

Dep't of Education v. Modesto

OATH Index No. 2509/25 (Apr. 24, 2026)

Petitioner failed to establish that respondent negligently disseminated a newsletter that hyperlinked to a "Stop Gaza Genocide Toolkit." ALJ recommends that the charges be dismissed.

**New York City Office of
Administrative Trials and Hearings**

In the Matter of
Department of Education

Petitioner

-against-

Kaitly Modesto

Respondent

Report and Recommendation

Michael D. Turilli, *Administrative Law Judge*

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Petitioner, the Department of Education (the “Department”), brought this employee disciplinary proceeding against respondent, Kaity Modesto, under section 75 of the Civil Service Law. Petitioner alleged that respondent, a program manager in the Office of Student Pathways (“OSP”), negligently disseminated a newsletter to staff and community partners on April 1, 2025, that included a hyperlink to a “Stop Gaza Genocide Toolkit,” which contained “hateful antisemitic language” (Pet. Ex. 1).

A trial was held before me on March 11 and 12, 2026. The proceedings were held remotely by videoconference. Petitioner relied upon documentary evidence and the testimony of OSP Senior Executive Director Melanie Mac. Respondent testified on her own behalf and offered documentary evidence and the testimony of OSP Deputy Executive Director John Foley-Murphy. Petitioner sought the termination of respondent’s employment as a penalty for the alleged misconduct (Tr. 12). The record closed on March 27, 2026, following post-trial submissions by the parties (ALJ Exs. 5, 6).

For the reasons set forth below, I find that petitioner failed to prove that respondent engaged in misconduct and recommend that the charges be dismissed.

Analysis

Most of the material facts were undisputed. Respondent has worked as a communications manager in OSP for approximately ten years (Tr. 28-29, 130). Her direct supervisor is Director Foley-Murphy and his supervisor is Director Mac (Tr. 27-28, 123-24, 131). Director Foley-Murphy has worked in OSP since 2016 (Tr. 123). Director Mac joined OSP eight years ago and reports to the Chief of Student Pathways (Tr. 20, 26). OSP is a centralized office that supports over 1,600 New York City public schools with college and career preparedness services, such as advising, financial literacy, internships, and apprenticeships (Tr. 21-22, 130-31).

As part of its programming, OSP created and distributed a newsletter, which provided information and resources related to college and career planning to over 6,500 school counselors and partnering community-based organizations (Tr. 24-26, 134-35). The OSP newsletter was e-mailed to a Listserv approximately 10 to 12 times per year (Tr. 25-26, 48). As the communications manager, respondent was responsible for the production and management of the OSP newsletter, including drafting its text, curating and vetting its content and resources,

and distributing it to the Listserv (Pet. Exs. 2, 3; Tr. 42-43, 45, 47-48, 126, 131). The newsletter was one of respondent's primary responsibilities (Pet. Ex. 2). Supervisory approval of the OSP newsletter was required prior to its distribution to the Listserv (Tr. 44-45, 94, 134). Director Mac previously reviewed and approved the newsletter and Director Foley-Murphy assumed those responsibilities in 2024 (Tr. 44, 133-34). Respondent provided her supervisors with the initial draft of each newsletter for review and later sent them the final version through the Mailchimp application for approval (Tr. 44-47, 139). The supervisors reviewed each newsletter for the "flow" and "appropriateness" of the content (Tr. 45, 95, 139-40).

The newsletter generally contained information regarding deadlines, events, and resources, and included many hyperlinks, some of which were from external sources (Pet. Ex. 3; Resp. Exs. 2-5, 15, 31; Tr. 47, 137). Content and resources in the newsletter sometimes addressed issues such as immigrant rights, transgender rights, and Black Lives Matter (Pet. Ex. 3; Resp. Ex. 17). Respondent testified that she would vet new sources of content for the newsletter and seek approval from her supervisors (Tr. 139-40). She explained that resources, including hyperlinks to external content, were sometimes reused in subsequent newsletters and that it was her responsibility and her practice to "check all the links every time before sending them for review and approval to [her] supervisors" (Tr. 140, 172). She added that she sought to "ensure that the text that [was] matched with the link [was] still applicable and that it still align[ed] with what we originally intended" (Tr. 140-41). Director Mac also testified that it "would be good professional judgment [for respondent] to check the links" each time they were used in a newsletter and that it was "part of the process" to "double-check[] all the links that they're active and not broken" before sending out each newsletter (Tr. 117-18). No written guidelines for the newsletter were provided to respondent (Tr. 99, 137).

Both Director Mac and respondent testified that OSP provided various resources to school counselors through the newsletter to help students affected by the Israel-Gaza conflict (Tr. 95-96, 142-43, 150). In November 2023, respondent prepared the December 2023 OSP newsletter, which expressed OSP's "appreciation for showing up for our students especially during this time of global crisis and grief," and highlighted "timely resources below" to "further support you and our students" (Resp. Ex. 15). Hyperlinked at the bottom of the newsletter were

five resources, including “Guidelines for teaching about genocide,” “Scripts to contact representatives,” “How to Talk with Kids About Violence,” “Current Events webpage,” and “Respect For All InfoHub page” (*Id.*). “Guidelines for teaching about genocide” hyperlinked to the Holocaust Center for Humanity’s “Guidelines: Teaching Genocide” (Resp. Ex. 8; Tr. 150-51, 183). Respondent testified that “Scripts to contact representatives” hyperlinked to a Google Doc that only contained information on how to contact representatives regarding the conflict and was provided as an educational tool regarding actions that students could take (Tr. 143-44). Director Mac and respondent both explained that the content of a Google Doc is not “static,” meaning that it can be changed by the owner (Tr. 96-97, 144).

After making “minor line edits,” Director Mac approved the December 2023 newsletter for distribution (Resp. Ex. 15). The same five hyperlinks were included in respondent’s draft of the January 2024 OSP newsletter as “resources to facilitate supportive conversations that remind us all of the importance of creating a more safer and peaceful world” (Resp. Ex. 3). Director Mac approved the January 2024 newsletter for distribution (*Id.*). The same five hyperlinks were included at the bottom of the May, October, and December 2024 OSP newsletters (Resp. Exs. 2, 4, 5). Director Foley-Murphy reviewed and approved each of those newsletters for distribution (Resp. Exs. 2, 4, 5). In his approval of the May 2024 OSP newsletter, Director Foley-Murphy e-mailed respondent that “your links are right but your described dates are wrong” for upcoming workshops (Resp. Ex. 2).

On April 1, 2025, respondent distributed the April 2025 OSP newsletter to the Listserv (Pet. Ex. 3). The eight-page newsletter, which had been drafted by respondent and approved by Director Foley-Murphy, contained information on financial aid, college applications, and upcoming events (Pet. Ex. 3; Resp. Ex. 31; Tr. 48, 171). The April 2025 OSP newsletter contained approximately 60 hyperlinks in total (Pet. Ex. 3). The same five hyperlinks described above were at the bottom of the last page, under the header “Resources + News,” and following the text, “Refer to these resources to facilitate important conversations about creating a safer, more peaceful world” (*Id.*). On April 3, 2025, following an e-mailed complaint from school counselor Jessica Arkin to Chancellor Aviles-Ramos that afternoon, Director Mac opened the “Scripts to contact representatives” hyperlink in the April 2025 OSP newsletter and observed a Google Doc

from the US Campaign for Palestinian Rights (“USCPR”) entitled “Stop Gaza Genocide Toolkit,” which she then downloaded (Pet. Exs. 4, 5; Tr. 51-52, 57-58). Even though she had approved the December 2023 and January 2024 newsletters with the same “Scripts to contact representatives” hyperlink, Director Mac had not seen this content prior to April 3, 2025 (Tr. 61, 116-17; Resp. Exs. 3, 15). Respondent testified that this content was not the same as the resource included through the “Scripts to contact representatives” hyperlink in the December 2023 newsletter (Tr. 144). Respondent testified that she checked each hyperlink when she created and sent out the April 2025 OSP newsletter (Tr. 146, 172). Specifically, she “click[ed] on each link to make sure that they’re working,” and that “it still look[ed] like what [she] reviewed and intended for it to be” (Tr. 146).

The “Stop Gaza Genocide Toolkit” was a 17-page document with 19 “ways to take action,” including:

1. Stop arming Israel and free Palestine!
2. Resist genocide on the Sat. Oct. 5th day of action
3. Join the Call for Mass Labor Action
4. Organize your local community to stop arming Israel
5. Look up: How much of your community’s tax dollars fund genocide?
6. Take action for Palestine at Pride events
7. Find more protests: uscpr.org/protests
8. Birddog your member of Congress
9. Send a big message with visuals
10. Organize for a local city council resolution
11. Boycott, Divestment, & Sanctions (BDS)
12. Wheatpaste flyers around your neighborhood
13. Mobilize a social media storm
14. Hold a vigil for Gaza
15. Text all your friends, group chats, your whole contact list
16. Tell the U.S. media to stop platforming the ADL
17. Print out a yard sign for your home
18. Follow these accounts on social media
19. Share this toolkit on Instagram and on TikTok

(Pet. Ex. 4).

On the first page, the document stated: “As of Oct. 7, 2024, the Stop Gaza Genocide toolkit has moved, newly updated for one year of resisting genocide” (*Id.*). It continued, “Israel is on a total rampage of death and destruction as it aggressively escalates a regional war,” “demand that Congress block weapons to Israel,” “make sure everyone knows that Israel is mass murdering Palestinian families with our tax dollars,” “Act Now Against These Companies Profiting from the Genocide of the Palestinian People,” and “[t]ell media outlets to stop platforming the ADL,” or “as many call it the Apartheid Defense League” (*Id.*). On the last page, USCPR was described as “a political home for all who believe that freedom for the Palestinian people is an integral part of achieving our collective liberation” and set forth its mission as “work[ing] to end U.S. complicity in Israel’s massive violence against the Palestinian people” (*Id.*).

Ms. Arkin’s April 3, 2025 e-mail to Chancellor Aviles-Ramos expressed her “outrage” regarding the “mis-labeled” hyperlink to the “Stop Gaza Genocide Toolkit,” which she protested as an “inflammatory” and “one-sided . . . manifesto dripping with Jew-hatred” (Pet. Ex. 5). Copying multiple elected officials, government agencies, and the press, Ms. Arkin described the Department’s actions as “a disgusting display of complicity in targeting a minority group with hatred” and demanded “a public apology for this rot within [the public schools]” and “severe consequences” for the individuals involved (*Id.*). Director Mac and respondent recalled other e-mailed complaints about the newsletter, and Director Mac testified that a publicly accessible Instagram post on the evening of April 3 discussed the “offensive link” and received thousands of “views” (Tr. 53, 66-67, 90, 175). On April 4, 2025, the New York Post published an article entitled, “NYC public schools accused of ‘abhorrent’ antisemitism after anti-Israel ‘Stop Gaza Genocide Toolkit’ is included in newsletter” (Pet. Ex. 6). The article included a screenshot of the first page on the “Stop Gaza Genocide Toolkit,” with the website “docs.google.com” at the bottom of the screenshot (*Id.*). The article quoted a statement from Chancellor Aviles-Ramos apologizing for the “troubling oversight” (*Id.*). On April 5, 2025, the Times of Israel published an article entitled, “NYC education department investigating after office sends out antisemitic toolkit” (Pet. Ex. 7). Neither article referred to respondent (Pet. Exs. 6, 7).

In the days and weeks after the publication of the April 2025 OSP newsletter, OSP took remedial actions and investigated the incident. Director Mac and respondent both testified that they immediately deactivated the hyperlink in all published newsletters and blocked the hyperlink from opening on Department devices (Tr. 65, 100-01, 153-54). Director Mac met with respondent and Director Foley-Murphy on the morning of April 4, 2025 to “debrief” regarding the incident (Resp. Ex. 6; Tr. 65). Director Mac recalled that respondent stated at the meeting that she was unfamiliar with the “Stop Gaza Genocide Toolkit” (Tr. 65). According to Director Mac’s notes from the meeting, respondent did not recall where she found the hyperlink and stated that she believed the content “significantly changed from when she first selected it to publish on November 2, 2023 to when the inappropriate content was flagged on April 3, 2025” (Resp. Ex. 6). Respondent told Director Mac that the content “was originally about how to contact local elected officials to discuss views of the conflict,” and as a result, was entitled “Scripts to contact representatives” in “each of the 7 instances it was published in the newsletter” (*Id.*). In summarizing the typical process for drafting the newsletter, Director Mac noted that respondent initially checked all resource hyperlinks “to ensure they are working” in the draft newsletter and respondent then did a “final check of links to make sure they are working” once the newsletter was transferred into the Mailchimp template (*Id.*).

In May 2025, respondent and Director Foley-Murphy submitted a report regarding the OSP newsletter processes and their recommendations (Resp. Exs. 12, 22; Tr. 102). According to their report, they “disabl[ed] the seven editions that included the flagged resource,” paused all “educator-facing communications,” confirmed through “limited analytics” that “the flagged resource received only 6-11 clicks” as of April 3, 2025, and reviewed all 135 prior editions of the newsletter to test all hyperlinks and flag potential concerns (Resp. Ex. 22). In a separate undated memorandum, respondent made recommendations for the newsletter process, including the use of a generic e-mail address for publications and the addition of a disclaimer to publications (Resp. Ex. 24). The document noted that respondent had received 234 threatening e-mails from April 4 to May 9, 2025, including some from “outside actors” (*Id.*).

By letter dated May 9, 2025, following an earlier disciplinary conference with respondent, OSP Senior Advisor Jeffrey Chetirko concluded that it was respondent’s

“responsibility to review each and every resource each time the newsletter is distributed” and that she “failed to complete this critical review [in the April newsletter] and included a link to a resource that contained hateful antisemitic language and materials and clearly violate[d] the NYCPS policy on political neutrality” (Resp. Ex. 18; Tr. 75-76). Prior to acknowledging receipt of the disciplinary letter, respondent asked Mr. Chetirko to “clarify which specific content—if any—in the toolkit and/or the newsletter was classified as hateful anti-Semitic language” (Resp. Ex. 9). Mr. Chetirko replied, “the presence of hateful anti-Semitic language [was] evident within the content itself” (*Id.*). Respondent testified that she did not intend to disparage the Jewish community or spread antisemitism through the hyperlink in the April 2025 OSP newsletter, and that her actions were mischaracterized in the media and the disciplinary charges (Tr. 159, 167-68, 178). According to Director Mac, respondent was suspended for 30 days following the disciplinary conference (Tr. 75).

The Charges

Petitioner charged respondent with “gross neglect of duty” by failing to review and then disseminating the OSP newsletter on April 1, 2025, which hyperlinked to a “Stop Gaza Genocide Toolkit” containing “hateful antisemitic language” (Pet. Ex. 1 at Spec. 1). Petitioner further alleged that respondent’s actions caused “widespread negative notoriety for the Department” and “violated the Department’s policies on political neutrality and/or created a hostile and/or offensive environment” (Pet. Ex. 1 at Specs. 2, 3). Respondent denied the charges.

Petitioner 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. 5, 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). “If the evidence is equally balanced, or if it leaves the [trier of fact] in such doubt as to be unable to decide the controversy either way, judgment must be given against the party upon whom the burden of proof rests.” *Id.*; *see Rinaldi & Sons, Inc. v. Wells Fargo Alarm Service, Inc.*, 39 N.Y.2d 191, 196 (1976).

“It is well established that in order to sanction a civil service employee for misconduct under section 75 of the Civil Service Law, there must be some showing of fault on the employee’s part, either that he acted willfully or intentionally, . . . or carelessly or negligently.” *Dep’t of Correction v. Phillips*, OATH Index No. 1954/15 at 2 (Sept. 10, 2015) (citing *Reisig v. Kirby*, 62 Misc.2d 632, 635 (Sup. Ct. Suffolk Co. 1968), *aff’d*, 31 A.D.2d 1008 (2d Dep’t 1969) and *McGinige v. Town of Greenburgh*, 59 A.D.2d 908, 908-09 (2d Dep’t 1977), *rev’d on other grounds*, 48 N.Y.2d 949, 951 (1979)). “The courts long have held that employees are not held to a strict liability standard, because a finding of misconduct is not the equivalent of a finding that an administrative rule has been violated; rather, misconduct requires proof of fault.” *Dep’t of Correction v. Caldwell*, OATH Index No. 2702/14 at 7 (May 27, 2015), *modified on penalty*, Comm’r Dec. (Apr. 19, 2016), *modified on penalty*, NYC Civ. Serv. Comm’n Case No. 2016-0444 (Feb. 21, 2017); *see also Ryan v. NYS Liquor Auth.*, 273 A.D. 576, 581 (3d Dep’t 1948) (“A mere technical breach of the rules without wrongful intent is not sufficient to warrant the discharge of an officer with a record of faithful service.”). “Mere errors of judgment, lacking in willful intent and not so unreasonable as to be considered negligence, are not a basis for finding misconduct.” *Dep’t of Health & Mental Hygiene v. Levia-Mena*, OATH Index No. 851/14 at 10 (Mar. 14, 2014), *aff’d*, NYC Civ. Serv. Comm’n Case No. 2014-0614 (Mar. 27, 2015).

The evidence did not establish that respondent negligently disseminated the April 2025 OSP newsletter without reviewing the “Scripts to contact representatives” hyperlink. It was undisputed that respondent was responsible for creating, reviewing, and distributing the OSP newsletter, that respondent had included the “Scripts to contact representatives” hyperlink in several newsletters from December 2023 to April 2025 as a resource for school counselors regarding the Israel-Gaza conflict, and that respondent’s supervisors had approved each of those newsletters. Neither party produced a copy of the document originally hyperlinked in the OSP newsletter in 2023 under “Scripts to contact representatives.” However, respondent’s un rebutted testimony that the newsletter did not originally hyperlink to the “Stop Gaza Genocide Toolkit” was corroborated by the text of the toolkit itself, which referenced updates and events from October 2024.

Consistent with the testimony at trial, I find that the standard of reasonable care for a widely distributed, public-facing newsletter warranted a review of hyperlinked external content, even where such content had been previously used, approved, and published. Petitioner, however, did not elicit any testimony from its sole witness regarding whether respondent reviewed the April 2025 OSP newsletter and the “Scripts to contact representatives” hyperlink contained therein prior to its distribution to the Listserv on April 1, 2025. Instead, petitioner primarily relied on the undisputed fact that the newsletter created by respondent contained a hyperlink to the “Stop Gaza Genocide Toolkit” on April 3, 2025. Such circumstantial evidence, however, did not support the conclusion that respondent failed to review the newsletter and the “Scripts to contact representatives” hyperlink prior to disseminating the newsletter on April 1, 2025. *See Dep’t of Social Services (Human Resources Admin.) v. DeFrance*, OATH Index No. 1593/20 at 8 (Sept. 28, 2020), *adopted*, Comm’r Dec. (Dec. 16, 2020), *aff’d*, NYC Civ. Serv. Comm’n Case No. 2020-0810 (Feb. 19, 2021) (“A finding based entirely on circumstantial evidence may be established in a civil service disciplinary proceeding so long as the circumstantial evidence supports the conclusion that ‘the inference drawn is the only one that is fair and reasonable.’”).

Respondent provided unrebutted testimony that she checked the hyperlinks in the April 2025 OSP newsletter—both by testing their functionality and observing their content. She did not offer details such as exactly when she reviewed the hyperlinks or what she saw when she clicked on the “Scripts to contact representatives” hyperlink. I nevertheless found her testimony to be credible. *See 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) (considering “witness demeanor, consistency of a witness’ testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness’ testimony comports with common sense and human experience” in assessing credibility). Her testimony was corroborated by Director Mac’s description of respondent’s typical process of double-checking all hyperlinks before sending out each newsletter, and it made sense that respondent would have observed the content of the Google Doc after clicking on the hyperlink as part of any

functionality test. The “Stop Gaza Genocide Toolkit” bore no resemblance to a resource on contacting elected officials with sample scripts regarding the conflict.

Moreover, petitioner did not establish that the “Stop Gaza Genocide Toolkit” was accessible through the hyperlink in the OSP newsletter at the time that respondent first drafted the April 2025 OSP newsletter or when the newsletter was distributed to the Listserv on April 1, 2025. It was plausible, on this record, that respondent reviewed the hyperlink when she created the April 2025 OSP newsletter and that the content of the Google Doc, which was accessible through the hyperlink in the newsletter, subsequently changed. Petitioner’s sole witness admitted that she first saw the “Stop Gaza Genocide Toolkit” on April 3, 2025, shortly after Ms. Arkin e-mailed Chancellor Aviles-Ramos, and petitioner presented no evidence that the “Stop Gaza Genocide Toolkit” was accessible through the newsletter before that date. Petitioner did not call Ms. Arkin to testify regarding when she opened the hyperlink and saw the “Stop Gaza Genocide Toolkit.” Petitioner did not offer any complaints from prior to April 3 regarding the content of the April 2025 OSP newsletter. Petitioner did not elicit any testimony from respondent or Director Foley-Murphy as to when they first saw the “Stop Gaza Genocide Toolkit.” Indeed, petitioner conceded in its closing statement that the “Stop Gaza Genocide Toolkit” was unlikely to have been accessible through the hyperlink prior to April 2025 given the multiple supervisory approvals and lack of complaints with respect to earlier publications of the newsletter (Tr. 214-15, 237). Although USCPR updated its “Stop Gaza Genocide Toolkit” on October 7, 2024, there was no evidence that the “Stop Gaza Genocide Toolkit”, as opposed to the original content selected by respondent and approved by her supervisors, was displayed on the hyperlinked Google Doc as of October 2024. Petitioner did not offer any complaints regarding the “Scripts to contact representatives” hyperlink contained in previous newsletters, including the October 2024 and December 2024 OSP newsletters.

Simply put, the fact that the newsletter hyperlinked to the “Stop Gaza Genocide Toolkit” on April 3, 2025, without more, did not prove that respondent failed to review the newsletter and its hyperlinks prior to distribution on April 1, 2025. Petitioner had the burden of proving

respondent's negligence with respect to the April 2025 OSP newsletter and failed to produce sufficient evidence to meet that burden. This charge is not sustained.¹

Petitioner also charged respondent with causing "widespread negative notoriety" to the Department based on her dissemination of the April 2025 OSP newsletter (Pet. Ex. 1 at Spec. 2). Rule 9.1 of the Rules and Regulations Governing Non-Pedagogical Administrative Employees prohibits conduct that "cause[s] embarrassment to or criticism of the Department" (ALJ Ex. 3). The evidence showed that Ms. Arkin publicly complained about the newsletter's hyperlink to the "Stop Gaza Genocide Toolkit" on April 3, 2025, which then led to numerous other complaints, two newspaper articles, and an Instagram post, all of which cast the Department in a negative light. However, as previously stated by this tribunal, "[i]n those cases where discredit to the agency has been proven due to negative publicity, the respondent(s) have been found to have engaged in misconduct which led directly to the publicity." *Dep't of Environmental Protection v. Hewlett*, OATH Index No. 644/07 at 7-8 (Mar. 9, 2007), *adopted*, Comm'r Dec. (Mar. 23, 2009) (dismissing charge that respondent's submission of dam inspection reports resulted in negative publicity where petitioner did not prove that respondent engaged in any misconduct with respect to the reports).

Because petitioner failed to prove that respondent committed misconduct by negligently disseminating the April 2025 OSP newsletter, it cannot establish respondent's misconduct based on the negative publicity alone. *See Office of Chief Medical Examiner v. Rheams*, OATH Index No. 262/25 at 19-20 (Apr. 11, 2025), *adopted in part, rejected in part*, Comm'r Dec. (June 12, 2025), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2025-0398 (Sept. 18, 2025) (dismissing charge of

¹ In her post-trial submission, respondent argued for the first time that the charges of misconduct should be dismissed under the affirmative defense of condonation and waiver (ALJ Ex. 5). *See Dep't of Health & Mental Hygiene v. Wu*, OATH Index No. 588/23 at 10 (June 26, 2023), *adopted*, Comm'r Dec. (July 18, 2023), *aff'd*, Civ. Serv. Comm'n Case No. 2023-0405 (Oct. 5, 2023) (To prove the affirmative defense of condonation and waiver, "respondent must show that the alleged misconduct was a regular practice known to and accepted by a supervisor."). I am not persuaded that the affirmative defense is applicable to this case, and in any event, petitioner failed to prove respondent's negligence with respect to the April 2025 OSP newsletter.

bringing the agency into disrepute that had been based on uncharged and unproven allegations of theft published in the New York Post); *cf. Dep't of Sanitation v. Gilchrist*, OATH Index No. 1897/20 at 8-9 (Aug. 13, 2021), *adopted*, Comm'r Dec. (Aug. 24, 2021) (finding that sanitation worker negligently drove a collection truck against the direction of traffic, which caused him to strike and kill a pedestrian, and that his conduct and subsequent arrest "generated publicity that reflected negatively on the Department"). This charge is not sustained.

Finally, petitioner charged respondent with violating the Department's policies on political neutrality and creating a hostile or offensive environment based on the dissemination of the April 2025 OSP newsletter (Pet. Ex. 1 at Spec. 3). Chancellor Regulation C-110 prohibits employees from engaging in political activities at work, and Chancellor Regulation D-130 prohibits employees from using Department equipment to "disseminate information on behalf of any candidate, candidates, slate of candidates or political organization/committee" (ALJ Exs. 1, 2; Tr. 231-32). Petitioner argued that the "Stop Gaza Genocide Toolkit" advocated for a particular political viewpoint, and that its "tone" and "totality," as opposed to any specific words or statements contained therein, were antisemitic because it "unfairly paint[ed] the Jewish community for the faults and actions of a government entity that has nothing to do with them" (Tr. 11-12, 221-30). Respondent countered that the "Stop Gaza Genocide Toolkit" protested the Israeli government's policy towards Gaza as well as its funding by the United States government and was not antisemitic (Tr. 195-96). Respondent further argued that Chancellor Regulation D-130 did not apply to respondent's conduct (Tr. 202).

I need not address these arguments. A finding of misconduct requires proof of fault and petitioner failed to prove respondent's negligence with respect to the April 2025 OSP newsletter. *See Dep't of Education v. Kherbouche*, OATH Index No. 266/20 at 14 (May 14, 2021), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2021-0792 (Feb. 11, 2022) ("This tribunal has repeatedly held that an employee cannot be held to a strict liability standard in a disciplinary proceeding."); *cf. Dep't of Environmental Protection v. Donas*, OATH Index No. 781/09 at 8 (Feb. 13, 2009), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 09-70-SA (Nov. 12, 2009) (finding that respondent engaged in misconduct by knowingly e-mailing other union officials regarding union campaigns in violation of agency policy). This charge is not sustained.

Findings and Conclusions

1. Petitioner did not establish that respondent failed to review and negligently disseminated the April 2025 OSP newsletter.
2. Petitioner did not establish that respondent engaged in misconduct by causing negative notoriety for the Department as a result of her dissemination of the April 2025 OSP newsletter.
3. Petitioner did not establish that respondent engaged in misconduct by violating the Department's policies on political neutrality and creating a hostile or offensive environment as a result of her dissemination of the April 2025 OSP newsletter.

Recommendation

I recommend that the charges be dismissed, and respondent be awarded backpay for any pretrial suspension served.

Michael D. Turilli
Administrative Law Judge

April 24, 2026

Submitted To:

Kamar Samuels
Chancellor

Appearances:

Roger T. Yu, Esq.
Attorney for Petitioner

Oriana Vigliotti, Esq.
Attorney for Respondent