N.Y.S.2d 18 (1982); *Conlon v. McCoy*, 27 A.D.2d 280, 278 N.Y.S.2d 449 (1st Dep't 1967), *modified on other grounds*, 22 N.Y.2d 356, 292 N.Y.S.2d 857 (1968). Accordingly, rules regulating procedure affecting substantial rights of an individual may not be waived. However, where no substantial right protecting a party from prejudice is violated by an agency's failure to abide by its own rule or regulations, such noncompliance constitutes harmless error. Substantial prejudice involves a determination as to whether a significant possibility exists that the rule violation affects the ultimate outcome. *See Dep't of Correction v. Harrison*, OATH Index No. 301/87, at 12-13 (Nov. 18, 1987). Most recently, this tribunal held that irregularities in the Department's command discipline process are irrelevant to the Department's authority under Civil Service Law section 75 to commence and prosecute disciplinary proceedings against its employees at OATH. *Dep't of Correction v. Pack*, OATH Index No. 1553/06, mem. dec. (June 14, 2006); *Dep't of Correction v. Kevelier*, OATH Index No. 131/83 (Mar. 11, 1983) (issue was whether the institution possessed the appropriate

jurisdiction or authority to impose command discipline on the respondent because the Department did not forward the proper disposition forms to the Chief of Operations for approval or disapproval as required by the Command Discipline Directive then in effect; held that the failure did not affect the Department's ability to proceed with the formal disciplinary process).

Here, while I do not find that the Department violated its own rules and regulations or any provisions of law, the established precedent commands that each respondent appearing before this tribunal be afforded notice of the allegations against him or her and be afforded a full and fair opportunity to answer those allegations. This respondent has had ample opportunity to do so. He was fully apprised by the Department of the specific allegations and had every opportunity to participate in the hearing. Accordingly, respondent has suffered no substantial prejudice.

As to respondent's specific claims, the Department Directives numbered 4257 and 7502 set out the internal procedures governing the disciplinary process as it applies to the uniformed employees. Directive Number 4257 provides that a Commanding Officer may adjudicate minor violations by uniformed members without resorting to formal charges and administrative hearings. Thus, a command discipline is an informal, non-adversarial proceeding available to correct minor deficiencies within the uniformed employees' ranks. Dep't Directive No. 4257, I, II & III (eff. May 5, 1988). This tribunal has held that the provisions of Directive 4257 do not establish a procedure affecting substantial rights of the Department's employees. *Dep't of Correction v. Bovell*, OATH Index No. 742/99, mem. dec. at 3 (Feb. 2, 1999). It is a managerial tool aimed at adjudicating violations by uniformed members without resort to the formal disciplinary process pursuant to section 75 of the Civil Service Law. *Id.* While there are provisions in the Directive that mandate the use of command discipline in all cases except those enumerated therein, the commanding officer is authorized to opt for the formal disciplinary process if aggravating circumstances exist. The commanding officer, when choosing the formal disciplinary process, provides the rationale for so doing. Dep't Directive 4257 (IV)(3). *See generally Dep't of Correction v. Pack*, OATH Index No. 1553/06, mem. dec. (June 14, 2006).

If a command discipline recommendation is refused by the employee or is inapplicable because of the nature of the alleged offense, the Commanding Officer of a facility must prepare a memorandum of complaint addressed to the Commissioner of Correction, with recommendations. The Commissioner forwards the complaint to the Office of the Inspector

General for review and legal sufficiency, after which formal charges and specifications are prepared. The uniformed officer is served with the charges, the matter is subjected to informal conference and, if not settled, the charges and specifications are forwarded to this tribunal for a formal administrative hearing. Dep't Directive No. 7502 (eff. Feb. 14, 1983).

Again, the purpose of the process is to provide notice to the employee and to afford the employee an opportunity to be heard on the allegations. It is undisputed that respondent refused the command discipline and that the procedure outlined above was then followed.³

Respondent's argument that section 5(a) of Mayoral Executive Order Number 16 precluded Captain Davis from initiating the charges against him is unsupported. The provision mandates that each mayoral agency is responsible for the preparation and prosecution of all formal administrative proceedings, including removal and other disciplinary proceedings for misconduct or incompetence and requires each agency head to establish a system for formal disciplinary proceedings. Accordingly, the Department has such a system as outlined in Directive number 7502. Nothing in the language would preclude a supervisor from initiating misconduct charges.

Finally, respondent refers to Department rule 3.40.080 which outlines procedure for the conduct of disciplinary trials. To the extent that respondent argues that Charter section 1049 (3) (d) was violated because the procedure outlined in Department rule 3.40.080 was not followed, the argument fails. The Charter provision provides that, if an agency has a procedure for the conduct of hearings, the OATH hearing should defer to that procedure. In reviewing the Department rule and comparing the procedure to that followed during the instant hearing, there is no substantive difference. The respondent was afforded notice of the charges, given an opportunity to be represented and the hearing was conducted in accordance with established procedure outlined in both the Department's rule and OATH's procedure.

Respondent cannot be heard to complain that he was not given ample opportunity to address the instant allegations. The conclusory assertion of departure from Department rule

³ Respondent's representative states that Directive Number 7502 is defunct. There is nothing before me that would lead to the conclusion that the Directive has been rescinded or superceded. Thus, any arguments that the forms used by petitioner to initiate this proceeding are defective is without merit. If the instrument satisfies the notice requirement of Civil Service Law section 75, whether it conforms to the model set forth in Directive Number 7502 is irrelevant to the instant proceeding. *See Dep't of Buildings v. 2837-39 Decatur Avenue, Bronx*, OATH Index No. 349/94 (Jan. 10, 1994).

3.40.080, fails to describe any substantive impairment of respondent's rights. *See Health and Hospitals Corp. (Coney Island Hospital) v. Jellinek*, OATH Index No. 2192/01 (Nov. 23, 2001) (motion to dismiss denied where respondent failed to show prejudice by violation of agency rules); *Human Resources Admin. v. Heneghan*, OATH Index No. 1249/95 (June 7, 1995) (dismissal requires showing of substantial prejudice to the respondent's ability to prepare or defend his/her case).

As to respondent's assertion that Correction Captains are not permitted to invoke disciplinary action independently against employees, but are required to notify the facility integrity control officer promptly whenever an employee is deemed to be in noncompliance with the rules, or when their performance is of substandard nature, I find nothing in the rules to support the assertion. It is true that the Department has promulgated an early intervention monitoring program to encourage supervisors to improve job performance without instituting formal disciplinary charges. *See Directive No. 7510*. This Directive encourages, but does not require, supervisors to refer employees exhibiting attendance or punctuality problems to the command integrity control officer, who will speak with the employee and seek to address the employee's problems without formal disciplinary action. The directive expressly states that the early intervention program "is not to be construed as waiving management's responsibility to invoke disciplinary actions in cases of misconduct or violations of department rules/regulations." Directive 7510 (III) (A). Thus, where, as here, aggravating circumstances exist, the Department supervisors are free to choose the more formal disciplinary process. There is nothing before me that would lead to the conclusion that the Department acted unreasonably in the instant matter. *See Dep't of Correction v. Tatum*, OATH Index No. 1631/05, at 5-6 (Oct. 28, 2005). Accordingly, the assertion is without merit.

For these reasons, respondent's motion to dismiss the instant proceeding is denied in its entirety.

ANALYSIS

These allegations arose out of an incident which occurred at the Anna M. Kross Center ("AMKC") on February 4, 2005. As noted above, respondent is charged in six specifications with failure to efficiently perform his duties; assaulting his supervisor; being out of uniform; and, transmitting a false and/or misleading report concerning the incident.

On February 4, 2005, Department Captain Gerald Davis was a supervisor at Anna M. Kross Center (AMKC) (Tr. 16). At about 1125 hours, an alarm sounded in the institution that required a response team. A response team is a group of officers charged with going to the scene of a problem which could consist of an altercation, inmate on inmate, officer on officer, or officer on inmate. The team responds to lend assistance to the officers assigned to the particular area. Members of the response team are issued a helmet, a vest and a baton, all of which are numbered (Tr. 17-18). Assistant Deputy Warden ("ADW") Van instructed Captain Davis to take a second response team to the "T" post to see whether any assistance was needed (Tr. 19). When the second response team arrived at the T post, the disturbance was over. The team was then ordered to return to the staging area at the front of the building (Tr. 20).

While the team was marching back to the staging area, Captain Davis noticed that respondent was not in the formation. Captain Davis called out, but there was no response. Respondent had given his equipment to Correction Officer Williams. Officer Williams told Captain Davis that respondent gave her his gear and helmet and said that he was going to return to his post. It is Department policy that whomever goes to the response must return to the staging area and remove and return the issued equipment. Captain Davis instructed Officer Williams that she was in the wrong for having taken respondent's equipment from him. It is Captain Davis's testimony that, if an officer is not feeling well at the beginning of a response call, that officer should tell the captain that he/she is not feeling well and ask to be replaced prior to donning the equipment and responding to the alarm (Tr. 22-25).

After the alarm was concluded, Captain Davis checked as to where respondent was posted and telephoned the post to tell respondent that he was wrong to give Officer Williams the equipment and to not return to the staging area with the response team. In the event that another alarm would have sounded, Officer Williams would not have been ready to respond because she was engaged in returning respondent's equipment. Respondent did not receive the telephone call well. It was the captain's intention to instruct respondent on the proper procedure, but respondent "sighed" and was unresponsive. Respondent hung up the telephone while the captain was in mid-sentence. The captain called again to ask respondent for a report regarding his actions while on the response team and to explain why respondent hung up the telephone while the captain was speaking to him. Before the captain could finish the second call, respondent again hung up the telephone (Tr. 25-27).

Captain Davis then decided to go to respondent's post to ask him for a written report. Department Captain Juan Calle volunteered to accompany him to respondent's post. The two captains went to Quad Lower 9 and 11 where respondent was on post. Captain Davis knocked loudly on the door to the Quad area; it took some time for someone to come to the door and let the two captains into the area (Tr. 27-28; Calle: Tr. 69-71, Captain Davis indicated that the officer had hung up the telephone when Captain Davis asked the officer to prepare a report concerning an alarm response; Officer Blake, after a long period of time, opened the door). After respondent opened the door, the three men went into the A station. Captain Davis again tried to explain to respondent that he had acted incorrectly and outside DOC procedure. Respondent did not want to hear the admonition. Captain Davis then gave respondent a direct order to prepare a report before the end of his tour. The report was to address why respondent hung up the telephone on the captain and why he transferred his equipment to Officer Williams (Tr. 27-30; Calle: Tr. 72-73, Captain Davis was direct and firm with respondent, not angry or demeaning in his tone).

While leaving the area, Captain Davis noticed that the insignia on respondent's uniform were incorrect. Respondent was wearing the "old" large insignias on his shirt collar instead of a small AMKC insignia currently in use. Respondent was, therefore, out of uniform. Captain Davis then asked respondent to inspect his utility belt as the Captain did not see the required utility knife on the belt. The knife is required when an officer is on post.

Respondent then started flailing his arms and saying, "Why is this . . . what is he harassing me? Why is he harassing me?" Respondent threw the institutional keys and pushed Captain Davis in the chest (Tr. 32). Captain Davis never raised his voice or cursed at respondent. After respondent pushed the captain, respondent paced back and forth and continued to flail his arms. Captain Calle asked Captain Davis to go inside the A station and Captain Calle attempted to calm respondent. Respondent had thrown the institutional keys toward the housing area about twelve feet and up against the ceiling (Tr. 33-34). It is Captain Calle's testimony that, after Captain Davis asked respondent about the lack of proper insignia on his uniform, respondent became excited and ran out into a corridor. Once he reached the hallway, respondent began to "scream and yell" (Tr. 74). He took his keys and threw them across the hallway to the opposite wall. In Captain Calle's report, he states that, when respondent left the A station, he put his hand

on Captain Davis. Captain Calle, at the hearing, did not recall whether or not respondent pushed the Captain (Tr. 75).

Captain Calle directed respondent to leave the area and began to escort respondent to the tour commander's office. As they approached the medical clinic area, respondent asked to go to the clinic. Captain Calle left respondent in the clinic with a female captain and proceeded to the tour commander's office where he met with Captain Davis and the tour commander (Tr. 76-78; Pet. Ex. 5).

When Captain Davis went into the A station, he called the tour commander, ADW Van, who instructed the Captain to complete a report (Tr. 35). After respondent left the housing area, Captain Davis reported to the clinic where he was told that his blood pressure was elevated (Tr. 38; Pet. Exs. 1, 4).

Captain Beverly Ford, around 1200 hours, heard on the radio that she should report to Quad 9, Lower 11. When she arrived, she saw Captain Calle with respondent, coming out of the area. Respondent looked upset; Captain Calle told Captain Ford that he was taking respondent to the clinic. Captain Ford notified ADW Van that the two men were going to the clinic. Captain Ford then went into the housing area where Captain Davis was making an entry in the log book. Captain Ford asked the tour room captain to send a relief officer to replace respondent. Captain Ford, after the relief officer arrived on post, went to the clinic, spoke to respondent and collected respondent's medical assessment sheet to give to ADW Van (Tr. 50-51; Pet Ex. 6).

Officer Ivette Blake was in the housing area with respondent during the tour on February 4, 2005. It is her testimony that, after respondent returned from meal on February 4, 2005 around 1200 hours, Officer Blake heard him say, while on the telephone, that "[he} was going to write the report" (Tr. 55). Respondent hung up the telephone and, about one minute later the telephone again rang. Officer Blake answered; it was Captain Davis who screamed, "Put Malone on the phone" (he was angry) (Tr. 56). Officer Blake gave the telephone to respondent. About ten minutes later, Captain Davis and Captain Calle came to the post. Captain Davis was pounding on the door; Officer Blake told the Captain that she did not have the key to open the door. Respondent had the key, but did not open the door immediately; respondent called ADW Van to say that he was having a problem with Captain Davis. Respondent then gave Officer Blake the key to the door; she opened it and Captain Davis said, "Call Malone to the door" (Tr. 57; Pet. Ex. 7). Captain Davis asked respondent to step outside. Officer Blake did not hear

Captain Davis curse or use foul language when addressing respondent. Captain Davis, during the conversation, said to respondent, "You're out of uniform" (Tr. 58).

Respondent did not testify in the instant proceeding. Petitioner did offer respondent's report which was submitted to AMKC Warden Riordan and dated February 6, 2005 (Pet. Ex. 2). In the report, respondent recounts a very different version of the confrontation with Captain Davis.

Respondent reported that he received a telephone call from Captain Davis at approximately 1145 hours on February 4, 2005 in which the captain stated that he did not appreciate respondent's having given his riot gear to another officer. Respondent then apologized to the Captain and explained to him that, during the response, respondent was feeling overheated, weak and sweating profusely and believed that he could not continue. Captain Davis then said to respondent, "Do not ever let that happen again on my watch." Officer Blake answered a second call from Captain Davis. When respondent came to the telephone, the Captain said, "You know what, give me a fucking report." Respondent told Captain Davis that he would provide the report and both men hung up the telephone. A few seconds later the telephone rang again and Captain Davis said, "I mean business, do not take me lightly, you better have that report." Respondent then told the Captain that he was going to discontinue the call and hung up (Pet. Ex. 2).

Captain Ford then came to the area and respondent reported to her that he was receiving "disturbing" telephone calls from Captain Davis. Captain Ford, according to respondent's report, put her two index fingers into her ears and said, "I'm not hearing this," and left the post (Pet. Ex. 2).

About five minutes later, Captain Davis and Captain Calle arrived. Officer Blake and respondent heard Captain Davis banging "savagely" on the door. This caused the inmates to run to the section gate to see what was happening. Respondent called ADW Van to report that he had been receiving disturbing telephone calls from Captain Davis. He told the ADW that Captain Davis had asked for a report and had used profane language and spoke in a threatening manner. Respondent held the telephone so that the ADW could hear the banging on the door. The ADW ordered respondent to open the door for the captains (Pet. Ex. 2).

Once inside, Captain Davis said to respondent, "Do you think I'm a fucking joke?" Captain Davis ordered Officer Blake to go to her post and told respondent to step outside in the

hallway. Respondent refused to leave the housing area as he was not properly relieved. Captain Davis said that he was not concerned and that he was giving respondent a direct order to step into the hallway. Captain Calle repeated the verbal order to step into the hallway. Respondent asked Captain Davis to enter the order in the logbook and the two captains and respondent stepped into the A station (Pet. Ex. 2).

Captain Davis then held his right index finger close to respondent's face and demanded that respondent tell him why he gave his riot gear to another officer. Respondent repeated that he was not feeling well. Captain Davis said that respondent's excuse was "bull----" and that he would, "expect this from a female officer - not you." Respondent protested that the inmates could see and hear the conversation. Captain Davis said, "fuck the inmates." Captain Davis asked for a report about the riot gear, respondent's sickness, why he did not timely answer the door, and, a second report for why respondent was out of uniform. When respondent asked how he was out of uniform, Captain Davis put his right index finger on respondent's lapel and said, "we will start with your insignias." Respondent protested that both insignias were on his collar. Captain Davis asked for respondent's utility belt, to which respondent replied that he was wearing it. Captain Davis asked for a report as to why respondent was not wearing a utility belt. Respondent asked Captain Calle to take Captain Davis away from the area.

Respondent felt a tightening in his chest, his left arm went numb and he dropped the keys. Captain Calle escorted respondent to the clinic. Respondent was subsequently examined and sent to the hospital where he was admitted. Respondent indicates also that ADW Van came to the clinic to speak to him prior to the arrival of EMS personnel (Pet. Ex. 2).

At the hearing, when questioned on direct examination, Captain Davis denied that respondent told him during the initial telephone conversation that he felt overheated and weak and that he had been sweating profusely during the response team maneuver. Captain Davis also denied making the statements respondent attributed to him in the report (Tr. 36). Captain Davis did not make a third telephone call to respondent's post. When he arrived at the post with Captain Calle, Captain Davis did not ask respondent whether he thought the Captain was a joke, nor did he make any comment about expecting such behavior as respondent's from a female officer. Finally, Captain Davis denied that he made any comment about the inmates (Tr. 37).

Captain Ford also denied, on direct examination, that early in the day of February 4, 2005 she went to respondent's post and that respondent complained to her about disturbing telephone

calls from Captain Davis. Captain Ford, according to her testimony, did not put her fingers in her ears and say to respondent, "I'm not hearing this" (Tr. 52-53).

Petitioner's burden in this administrative proceeding is to prove misconduct by a preponderance of the credible evidence. *See Foran v. Murphy*, 73 Misc.2d 486, 342 N.Y.S.2d 4 (Sup. Ct. N.Y. Co. 1973) (preponderance of the evidence standard is proper for section 75 disciplinary proceeding).

I found petitioner's witnesses to be credible. Captain Davis was straightforward and professional in his testimony. The testimony before me was consistent with his contemporaneous report and he did not seek to embellish any facts. Similarly, Captain Calle was straightforward and his testimony was consistent with his earlier report. Moreover, Captain Calle had no stake in the outcome of this proceeding and had no reason to embellish or minimize his testimony. Captain Ford was also without reason to fabricate her testimony. It belies logic to credit respondent's statements in his report about the behavior of Captain Davis and Captain Ford. While Captain Davis was, undoubtedly, upset with respondent's behavior, there is no credible evidence in this record that the Captain was out of control as described by respondent in his written statement. Indeed, Officer Blake indicated that Captain Davis was angry, but she did not hear Captain Davis curse or use any foul language when addressing respondent. Moreover, had Captain Davis been so disrespectful to respondent, it is not likely that he would have invited another captain, here Captain Calle, to confront respondent about respondent's behavior. The behavior respondent attributes to Captain Davis would not be that any supervisor would want a colleague to witness. It was only after respondent became so upset that he was flailing his arms and, after respondent threw his keys, that Captain Calle believed it wise to intervene and remove respondent from the scene as well as ask Captain Davis to step into the A station. Captain Calle does not attribute any demeaning language to Captain Davis.

The only inconsistency in the testimony is whether or not Captain Davis made two or three telephone calls to the post prior to appearing on the post with Captain Calle. Captain Davis was convinced that he called the post twice. Officer Blake believed that he called three times. This inconsistency is not one that would diminish Captain Davis's credibility, even if proven to be true. I cannot resolve the issue on this record, however it is more likely that Captain Davis would accurately recall that, following a second telephone call to which respondent hung up, he decided to go to the post rather than to continue attempting to speak to respondent by telephone.

As these allegations are serious, respondent's refusal to testify about the statements in his written report and his representative's failure to cross examine petitioner's witnesses on the substance of their testimony, is significant. Respondent's election not to testify deserves the "strongest inference that the opposing evidence in the record permits." *Dep't of Correction v. Jones*, OATH Index No. 393/04, at 9 (May 3, 2004), citing *Comm'r of Social Services v. Phillip De G.*, 59 N.Y.2d 137, 141, 463 N.Y.S.2d 761, 763 (1983) (judgment awarded against non-testifying party where "there was evidence in the record which if believed would meet [the applicable] standard" for judgment); *Dean v. Bradford*, 158 A.D.2d 772, 774, 551 N.Y.S.2d 364, 366 (3d Dep't 1990) (in a disciplinary case, employee's failure to testify allows the hearing officer "to draw all adverse inferences which the evidence permits"); *Transit Auth. v. Daly*, OATH Index No. 947/95 (Nov. 2, 1995); *Dep't of Parks & Recreation v. Waters*, OATH Index No. 1310/90 (Nov. 1, 1990).

Accordingly, I find the facts, as presented by petitioner's witnesses Captain Davis, Captain Calle and Captain Ford, to be credible. They are sufficient, therefore, to meet petitioner's standard of proof in this proceeding.

Specification one charges that respondent, on February 4, 2005, left his post and surrendered his helmet and equipment to another officer without permission or authority in violation of Department rules and regulations (ALJ Ex.1). It is Captain Davis's testimony that respondent, as a member of the second response team, did not complete the assignment. Respondent, on the return from the call, gave his equipment to another correction officer to return to the staging area. Captain Davis testified that all officers who are assigned to a response team are required to return with the team to the staging area and return their equipment, absent permission to leave the team before the return to the staging area. Department rule 3.05.130 provides that, "members of the Department shall not leave their post or place of assignment without the permission of a superior." Rules and Regulations 3.05.130 (eff. 1996). It is undisputed that respondent left the team without permission from Captain Davis, who was in charge of the response.

Therefore, specification one has been sustained.

Specification two charges that respondent twice hung up the telephone on a supervisor without permission on February 4, 2005 (ALJ Ex.1). The credible evidence established that respondent did hang up the telephone twice while Captain Davis was speaking to him.

Department rule 3.20.180 provides that, "members of the Department shall not behave with disrespect toward a supervisor." Rules and Regulations 3.20.180 (eff. 1996). Respondent hung up the telephone before Captain Davis was finished speaking to him about his behavior on February 4, 2005.

Therefore, specification two has been sustained.

In specification three, petitioner alleges that respondent, on February 4, 2005, while a supervisor was giving him orders, abandoned his post and threw away his facility keys, all without permission or authority (ALJ Ex. 1). Petitioner argues that respondent, when Captain Davis confronted him about the uniform insignia and utility belt infractions, left the A station and threw his keys down the corridor, abandoned his post and failed to safeguard Department property (Tr. 86). While respondent's actions may have been insubordinate, in the circumstances of the encounter with Captain Davis, they did not contravene the Department rule pertaining to abandonment of post.

Department rule 3.05.130 provides that:

Members of the Department shall not leave their post or place of assignment without the permission of a superior. Employees who are authorized to leave their post for any reason must return to the post as quickly as possible. If the nature of the employees' duties are such that the safety of the inmates or the facility/command is involved, employees shall not be permitted to leave until they have been properly relieved.

Rules and Regulations 3.05.130 (eff. 1996).

Generally, in cases where abandonment of post has been found, the employee has left his/her assignment without notifying a supervisor and/or without waiting for a replacement. *See Dep't of Correction v. Stalzer*, OATH Index No. 1433/96 (Sept. 27, 1996), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD99-112-SA (Nov. 30, 1999) (correction officer left post at magnetometer without permission); *Dep't of Correction v. Oliver*, OATH Index No. 931/93 (July 14, 1993) (correction officer left over-time assignment without permission). In addition, in those situations where abandonment has been found, the circumstances created by the officer leaving the post were such that the security of the facility may have been in jeopardy. Here, respondent was obviously extremely upset by the encounter with Captain Davis. He left the A station and moved

into the corridor leading to the housing area to which he was assigned. Captain Ford, who had been summoned by Captain Calle, realizing that respondent needed to be removed from the post, contacted the tour room and requested a replacement officer. She then remained on the scene until the replacement officer arrived after Captain Calle took respondent to the clinic. This, then, is not a case that falls under the abandonment rule. Respondent was obviously in need of medical attention and the captains provided coverage of his post until such time as relief was provided, thereby securing the post.

As to petitioner's charge that respondent "threw away" his keys, the credible evidence establishes that respondent did throw the keys in the corridor. However, the keys were not lost nor were they thrown in such a way that the inmates had access to them. Respondent's action was in conjunction with his frustration with Captain Davis and, while certainly not justified in the circumstances, the action must be viewed in the total context of the situation. Respondent was extremely upset and likely threw the keys because they were in his hand at the time. As noted, the captains were on the scene and recovered the keys instantaneously. Thus, security was not compromised.

While I do not minimize the Department's concern that the uniformed employees all must maintain a certain level of decorum and must be vigilant as to the security of the facility, the charged behavior in a disciplinary proceeding must also be evaluated in its complete context. Here, unlike specification one of the instant charges where respondent intentionally left the response the team without notifying the supervisor, there is no evidence that respondent intentionally abandoned his post or intentionally failed to safeguard Department equipment.

Accordingly, the charge has not been sustained. *See Dep't of Correction v. Gordon*, OATH Index No. 275/81 (Feb. 3, 1982) (intentional and willful misconduct must be demonstrated to support any allegation of serious, non-negligent misconduct under section 75 of the civil service law).

Petitioner charges in specification four that respondent engaged in misconduct by assaulting a supervisor (Pet. Ex. 1).

As noted above, the credible evidence establishes that respondent put his hand on Captain Davis's chest, according to Captain Calle's testimony. Captain Davis testified that respondent pushed him after the three men left the A station and after Captain Davis told respondent that he was out of uniform.

It is well settled that the touching or threatening of a supervisor by an agency employee violates agency rules and constitutes misconduct under section 75 of the civil service law. See *Dep't of Sanitation v. Gasparri*, OATH Index No. 1844/00 (Aug. 16, 2000), *modified on penalty as per plea agreement* (Oct. 19, 2000) (sanitation worker grabbed and pushed supervisor); *Dep't of Buildings v. King*, OATH Index No. 850/99 (Dec. 23, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD00-25-SA (Apr. 10, 2000) (respondent threatened and physically assaulted supervisor); *Dep't of Sanitation v. Anderson*, OATH Index No. 1215/98 (June 24, 1998) (sanitation worker pushed supervisor during a workplace incident). Supervisors must be free to issue orders and direct the activity of the employees under their supervision without fear of physical assault. In the instant case, respondent put his hand on Captain Davis's chest while the captain was trying to give respondent direction about his behavior. Department rules 3.20.180 and 3.20.190 prohibit members of the Department from behaving with disrespect toward a supervisor and admonish that members of the Department shall not act disrespectfully in language or demeanor toward a supervisor. Rules and Regulations (eff. 1996).

Accordingly, the specification has been sustained.

Specification five charges that respondent was out of uniform while on duty (ALJ Ex. 1).

Captain Davis testified that respondent was wearing the outmoded large AMKC insignia on his collar instead of the smaller ones currently in use. According to Department Uniform and Equipment Specifications and Regulations number 2270, effective September 23, 1996, the command insignia worn on the uniform must be 3/8" letters. In addition, Captain Davis testified that respondent did not have the required utility knife, known as a 9-11, on his utility belt. Credible testimony also established that supervisors may inspect uniform members at any time during the tour of duty.

I find, therefore, that respondent was out of uniform on February 4, 2005.

Finally, petitioner charges in specification six that respondent transmitted a false and/or misleading report concerning the incident on February 4, 2005.

Department rule 4.30.020 provides that, "members of the Department shall not make any false entries or notations or render any false reports concerning the business of the Department." Rules and Regulations 4.30.020 (eff. 1996).

Respondent's report (Pet. Ex. 2) attributes language and demeanor to Captain Davis that is not supported by any of the credible evidence before me. In addition, respondent states in his report that Captain Ford refused to hear his complaints about Captain Davis and "put her two index fingers from each hand into her ears and said, 'I'm not hearing this' and left the post" (Pet. Ex. 2). Captain Ford explicitly denied that she engaged in such a conversation with respondent. I found the Captain to be credible. Moreover, it seems highly unlikely that a captain or any other adult would engage in such conduct. In addition, respondent indicates in the report that Captain Davis and Captain Calle were threatening in their demeanor and that Captain Davis made a derogatory comment about the inmates and a derogatory comment about female correction officers. None of these accusations are supported by any credible evidence.

Accordingly, I find that respondent made false statements in the report submitted to Warden Riordan and dated February 6, 2005.

FINDINGS AND CONCLUSIONS

1. Respondent left his post and gave his helmet and equipment to another officer without permission during a response call on February 4, 2005 in violation of Department rule 3.05.130.
2. Respondent was disrespectful to a supervisor on February 4, 2005 when he twice hung up the telephone during a conversation with the supervisor in violation of Department rule 3.20.180.
3. Respondent did not willfully or intentionally abandon his post or fail to safeguard Department property when he threw his keys on February 4, 2005.
4. Respondent physically attacked his supervisor on February 4, 2005 by placing his hand or hands on the captain's chest in violation of Department rules 3.20.180 and 3.20.190.
5. Respondent was out of uniform when inspected by the captain on February 4, 2005 by failing to have the proper collar insignia and by failing to have a required utility knife on his utility belt.

6. Respondent submitted a false and misleading report concerning the encounter with a captain on February 4, 2005 in violation of Department rule 4.30.020.

THEREFORE:

Specifications one, two, four, five and six have been sustained by a preponderance of the credible evidence. Specification three has not been sustained and should be dismissed.

RECOMMENDATION

Upon making the above findings, I requested and received an abstract of respondent's personnel history in order to make an appropriate penalty recommendation.

Respondent was appointed to his position as a correction officer on June 1, 2000 and has a prior disciplinary record. In January 2003, respondent was suspended for fifteen days and entered into a one-year probation relating to an arrest. In October 2004 respondent lost one vacation day for a violation that was settled at the command discipline level. Respondent's sick leave history is unremarkable, except that he was absent for thirty-three days in 2005.

For the misconduct charged here, petitioner has asked that a recommendation that respondent be suspended for sixty days. In the alternative, petitioner has asked that, if all charges are sustained, a recommendation that respondent be terminated from his position should be forthcoming.

Respondent has been found to have engaged in very serious misconduct, particularly the physical contact with Captain Davis and the submission of a false report to the Department concerning the events of February 4, 2005. In addition, respondent does not have a long tenure with the Department and has some prior disciplinary actions on his record. These factors do not serve to mitigate a penalty recommendation.

Prior cases involving a physical assault on a supervisor and false reporting have commanded penalties ranging from fifteen to sixty days' suspension without pay. *Dep't of Correction v. Diaz*, OATH index No. 518/04 (Mar. 25, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD05-06-SA (Apr. 15, 2005) (sixty-day suspension for disrespect in language and demeanor to supervising officer, among other violations); *Dep't of Correction v. Graham*, OATH Index No. 1380/03 (Feb. 25, 2004), *modified on penalty*, Comm'r Decision (Aug. 6, 2004) (thirty-day suspension for two submissions of defamatory and disrespectful written reports); *Dep't of Correction v. Sostre-Valentin*, OATH Index No. 1923/99 (Sept. 22, 1999), *aff'd*, NYC

Civ. Serv. Comm'n Item No. CD00-94-SA (Nov. 14, 2000) (physical contact with supervisor and false reporting; recommended twenty-five day penalty); *Dep't of Correction v. Vanderpool*, OATH Index No. 191/93 (Dec, 4, 1992) (disrespect aggravated by physical assault; fifty-day suspension).

Here, while respondent does not have long tenure with the Department and the instant allegations contain aggravating circumstances, I am reluctant to recommend that he be terminated from his position as there is some evidence that he did have a severe emotional reaction to the encounter with the captain and was, in fact, later hospitalized. However, respondent must understand that the behavior he engaged in cannot be tolerated by the Department, particularly in the quasi-military setting in which he works and because of the mandate for the Department to care for its inmates.

Accordingly, I recommend that respondent be suspended without pay for sixty days, the maximum penalty available short of termination.

Donna R. Merris
Administrative Law Judge

January 11, 2007
SUBMITTED TO:

MARTIN F. HORN
Commissioner

WILLIAM BRYK, ESQ.
Attorney for Petitioner

WAYNE TATUM
Representative for Respondent

Supreme Court New York County, Index No. 108250/07, January 14, 2008

SUPREME COURT NEW YORK COUNTY

In the Matter of the Application of

TERRENCE MALONE

Petitioner

- Against -

THE CITY OF NEW YORK

NYC DEPARTMENT OF CORRECTION

MARTIN HORN,

Commissioner

NYC DEPARTMENT OF CITYWIDE

ADMINISTRATIVE SERVICES

MARTHA K. HIRST

Commissioner

NYC OFFICE OF ADMINISTRATIVE

TRIALS AND HEARINGS

ROBERTO VELEZ

Chief Administrative Law Judge

DONNA MERRIS

Administrative Law Judge

Respondents

SHIRLEY WERNER KORNREICH, *Supreme Court Justice*, New York County

DECISION and ORDER

Pro se petitioner Terrance Malone ("petitioner" or "Malone"), a tenured Correction Officer employed by respondent New York City Department of Correction ("DOC"), brings this Article 78 proceeding and seeks a judgment: (1) vacating and annulling respondent DOC Commissioner Martin Horn's ("Commissioner Horn") decision to accept Administrative Law Judge Donna R. Merris' ("Judge Merris") recommendation to suspend petitioner for sixty days

without pay; (2) ordering that petitioner's record be expunged of such suspension; (3) ordering that respondent The New York City Office of Administrative Trials and Hearings ("OATH") expunge from its database and website petitioner's personnel records; (4) ordering that DOC overhaul its entire disciplinary system; (5) ordering that Horn be removed from office; (6) ordering that respondent Chief Administrative Judge Roberto Velez be removed from office; (7) ordering that Judge Merris be removed from office at OATH; (8) ordering that the City of New York overhaul OATH; (9) ordering that petitioner's sixty day suspension be stayed, annulled and vacated; and (10) ordering that the City of New York completely overhaul the executive administration of OATH. Respondents oppose.

I. Background

On the morning of February 4, 2005, Captain Gerald Davis ("Captain Davis"), petitioner's supervisor at the Anna M. Kross Center ("AMKC") sounded an alarm requiring all members of AMKC's response team to immediately report and address an incident that arose at the prison. A response team is a group of officers who address any problems that arise inside the facility. Following the disturbance, Captain Davis noticed that Malone did not report as ordered. In fact, Malone gave his equipment to Correction Officer Williams and asked her to replace him on the response team, while he remained at his post. Captain Davis then proceeded to call Malone at his post to inquire as to why he not only did not respond to the alarm, but also why he gave Officer Williams his equipment without telling anyone. Captain Davis testified that it was his intention to instruct Malone on proper procedure so that this type of situation could be avoided in the future. However, during the initial phone call, Malone hung up on him in mid-sentence. Captain Davis then called back and Malone proceeded to hang up on him a second time.

Captain Davis decided to go down to where Malone was stationed to speak with him face to face and ask him to prepare a written report explaining his actions. During their conversation, Captain Davis again attempted to explain to petitioner why his actions were improper. Malone became annoyed and refused to discuss his actions. Captain Davis then noticed that the insignia on Malone's uniform was incorrect. Petitioner was wearing a large older type insignia on his collar instead of the new smaller version. Captain Davis, therefore, in accordance with DOC procedure, asked to inspect Malone's utility belt. During the inspection, Captain Davis discovered that Malone was missing his utility knife. DOC procedures require all correction

officers to have their utility knives clipped to their utility belts while stationed at their respective posts. Malone thereupon became agitated accusing Captain Davis of harassing him. He threw his keys and pushed Captain Davis in the chest.

On August 8, 2005, petitioner was served with charges and specifications for violations he allegedly committed stemming from this incident. Specifically, he was charged with violating approximately fourteen different DOC rules and regulations for "conduct unbecoming an officer" and failing to fully and efficiently perform his duties by: (1) leaving his post and surrendering his equipment to a fellow officer; (2) twice hanging up on and terminating the transmission of his supervisor Captain Davis; (3) abandoning his post and throwing his keys during a conversation with Captain Davis; (4) assaulting Captain Davis; (5) failing to be in proper uniform; and (6) transmitting a false/ and or misleading report concerning the incident.

Pursuant to DOC regulations, a hearing was held at OATH before Judge Merris on June 5, and 26, 2006. At the hearing, petitioner was represented by counsel. Both sides offered numerous documents and exhibits into evidence and were afforded the opportunity to call and cross-examine witnesses. DOC called four witnesses to testify on its behalf; petitioner neither called a witnesses nor testified. Following the hearing, Judge Merris allowed each side to present post-hearing memoranda of law in further support of their positions.

On January 11, 2007, Judge Merris issued her report to Commissioner Horn. She sustained five of the six charges leveled against petitioner and recommended that he be suspended for sixty days without pay. Petitioner, through counsel, was then advised of his right to submit a letter to Commissioner Horn challenging Judge Merris' findings and to support his position as to why Commissioner Horn should not implement the proposed suspension. Petitioner's counsel submitted such a letter on January 29, 2007. On March 8, 2007, petitioner was notified by letter that Commissioner Horn affirmed Judge Merris' decision on February 22, 2007, and petitioner was suspended for sixty days without pay. Petitioner thereafter commenced the instant proceeding, pro se, on June 13, 2007.

II. Conclusions of Law

CPLR section 7803 provides that an Article 78 proceeding raises the question: "Whether a determination was made in violation of lawful procedure, was effected by error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." A court reviewing an Article 78 proceeding must

judge the propriety of an administrative action solely on the reasons cited by the administration. *Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991). Such an action must be upheld unless it "shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law." *Featherstone v. Franco*, 95 N.Y.2d 550, 554 (2000).

Malone argues that OATH lacked jurisdiction over the proceeding and, thus, Judge Merris was not authorized by law to preside over his hearing. Specifically, Malone argues that pursuant to Civil Service Law § 75(2), Judge Merris did not obtain written consent from Commissioner Horn authorizing her to hear his case. According to petitioner, Civil Service Law § 75(2) mandated that Commissioner Horn should have held the hearing, and that his failure to do so and subsequent acceptance of Judge Merris' report and recommendation was arbitrary and capricious.

Civil Service Law § 75(2) permits the officer or body with power to remove or sanction a civil servant, to designate in writing a deputy or other person to conduct administrative trials and hearings in any and all disciplinary matters. *See Civil Service Law 75(2); Wiggins v. Board of Educ. of the City of New York*, 60 N.Y.2d 385, 387 (1983). When a deputy or other person is so designated, he "shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision." Civil Service Law 75(2). Without such written designation authorizing the deputy or other person to conduct the hearing, the removing board or officer does not have jurisdiction to discipline the civil servant. *Wiggins*, 60 N.Y.2d at 387.

In her decision, Judge Merris, in addressing these jurisdictional concerns, stated that pursuant to Civil Service Law § 75(2), OATH had jurisdiction to conduct the proceeding. Judge Merris referenced a letter of May 19, 1992 from then DOC Commissioner Abate to then Chief Judge McFaul which states, *inter alia*, that:

Pursuant to the provisions of Sections 71, 72, 73, and 75 of the Civil Service Law, I hereby authorize the Chief Administrative Law Judge or such Administrative Law Judges as he may assign to hold and conduct administrative trials and hearings in disciplinary matters,...,and to make such recommendations thereon to me as shall be deemed appropriate.

You are further authorized to conduct such trials and hearings in conformity with

Sections 71, 72, 73, and 75 of the Civil Service Law.

Following your analysis of all the testimony and other evidence, you shall submit to me for my review the record of such trial or hearing with your report or recommendation.

This letter remains in full force and effect and serves to provide OATH with jurisdiction over DOC hearings and trials. In addition, DOC Directive #7502 ("Directive 7502") entitled "Disciplinary Process for Uniformed Personnel" states, *inter alia*, that in the event an informal conference between the parties and the Inspector General does not settle the matter, "the charges and specifications will be forwarded to [OATH] for [an] administrative hearing." Consequently, it is clear that OATH had jurisdiction over petitioner's disciplinary proceeding.

Malone also argues that he should have been disciplined in accordance with DOC Directive #7510 entitled "Early Intervention Monitoring Program" ("Directive 7510") and DOC Directive #4257 entitled "Command Discipline" ("Directive 4257"). These two sections outline procedures and penalties available to the DOC in order to avoid filing formal disciplinary charges against an officer. Directive 4257 allows commanding officers to adjudicate minor offenses committed by correction officers without resorting to formal charges and administrative hearings. This section is "designed to correct minor deficiencies and to maintain discipline among uniformed members." However, it also permits commanding officers to initiate formal disciplinary charges where appropriate. For example, section (IV)(3) states:

Even in those situations where Command Discipline is required by this Directive, if the Commanding Officer determines that aggravating facts and circumstances warrant the filing of formal disciplinary charges he/she may do so. In such a case, the Commanding Officer shall include in the Memorandum of Complaint a statement explaining why command discipline is inappropriate.

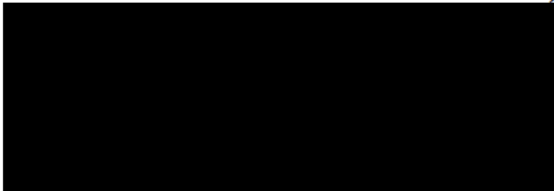
This is exactly what happened here. Captain Davis determined that formal disciplinary charges were appropriate and explained that he offered Malone a "(4) day penalty [in accordance with command disciplinary procedures] but [he] refused and requested [a] formal hearing." Therefore, Captain Davis and the DOC acted in accordance with the procedures outlined in Directive 4257.

Directive 7510 provides the DOC with an early intervention program to assist commanding officers to assess and monitor job performance of correction officers who may be having trouble performing their duties in accordance with DOC standards. However, section

(III)(A) specifically provides that "[t]he implementation of the Early Intervention Monitoring Program is not to be construed as waving management's responsibility to invoke disciplinary actions in cases of misconduct or violations of departmental rules/regulations." As a result, the DOC did not violate Directive 7510. Malone violated numerous DOC rules and regulations. Petitioner's remaining arguments have been raised for the first time before this court and, therefore, need not be addressed. *Franco*, 95 N.Y.2d at 554 ("judicial review of administrative determinations is confined to the facts and record adduced before the agency"). Accordingly it is

ORDERED that the application by petitioner seeking to vacate and annul the determination by respondent is denied and the proceeding is dismissed.

SHIRLEY WERNER KORNREICH, *Supreme Court Justice*, New York County



**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 54**

ENTER: JANUARY 14, 2006

FILE: JANUARY 17, 2006