Office of the Comptroller v. Lattanzio

OATH Index No. 1029/04 (Oct. 13, 2004)

Claims specialist found guilty of violating rules against personal use of office equipment for using her office computer to view and print documents that she was not authorized to access, including a summary prepared by the City's attorneys that evaluated her personal injury claim against the City. ALJ recommended 30-day suspension. ALJ found attorney-client privilege was waived where agency disclosed documents to its adversary. ALJ also ruled that OATH lacks jurisdiction to determine whether Penal Law sections were violated.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
OFFICE OF THE COMPTROLLER
Petitioner
- against -
MARGARET LATTANZIO
Respondent

REPORT AND RECOMMENDATION

TYNIA D. RICHARD, *Administrative Law Judge*

This disciplinary proceeding was referred by petitioner, Office of the Comptroller ("Comptroller"), pursuant to section 75 of the Civil Service Law. Respondent Margaret Lattanzio is employed by petitioner as a claims specialist and has worked for the Office of the Comptroller for 16 years. The petition sets forth five charges alleging illegal and personal use of her office computer to access four documents relating to her personal injury claim against the City, in violation of Penal Law sections 156.10, 156.35, and 195.00 and provisions of the employee manual. Respondent denies the allegations.

The hearing was held before me on March 16, and April 13, 2004. Petitioner put on one witness, Michael Aaronson. Respondent put on two witnesses, Carolyn Askew and Peter Balasis; she did not testify on her own behalf.

Based upon the record of the proceeding, I find that respondent committed misconduct by viewing and printing her claims records without authorization, and I recommend a penalty of 30 days' suspension.

ANALYSIS

In this case, petitioner accuses respondent of committing acts that constitute the crimes of computer trespass (Penal Law § 156.10), criminal possession of computer related material (Penal Law § 156.35), and official misconduct (Penal Law § 195.00), and that violate disciplinary rules against the personal use of computer equipment and the conduct of personal business. Respondent did not testify on her behalf, according to her counsel, because of pending criminal charges involving the same conduct.[1]

Petitioner put on its case through the testimony of Michael Aaronson, chief of the Comptroller's Bureau of Law and Adjustment, which investigates and adjusts claims made for and against the City of New York (Tr. 9-12). Respondent works in the Bureau as a claims specialist investigating personal injury claims. To support the processing of these claims, the Bureau maintains an image and workflow system called OAISIS, the Omnibus Automated Image Storage Information System. OAISIS contains digitized images of all documents received by the Bureau in connection with City claims. Once a document is imaged into the system, it cannot be altered. OAISIS is a file system with a backup database; it routes all files to users throughout the City. More than 200 users in the Comptroller's Office and in the Law Department have access to OAISIS.

Gaining access to OAISIS is a relatively simple process and occurs by logging onto the network and then logging onto the OAISIS application, each of which is password protected (Tr. 12-14). Each user has a unique user id and password. A warning screen pops up after logging onto the network; it states as follows:

> WARNING! This computer system, including all related equipment, is the property of the NYC Office of the Comptroller, and is solely for uses authorized by NYC Office of the Comptroller. You have no right to privacy on the system, and all information and activity on the

[1] After the close of the administrative hearing, the criminal charges were dismissed. *See* letter of Antonia Kousoulas, Esq., dated August 24, 2004.

> system may be monitored. Any unauthorized use of the system may result in disciplinary action, civil or criminal penalties. Your use of the system constitutes express consent to the above terms and conditions.

(Pet. Ex. A).

OAISIS has no mechanism that distinguishes those users who are authorized to access a particular document or claim and those who are not (Tr. 80-81). As a result, the 200 users have access to lots of claims information that they are not authorized to access. Though not all 200 users have access to all images in OAISIS (for example, there are limitations on access to confidential information such as the 50H hearing abstract), Mr. Aaronson estimated that 85% of them do have unobstructed access.

On or about September 25, 2003, respondent filed a claim against the City, alleging a slip-and-fall personal injury (Tr. 15). Mr. Aaronson learned about the claim from respondent's supervisor, Maria Giordano, shortly after it was filed. On December 23, 2003, Mr. Aaronson wrote an end user report which he used to see if respondent had obtained access to her own OAISIS file (Pet. Ex. B). He said he had never spoken to or counseled respondent about the propriety of accessing this information (Tr. 36). When he discovered she had, he sent a memo to the Deputy Comptroller for Claims and Adjudications expressing concern about her conduct and suggesting that it constituted misconduct (Tr. 37-39). He never discussed with the Deputy Comptroller, or other managers, the possibility of counseling or warning respondent about accessing her file. Respondent's access to OAISIS was revoked in early January 2004 (Tr. 69).

The "crystal" reports that Mr. Aaronson ran (Pet. Exs. C1, C2, C3 & D) indicated that respondent had obtained access to her file several times on five different days, as set forth in Chart I, below:

C H A R T I

Date	*# times/day*	*Document accessed*	*Type of access*
10/27/03	5x	notice of claim	viewed (2x) and printed (3x)
11/18/03	6x	notice of claim adjournment of the 50H hearing notice of 50H hearing	viewed (1x) and printed (2x) viewed (1x) viewed (2x)

12/10/03	7x	adjournment of the 50H hearing 50H hearing abstract	viewed (1x) viewed (5x) and printed (1x)
12/11/03	3x	50H hearing abstract	viewed (3x)
1/5/04	2x	adjournment of the 50H hearing 50H hearing abstract	viewed (1x) viewed (1x)

Attendance records confirm that respondent was present at work on those dates (Pet. Exs. F1- F4).[2]

The notice of claim is a document prepared by the claimant's attorney, signed by the claimant (Ms. Lattanzio), and filed in court; it gives the City notice of the claimant's personal injury claim against the City (Tr. 41-42; Pet. Ex. E1). The 50H hearing, held on November 19, 2003, is an oral examination taken in accordance with section 50H of the General Municipal Law. The notice of the 50H hearing and notice of the hearing's adjournment were sent to Ms. Lattanzio's attorneys by the City (Pet. Exs. E2 & E3). The 50H hearing abstract is a two-page summary of the examination prepared by the City's attorneys, which contains their assessment of the case and the claimant as a witness and the proposed strategy – all of which is intended to be confidential information (Tr. 31; Pet. Ex. E4). In this case, the abstract stated that the attorneys believed respondent was exaggerating her injuries and recommended she be placed under surveillance (Tr. 32).

Mr. Aaronson admitted that several other employees obtained access to Ms. Lattanzio's files with no apparent authorization or business purpose (Tr. 46-70).[3] Other City employees who accessed Ms. Lattanzio's files are listed chronologically in Chart II, below:

C H A R T II			
Date	*Employee*	*Authorization*	*Type of access*
10/9/03	Robert Howell	authorized	notice of claim - viewed and printed
	Maria Giordano	authorized	notice of claim - viewed

[2]Records indicate that respondent signed out at 4:30 p.m. on December 10th but accessed her file after that time. Respondent contends that someone else could have accessed her records from a computer where she had worked and failed to log out completely (Pet. Exs. C3 & F3; Tr. 40). Petitioner disputes the likelihood of such an occurrence (Tr. 77).

[3]Mr. Aaronson's testimony indicated that he equated "authorization" with having a business reason to access the information (Tr. 53-54).

10/10/03	Alvarado	authorized	notice of claim - viewed and printed
	Mullin (Law Dept)	unknown	notice of claim - viewed
10/15/03	Garret (Law Dept)	unknown	notice of claim - viewed
10/17/03 10/20/03	Mullin (Law Dept)	unknown	notice of claim - viewed
10/23/03	Kuehl, school division	not authorized	notice of claim - viewed
	Balasis, sidewalk unit	not authorized	notice of claim - viewed
	Briskin, sidewalk team	not authorized	notice of claim - viewed
10/28/03	Nesmith, general counsel's office	not authorized	notice of claim - viewed and printed
10/31/03	Lues, settlement rep	not authorized	notice of claim - viewed
11/6/03	Drury, motor vehicle team	not authorized	notice of claim - viewed adjournment of 50H hearing - viewed
11/13/03	Howell	authorized	notice of claim - viewed notice of hearing - viewed
11/14/03	Thomas/Wickers, property damage division	not authorized	notice of claim - viewed notice of hearing - viewed
11/20/03	Newcomb	authorized	notice of claim - viewed
11/25/03	Balasis	not authorized	notice of claim - viewed and printed notice of hearing - viewed
11/26/03	Rivera, school settlement team	not authorized	notice of claim - viewed notice of hearing - viewed
11/28/03	Baptiste, clerical	not authorized	notice of claim - viewed and printed adjournment of 50H hearing - viewed notice of hearing - viewed
12/5/03	Howell	authorized	50H hearing abstract - viewed
12/9/03	Howell	authorized	50H hearing abstract - viewed
12/11/03	Mohan, school settlement team	not authorized	50H hearing abstract - viewed
	Balasis	not authorized	50H hearing abstract - viewed and printed
12/12/03	Dalton, motor vehicle team	not authorized	50H hearing abstract - viewed

12/16/03	Drury	not authorized	50H hearing abstract - viewed
12/23/03	Courtney	authorized	notice of claim - viewed 50H hearing abstract - viewed
	Giordano	authorized	notice of claim - viewed and printed
12/24/03	Aaronson	authorized	notice of claim - viewed and printed notice of hearing - viewed 50H hearing abstract - viewed and printed
12/26/03	Newcomb	authorized	notice of claim - viewed and printed
1/21/04	Askew, clerical	not authorized	50H hearing abstract - viewed and printed
1/22/04	Frisz	authorized	unknown - viewed

Mr. Aaronson said that respondent's supervisor, Maria Giordano, the supervisor of the personal injury group, Robert Howell, two employees involved in scheduling the 50H hearing and physical examination, Mary Ellen Courtney and Nancy Newcomb, and Belinda Alvarado all had authorization to access Ms. Lattanzio's file (Tr. 44-47). Mr. Howell initially called Mr. Aaronson's attention to the fact that an employee had a claim filed on the system. Mr. Aaronson said that, because of her status as an employee, Ms. Lattanzio's claim had not been assigned to a claims specialist in the office, and no decision had been made about who would be appropriate to handle it. After reviewing the records of access to respondent's claim files, Mr. Aaronson spoke with all of the employees who had accessed them (Tr. 50). None of those who were not authorized to access Ms. Lattanzio's records were charged with misconduct (Tr. 64-65).

Even though the 50H abstract indicated that Mr. Howell was a potential witness to Ms. Lattanzio's claim, Mr. Aaronson never spoke with Mr. Howell about this possibility, and his authorization to review Ms. Lattanzio's files was never abridged because of it (Tr. 51-52). Mr. Aaronson said he did not think about whether it was improper for Mr. Howell to continue to access respondent's files after he was designated a potential witness.

Carolyn Askew is a clerical associate in the contracts unit; she is authorized to use OAISIS (Tr. 92-95). She testified that she became aware of respondent's claim against the City when she was told to reschedule her 50H hearing. In her 32 years at the Comptroller's office, she was never instructed when to use OAISIS and when not to use it. She said she was just curious when she

accessed Ms. Lattanzio's 50H hearing abstract in January 2004. She viewed the abstract but said she did not print it (though the documentary evidence indicated she did). She admitted printing the notice of claim and said she put it in recycling afterward. She first said she was not aware of any conversations in the office about Ms. Lattanzio's claim; but then she admitted that she was prompted to look at the abstract because there was "some talk in the hallway" and she "was just curious." She said Mr. Aaronson asked her why she looked at the records and told her not to do so in the future. She was not reprimanded for her conduct.

Peter Balasis is a claims manager in the sidewalk unit (Tr. 97-98). He was familiar with the computer screen warning against prohibited use of computer equipment but could not explain what it meant. Though he was aware there was some prohibition about what could be viewed, it was not clear what was prohibited information. He admitted that he printed respondent's 50H hearing abstract out of curiosity (Tr. 99-100). He learned about Ms. Lattanzio's claim from one or two of the secretaries. He also discussed the claim with several managers – Barbaro, Briskin, Kuehl, and Rivera – who also had learned of it from a secretary. He looked up the claim after hearing about it through this manner. He said he reviewed Ms. Lattanzio's files to determine whether there was liability, but he admitted he was not authorized to handle her claim (Tr. 102). He admitted printing Ms. Lattanzio's abstract and showing it to another manager, David Barbaro (Tr. 103-04). The two of them wanted to find out Ms. Lattanzio's date of birth, because she refused to tell them her age. He said Mr. Aaronson spoke to him five or six weeks before his testimony and told him he should not have printed the records. He was never reprimanded or charged for his conduct.

Respondent did not testify at the hearing. Her counsel asserted that she chose not to because of the pending criminal charges related to the charged conduct. Though of no evidentiary value, respondent's attorney offered a theory for her client's conduct. She contended that respondent was motivated by an awareness that her co-workers were reading these documents and gossiping about them, and she wanted to know what they were reading. This was corroborated, in part, by the testimony of Peter Balasis who admitted hearing secretaries talk about the claim and admitted discussing the claim with other managers – their curiosity so unchecked that it extended to reading the documents simply to find out respondent's age. Respondent argues that her actions were no different from those of her co-workers, and that petitioner failed to prove that she intended to benefit

from her actions. Since respondent did not testify, however, there is no evidence of an alternative motive.

The records demonstrate that, before respondent first viewed her file on October 27, 2003, three claims managers – Keuhl, Balasis and Briskin – had already accessed it without a business reason for doing so. She next accessed her records the day before her 50H hearing, on November 18th. By that time, four more unauthorized co-workers had reviewed her files. Respondent was the first unauthorized user to view the abstract of her 50H hearing written by the City's attorneys. The abstract has a fax date of November 20, 2003, indicating its receipt by the Comptroller's office. Robert Howell was the first to view the abstract, on December 5th; respondent first viewed and printed it on December 10th. Respondent viewed it again on December 11th. So did two of her unauthorized co-workers, one of whom – Mr. Balasis – also printed the abstract. After that date, three more unauthorized co-workers accessed the abstract, and one of them printed it. In all, there were 15 instances of unauthorized access to Ms. Lattanzio's records made by 12 of her co-workers.

I. Using Office and Computer Equipment for Personal Purposes

Charge IV alleges that respondent violated sections III (A)(8) and III (I)(1) of the employee manual. Section III (A)(8) prohibits use of office and computer equipment for personal purposes. Section III (I)(1) states that "office equipment assigned to you . . . is for work related activities **only**" and warns that "inappropriate or unauthorized" use is subject to disciplinary action (original emphasis).

It is undisputed that respondent had no business purpose for accessing her OAISIS file. As a claims specialist, respondent had virtually unlimited access to OAISIS (Tr. 13). She was not authorized, however, to access or to work on her own claim against the City, and petitioner's warning notice supplied respondent with sufficient notice that she was not authorized to make personal use of the computer. *See* Pet. Ex. A; *see also Dep't of Correction v. Battle*, OATH Index No. 1052/02, at 52 (Nov. 12, 2002) (use of Department's computers to obtain inmate's bail and charge information so that she could pay his bail constituted misdemeanor crime of "unauthorized use of a computer," because it was a personal use rather than a legitimate business use of the computer). Because of the obvious conflict that it established, it would have been unreasonable for

respondent to have believed that such access was appropriate. Her review of her own files, done on several different occasions, had to have been intentional. I find the evidence sufficient to sustain charge IV.

I also find that respondent intended to benefit from reading the abstract.[4] *See Dep't of Correction v. McFarland*, OATH Index No. 650/92 (Aug. 24, 1992), *aff'd sub. nom. McFarland v. Abate*, 203 A.D.2d 190, 611 N.Y.S.2d 153 (1st Dep't 1994) (evidence was sufficient to infer that respondent hoped to reap substantial financial gain from gambling activities conducted with inmate, thus establishing proof of official misconduct under Penal Law § 195.00). Because of respondent's 16 years of experience processing claims against the City, it is reasonable to infer that she knew that the City's attorneys would prepare a 50H hearing abstract evaluating her claim, that the information in the abstract would be of value to her in the conduct of her case, and that it would be available to her on OAISIS. Also, respondent read the abstract several times and printed it. These facts support the inference that she understood the potential benefit to her and that she intended to benefit from it. As a result of reading the abstract, respondent learned that the City's lawyers were suspect of her claim and wanted to put her under surveillance – information very likely to be of benefit to her. *See* Penal Law § 10.00 (17); *People v. Heckt*, 62 Misc. 2d 287, 306 N.Y.S.2d 320 (Eric Co. Ct. 1969) ("benefit" is broadly defined as "any gain or advantage" to the beneficiary and need not encompass actual financial gain). This aspect of her conduct makes it more serious.

Petitioner charges that respondent violated the prohibition against personal use by both viewing and printing her records as set forth in Chart I, above, which I find is true. It is true of all four documents. I also find that petitioner demonstrated that respondent had an intent to benefit from accessing the abstract, but not the notice of claim, adjournment letter, or notice of hearing. Since none of the documents were accessed for work related activity, her access was unauthorized. There is a qualitative difference, however, between viewing the notice of claim or other records already in her possession, and viewing the abstract, which she would not otherwise have had access to. This difference will be addressed in the context of the penalty recommendation, below.

---

[4] Although an "intent to benefit" is not necessary to prove improper personal use of her work computer, it is alleged by petitioner in charge III which charges respondent with the misdemeanor crime of official misconduct (Penal Law § 195.00). I have incorporated the discussion of this element here, since I find sufficient cause to dismiss charge III *(see* discussion *infra*.), and a discussion of respondent's intent is relevant to the personal use alleged in charge IV.

The difference is not dependent upon petitioner's contention that the abstract is protected by the attorney-client privilege, however. The abstract, prepared by petitioner's attorneys, was likely protected by the work product privilege. *See* CPLR 3101 [c]; *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385 (1947) (a memorandum prepared in anticipation of litigation which reflects an attorney's opinion, analysis, theory or strategy is protected from disclosure under the work product privilege). Petitioner's contention that it was a privileged document at the time that respondent read it, however, was unproven on this record since the privilege appears to have been waived by petitioner's publication of the document on OAISIS, which essentially disclosed the document to Ms. Lattanzio (the adversary in the litigation), and to 200 other city employees, the overwhelming majority of whom had no business reason for viewing it. *See In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) (voluntary, though inadvertent, disclosure of privileged document to adversary constitutes waiver of the privilege). It has been held that "the confidentiality of communications covered by the privilege must be jealously guarded by the holder of the privilege lest it be waived. The courts will grant no greater protection to those who assert the privilege than their own precautions warrant." *In re Sealed Case*, 877 F.2d at 980. Here, it is petitioner's own procedures that caused the disclosure, thereby likely creating a waiver. *See Eigenheim Bank v. Halpern*, 598 F. Supp. 988, 991 (S.D.N.Y. 1984) (attorney-client privilege waived by production of document to adversary caused by procedures that were "'lax, careless, inadequate and indifferent to consequences'"). Respondent's supervisors knew she had filed the claim shortly after it happened, yet acknowledged that the office did nothing to prevent her from accessing the abstract (Tr. 64). Thus, I find that, although the degree of respondent's intrusion is greater with respect to the abstract, it is not so because of any privilege.

II. Conducting Personal Business in the Office

Charge V alleges that respondent violated sections III (A)(2) and IV (D) of the employee manual. These sections prohibit the conduct of "<u>any</u> personal business in the office" (original emphasis). It further warns that employees "may not enter into any business or financial relationship with another public servant" who is either a superior or subordinate, and may not enter into any such relationship with a fellow employee during office hours. The referenced disciplinary provisions are broadly stated and appear to refer to the conduct of business. I did not find that respondent's

conduct, though personally-motivated, violated these provisions in any manner different from the provisions set forth in charge IV. I, therefore, recommend that charge V be dismissed.

III. Computer crimes alleged in Charges I, II, and III

Charges I, II, and III allege that respondent committed the following crimes under the New York Penal Law: computer trespass (§ 156.10), criminal possession of computer related material (§ 156.35), and official misconduct (§ 195.00). Although this tribunal is authorized to conduct disciplinary proceedings under section 75 of the Civil Service Law to determine whether there is sufficient evidence of misconduct, it does not have jurisdiction to decide whether the Penal Law has been violated. *Dep't of Housing Preservation and Development v. Lawhorne*, OATH Index No. 420/87 (June 22, 1988) (noting that the New York Supreme Court has exclusive jurisdiction over felony proceedings under New York State Constitution Art. 6, § 6, and the New York City Criminal Court has exclusive jurisdiction over misdemeanors according to the New York City Criminal Court Act, § 31); *Dep't of Environmental Protection v. Yehounatan*, OATH Index No. 413/84 (Feb. 7, 1985); *Dep't of General Services v. Englander*, OATH Index No. 242/84 (July 12, 1984). In *Dep't of General Services v. Englander*, the ALJ opined that making a finding regarding the violation of criminal statutes "would constitute an advisory opinion, which is repugnant to fundamental concepts of judicial dispute resolution." *Id.*

This tribunal may only determine whether acts which might constitute a crime as determined by a court of appropriate jurisdiction constitute misconduct for which an employee may be disciplined. *See Bd. of Educ. v. Forde*, OATH Index No. 491/95 (Mar. 29, 1995) (having determined that respondent committed misconduct by forcing open his supervisor's office door, there was no need to determine whether such conduct also constituted a crime); *Dep't of Housing Preservation and Development v. Lawhorne*, OATH 420/87 (finding that respondent committed misconduct and dismissing charge that alleged the same conduct constituted a crime); *Dep't of Environmental Protection v. Yehounatan*, OATH 413/84 (petitioner withdrew duplicative charges that alleged that disciplinable conduct also constituted crimes); *Dep't of General Services v. Englander*, OATH 242/84 (finding that respondent committed misconduct and dismissing charges that alleged the same

conduct constituted crimes, without prejudice to reassert if respondent was found guilty in a criminal court).

With few exceptions, cases adjudicated in this tribunal that involve the review of criminal statutory provisions have done so to determine whether the crimes exception to the 18-month statute of limitations set forth in section 75(4) of the Civil Service Law has been satisfied,[5] or when the commission of a crime constitutes off-duty misconduct.[6] In a few cases, the fact that the alleged conduct also constitutes a crime has triggered the violation of a disciplinary provision. *See, e.g., Human Resources Admin. v. Castro-Sanabria*, OATH Index No. 888/96 (Apr. 11, 1996) (proof that respondent committed larceny was proof of misconduct under HRA Executive Order 618 which prohibited criminal conduct); *Bd. of Educ. v. Osoba*, OATH Index No. 237/92 (Feb. 28, 1992) (petitioner asserted that conduct, which included stealing highly personal data relating to co-workers in order to further a long-running scheme of theft and fraud, violated misconduct rules and criminal statutes); *Dep't of General Services v. Williams*, OATH Index No. 399/91 (Dec. 28, 1990) (respondent guilty of misconduct for violating laws against driving with a suspended license and unauthorized operation of a vehicle where Departmental rules prohibited disobeying any law and disreputable conduct).[7]

---

[5] *See Dep't of Correction v. Battle*, OATH Index No. 1052/02 (Nov. 12, 2002); *Dep't of Correction v. Price*, OATH Index Nos. 363/00 & 1399/00 (Apr. 17, 2001), *aff'd in part*, *rev'd in part*, Comm'r Decision (June 26, 2001); *Dep't of Correction v. Nee*, OATH Index No. 1226/97 (May 14, 1997); *Dep't of Correction v. Wells*, OATH Index No. 1421/96 (Dec. 5, 1996); *Dep't of Correction v. Saunders*, OATH Index No. 1694/96 (Aug. 1, 1996); *Dep't of Correction v. Thompson*, OATH Index No. 1412/96 (July 18, 1996); *Transit Auth. v. Daly*, OATH Index No. 947/95 (Nov. 2, 1995); *Dep't of Correction v. McFarland*, OATH Index No. 650/92 (Aug. 24, 1992), *aff'd sub. nom. McFarland v. Abate*, 203 A.D.2d 190, 611 N.Y.S.2d 153 (1st Dep't 1994).

[6] *See Dep't of Correction v. Jones*, OATH Index No. 393/04 (May 3, 2004) (dietary aide charged with off-duty misconduct for extorting a co-worker); *Human Resources Admin. v. Beauford*, OATH Index No. 1517/03, at 4 n.1 (Dec. 5, 2003) (custodian charged with off-duty misconduct for possession of a controlled substance); *Dep't of Transportation v. Woods*, OATH Index No. 266/89 (Sept. 22, 1989), *aff'd*, N.Y. Civ. Serv. Comm'n Item No. CD 92-33 (Apr. 6, 1992) (off-duty misconduct established by guilty plea to attempted manslaughter); *Dep't of Correction v. Breland*, OATH Index No. 128/85 (May 14, 1985) (respondent's off-duty shoplifting was disciplinable misconduct).

[7] It may be noted that petitioner failed to prove elements of both computer trespass (Penal Law § 156.10) and criminal possession of computer-related material (Penal Law § 156.35). As to the former, there was no proof that any of the documents constituted "computer material" inasmuch as none were "otherwise prohibited by law from being disclosed." As to the latter, petitioner did not prove that respondent intentionally and wrongfully appropriated "an economic value or benefit in excess of $2,500," or had an intent to commit or attempted to commit a felony.

In this case, petitioner's first three charges allege violation of the Penal Law, but no violation of disciplinary rules. Having found that Ms. Lattanzio's conduct constituted misconduct, as alleged in charge IV, there is no reason for this tribunal to make a finding as to whether her acts also may have constituted crimes. Therefore, charges I, II, and III should be dismissed.

FINDINGS AND CONCLUSIONS

1. Respondent violated Comptroller rules against personal use of her office computer by viewing and printing from the office database an abstract prepared by the City's attorneys, and by viewing and/or printing three other documents that respondent already had possession of.

2. Petitioner did not prove that respondent violated rules against conducting personal business in the office.

3. Charges alleging that respondent committed various crimes by her misconduct were dismissed on jurisdictional grounds.

THEREFORE:

I find that petitioner proved misconduct as set forth above.

RECOMMENDATION

Upon making the above findings and conclusions, I obtained an abstract of respondent's personnel record. Ms. Lattanzio was appointed to a position in the Comptroller's Office on October 10, 1989, after having already served 11 years in City employment. Ms. Lattanzio has never been the subject of disciplinary action during her 16-year career at the Comptroller's Office. Petitioner seeks to terminate respondent's employment for the misconduct proven here.

The misconduct that respondent engaged in, obtaining the attorneys' abstract, is at its root an abuse of her official position – use of her official position to gain advantage. As to the other three notices she accessed, though unauthorized, there was no demonstrable benefit to be gleaned from them. Because she intended to benefit from her access to the abstract, her conduct is more serious

than more routine examples of personal use of a work computer. This aspect of respondent's conduct demonstrated a lack of integrity in her professional responsibilities that cannot be tolerated.

The facts of this case are somewhat unique, however. While the typical abuse of authority case results in termination and involves bribery or kickbacks, theft or tangible financial gain to the perpetrator, or the deprivation of rights to another, *see, e.g., People v. Feerick*, 93 N.Y.2d 433, 448, 692 N.Y.S.2d 638, 645 (1999) (police officers intentionally violated the rights of individuals in order to retrieve stolen police radio); *Dep't of Correction v. McFarland*, OATH 650/92 (respondent stood to reap substantial financial gain from participating in illegal gambling activity with an inmate who he failed to report); *Bd. of Educ. v. Osoba*, OATH 237/92 (misconduct involved theft of sensitive data relating to co-workers in order to further a long-running scheme of theft and fraud), the potential financial payoff to respondent or loss to the office is unclear. Respondent's conduct is most disconcerting because of its potential for abuse, rather than for any particular result effectuated in this instance. Contrary to the contention of petitioner's advocate, this case does not contain evidence of the kind of deceit typical of abuse of authority cases as there was no evidence that Ms. Lattanzio tried to hide what she was doing; petitioner never questioned her to determine whether she would admit her conduct.

Also in respondent's favor is her unblemished 16-year record prior to this instance, which portrays an ability to comport herself in accordance with agency rules. I therefore viewed her misconduct as an aberration. I also considered her breach in the context of an office climate that provided no clear instruction about the confidentiality that these records should be accorded, that maintained minimal controls over access to them, and that tolerated certain breaches to the integrity of the system. That is, although 12 other employees who viewed the documents were "unauthorized" to do so, none of them were charged with unauthorized use (a charge that would not require proof of an intent to benefit). Presumably, petitioner has revised its system to bar employees from accessing documents involved in their own claims against the City, in which case the conduct proven here is unlikely to be repeated. Moreover, because her breach involved her own claim, respondent's misconduct does not logically pose a threat to the claims of others.

According due consideration to all of the aforementioned, I found no justification for terminating respondent's employment. I recommend a penalty of 30 days' suspension (with credit for time served during the pre-hearing suspension), which I believe is sufficient to penalize respondent for her misconduct.

TYNIA D. RICHARD
Administrative Law Judge

October 13, 2004

SUBMITTED TO:

WILLIAM C. THOMPSON, JR.
Comptroller

APPEARANCES:

ALLEN FITZER, ESQ.
Attorney for Petitioner

ANTONIA KOUSOULAS, ESQ.
Attorney for Respondent