

Dep't of Consumer Affairs v. Yampolsky

OATH Index No. 2269/10 (Aug. 12, 2010)

Respondent charged with incompetence and misconduct for improperly or inefficiently performing her duties on 14 occasions over a 14 month period. Termination recommended.

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

In the Matter of
DEPARTMENT OF CONSUMER AFFAIRS
Petitioner
- against -
TSILIYA YAMPOLSKY
Respondent

REPORT AND RECOMMENDATION

KARA J. MILLER, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, the Department of Consumer Affairs, pursuant to section 75 of the Civil Service Law. The charges allege that respondent Tsiliya Yampolsky, a clerical associate III, improperly, inefficiently, negligently or carelessly performed her duties on 14 occasions between October 8, 2008 and December 11, 2009. Respondent is further charged with neglecting her duties and displaying incompetence on the same 14 occasions. In addition, respondent is charged with violating the Department's time and leave policy on one occasion (ALJ. Ex. 1). At the commencement of the hearing, petitioner's motion to withdraw charge 4, specification 1 alleging that respondent failed to report for a meeting was granted.

Prior to the hearing, respondent's counsel requested that a Russian translator be present to assist his client. On the first day of hearing, respondent indicated that she understood and spoke English fluently but preferred to have the translator present in case she had a comprehension issue. The translator was excused after the lunch break because it was clear that his services were not needed. Instead, respondent was informed that the court room was equipped with a

speaker phone which could be connected to Language Line, a translation service routinely used in cases with non-English speaking parties. Respondent was told that if she were confused or needed some clarification the telephone translation service could provide a Russian translator to assist her. Respondent continued the hearing in English and did not avail herself of Language Line's translation services despite multiple offers throughout the hearing to activate the translation service.

Following a two-day hearing, I find respondent guilty of 13 instances of incompetence and one instance of misconduct. For the reasons stated below, I recommend that respondent be terminated from her position with the Department.

ANALYSIS

Respondent was hired by the Department as a timekeeper off of a civil service list in 2005, and has worked as a timekeeper in the human resources division for the past five years. She was previously employed as a timekeeper by the Department of Health and Mental Hygiene. In October 2007, the Department implemented CityTime, a web based timekeeping system (Tr. 19-20, 239). Respondent received training in the use of the CityTime system during the transition and attended update training periodically at the CityTime facility (Pet. Exs. 3, 4, 5, 6, 7; Tr. 26, 28-30, 253, 257, 325-28).

CityTime support staff stayed at Department offices for approximately four months during the initial introduction of the system, working with respondent to assist her with any problems or issues that arose. Respondent subsequently attended CityTime meetings once a month where updates on the system were explained and users had an opportunity to ask questions about any issues they encountered. In addition, CityTime has a help desk which provides answers to technical questions about the system. Another tool available to respondent is the online help button that is built into the CityTime home page which allows a user to click on the button and receive "how to" information (Pet. Ex. 13; Tr. 30-34, 46-48, 325-27).

There have been periodic problems with CityTime, not just with the Department, but citywide. The system is frequently being upgraded. In addition, there have been times when it has trouble interfacing with the Payroll Management System ("PMS") within a 24-hour period. There have also been a number of cosmetic changes made to the system. Although the CityTime

system had been upgraded and modified over the course of time, respondent has received all of the updates about any changes or problems, as well as additional training when necessary (Tr. 244, 313, 325-27, 358, 399).

Prior to the implementation of CityTime, respondent, as the sole timekeeper for the agency, was responsible for reviewing 300 timesheets. She would spend approximately 75% of her time manually inputting the data from the employee timesheets into PMS after it was initially reviewed and approved by the individual employee's supervisor. PMS does the actual calculation of each employee's paycheck. CityTime eliminates the need for respondent to manually enter the information into PMS. Instead, CityTime feeds the time and leave information directly into PMS, so that the paychecks can be generated. CityTime has all the leave rules and regulations by union and title already built into the system. If an employee does something that is inconsistent with their contract the system will alert them with an error message. Respondent was secondarily responsible for catching any errors the employees may make in filling out their timesheet whenever the employees' supervisors did not catch the mistake themselves (Tr. 19-21, 25-26, 78, 239-40, 358).

After the implementation of CityTime, employees were responsible for directly inputting their time into a computerized timesheet in the CityTime system. Respondent, as the timekeeper, was responsible for reviewing the data entered by the employees to ensure that it was done correctly, to answer routine questions related to CityTime, and to continue to track and process employee leave. If there were mistakes, she was responsible for making the corrections (Tr. 22, 242, 313).

Respondent's supervisors believed that she was having problems communicating with her co-workers and understanding the CityTime system despite receiving training and instructions. They concluded that she was making a lot of mistakes because she was not following simple instructions. On August 8, 2007, Russell DeVito, the Deputy Director of Human Resources and respondent's immediate supervisor, sent a memo informing her that the Department would be enrolling her in two courses to help her communicate better and improve her performance – Managing Multiple Priorities and Successful Workplace Communication. Additionally, Mr. DeVito conducted biweekly meetings with respondent and one of her co-workers, Manuel

Menjivar, the payroll officer, regarding timekeeping and payroll issues that needed to be addressed for the upcoming pay date (Pet. Exs. 8, 9; Tr. 36-40, 287, 396-97).

In order to make sure there was no confusion and that respondent had a reference guide, Mr. DeVito sent a memo to respondent with delineated instructions to follow during pay day week and “pay calc” week. Department employees are paid biweekly on every other Friday. “Pay calc” is the Friday before the pay date. All transactions for the upcoming pay date must be implemented and finalized for them to appear on the upcoming paycheck. The instructions provided detailed tasks to complete on a day by day basis to ensure that respondent’s workflow was consistent and accurate. Respondent was also provided with the citywide time and leave manual and a list of time and leave codes (Pet. Exs. 10, 14; Tr. 16-17, 41-44, 280, 291, 329, 397).

The Department charges respondent with incompetence and misconduct attributed to the improper, inefficient, negligent or careless manner in which she performed her duties. All of the charges occurred after CityTime was implemented and will be discussed chronologically by month.

October 8, 2008

Respondent was charged with disobeying her supervisor’s instructions not to send e-mail reminders to Department employees to complete their timesheets (ALJ Ex. 1). On October 1, 2008, the Department implemented a policy change regarding e-mail reminders from timekeeping. Previously, respondent would send e-mail reminders to every employee who failed to submit or complete their timesheets, made errors on their timesheet, and for any other timesheet related issue that arose. It was a very time consuming process. The new policy was intended to simplify the process by limiting the number of e-mails sent out by timekeeping. Respondent was directed to send e-mails only to those employees who had errors on their timesheets, preventing supervisors from giving final approval. Mr. DeVito informed respondent about the policy on October 1, 2008, and re-iterated the policy at the next biweekly meeting with respondent, Mr. Menjivar, and Dorlene Cotton, the Director of Human Resources, on October 8 (Pet. Ex. 16; Tr. 49-50, 54-55, 245-49, 260-61, 331-32).

Respondent still sent out e-mail reminders to several employees who failed to submit their timesheets, late in the day on October 8 despite being reminded about the new e-mail policy less than four hours earlier. Mr. DeVito testified that the rationale behind limiting the number of e-mails to be sent out by timekeeping was to reduce the amount of wasted time. Respondent ended up working one and half hours of overtime on October 8 to send out e-mails that the Department deemed unnecessary and a waste of time. On October 10, 2010, Mr. DeVito gave respondent a written warning about her failure to follow directions and an assessment that she is not performing her job in a competent manner (Pet. Exs. 16, 17, 18, 19; Tr. 55-61, 245-49, 260-61, 332).

Respondent denied committing misconduct but admitted that she sent e-mail reminders out to employees who had not yet submitted their timesheets. Respondent acknowledged that Mr. DeVito had told her not to send these e-mails out, but she did so anyway. She testified that she thought it was necessary because she has a lot of work to do. She is the only timekeeper and the agency has 300 employees. When she is out sick or takes a day off, no one helps her to get the work done. She is still responsible for meeting deadlines so that the employees get paid. With respect to this incident, respondent intended on taking Thursday, October 9, 2008, off from work. On Wednesday, October 8, 2008, she noticed that there were around 60 employees whose timesheets were still in draft status and had not been finalized. Respondent knew that Friday, October 10, 2008, was pay calc and that the timesheets needed to be submitted and finalized. Thinking that she would not have enough time to complete her work on Friday and wanting to make sure that everyone was paid properly, she sent out e-mails to employees who had not yet submitted their timesheets. Respondent testified that if she did this on Wednesday then she would have less to deal with on Friday (Tr. 419-20, 423-24, 426-27, 491-92, 494).

Despite her contention that she did not commit misconduct, respondent is guilty of this charge. It is undisputed that she was given a directive from her supervisor and she did not comply with it. It is well settled that once a directive has been given, an employee must abide by the principle of "obey now, grieve later." An employee is required to obey the order when it is given and subsequently challenge it through formal grievance procedures if there are any substantive or procedural objections. *See Ferreri v. New York State Thruway Auth.*, 62 N.Y.2d 855, 856 (1984); *Strokes v. City of Albany*, 101 A.D.2d 944, 945 (3d Dep't 1984); *Dep't of*

Correction v. Shabazz, OATH Index No. 111/03 at 6 (Aug. 21, 2003); *Health & Hospitals Corp. (Kings County Hospital Center) v. Gordon*, OATH Index No. 1843/98 at 7 (Nov. 2, 1998). Respondent should have complied with her supervisor's directives. Accordingly, I find her guilty of disobeying her supervisor's instructions not to send e-mail reminders to Department employees to complete their timesheets.

December 2008

Respondent was charged with failing to promptly approve an employee's request for vested annual leave as instructed by her supervisors (ALJ Ex. 1). The Department requires employees to submit a request for annual leave or vacation time to their supervisor at least 72 hours in advance of the date requested. After the supervisor approves it the employee must submit the leave request through the CityTime system, and the supervisor will do a formal approval in the system (Tr. 61-62).

When an employee transitions from a non-managerial position to a managerial one, the non-managerial annual leave balance is converted to vested annual leave. A manager must exhaust his current annual leave balance before he can use vested annual leave. A request for vested annual leave requires approval from both the supervisor and the timekeeper. If a leave request is not approved promptly, then the timesheet can not be given final approval. If the final approval for the timesheet is not completed by the day of pay calc, the employee's check will not be processed and a "commissioner's check" will need to be issued. A commissioner's check is a paper check that will not be released to the employee until the employee's timesheet has a final approval (Tr. 62-64, 67).

Lance Willis, a manager at the Department, was out of the office on December 26, 2008. When he returned on December 29, 2008, Mr. Willis requested that his absence be covered by vested annual leave. His supervisor, Alba Pico, approved the leave the same day. Once the leave was approved by Ms. Pico, the system transferred the request into respondent's workflow for a second approval. Respondent, however, never approved the leave request. Respondent was at work on December 29 and 30, but was off on December 31, her birthday, and January 1, an official City holiday. Mr. DeVito testified that respondent should have approved the leave

request on December 29, after Ms. Pico approved it, or the latest the very next day (Pet. Exs. 20, 21; Tr. 67-69, 71-72).

Mr. DeVito ultimately approved this leave request on January 2, 2009. He explained that he approved the leave request because January 2, 2009, was pay calc, the last day that Mr. Willis' timesheet could be approved for the following pay date. If the leave was not approved by timekeeping, the supervisor would have been unable to give a final approval of Mr. Willis' timesheet. Ms. Pico, however, was not at work on January 2, the day Mr. DeVito provided a second approval of the leave. As a result, Ms. Pico did not approve Mr. Willis' timesheet until she returned to work on January 6, 2009, which was four days after pay calc, resulting in a commissioner's check having to be issued. Instead of receiving direct deposit, which Mr. Willis normally gets, he received a paper check that he had to deposit manually in the bank (Pet. Exs. 24, 25; Tr. 71-77, 81).

Respondent testified that she had the day off on December 31, 2009, for her birthday. She explained that she knows that as part of her workflow instructions it is her responsibility to approve leave requests in the morning. Mr. Willis' leave, however, was not approved by Ms. Pico until after 2:00 p.m. on December 29. Respondent testified that when she returned to the office on January 2, she saw that Mr. DeVito tried to assist her by giving the second approval on Mr. Willis's leave. Respondent testified that the problem was that Ms. Pico was out of the office on January 2, and was unable to approve Mr. Willis' timesheet until she returned on January 6. When asked why she did not approve Mr. Willis' leave on December 30, respondent replied that she was going to be out of the office the next day and decided to check for part-time employees who had not yet submitted their timesheets (Resp. Ex. A; Tr. 433-435, 495).

It is not entirely clear why respondent did not approve Mr. Willis' leave request on December 30, since she testified that she is responsible for approving leave requests each morning. It seems as though respondent was so fixated on minimizing her workload on Friday, pay calc, that she was more focused on timesheets that had not been submitted rather than following her workflow instructions. This was one of respondent's daily tasks and she provided no reasonable justification for not doing her job. Rather than blaming the situation on Ms. Pico for not approving Mr. Willis' timesheet until January 6, respondent should take responsibility for what occurred. If respondent had properly performed her job and approved the leave request on

December 29 or 30, Ms. Pico could have approved Mr. Willis' timesheet in a timely manner. Accordingly, I find respondent guilty of failing to promptly approve Mr. Willis' request for vested annual leave as instructed by her supervisors.

February 2009

Respondent was charged with failing to properly remove a leave request error, which resulted in additional timesheet errors and incorrect payments (ALJ Ex. 1). Respondent informed Mr. DeVito that there was a leave request for Hany Nasaralla that did not correspond with the timesheet that he had already submitted. Mr. Nasaralla's schedule had changed and the leave request did not connect with any of the dates that he was supposed to work. Mr. DeVito instructed respondent to correct the problem by overriding Mr. Nasaralla's schedule and deleting the leave request. Either he or respondent would have to enter a new leave request to replace it. Mr. DeVito testified that respondent attempted to make the corrections, but somehow caused a payroll error in the process, causing Mr. Nasaralla to be overpaid. Instead of being paid for ten days, he was paid for 11 days. He was double paid for the day that he had put in the leave request (Pet. Ex. 35; Tr. 113-115).

To remedy the problem, the Department had to issue a supplemental check in lieu of the regular check. Whenever an error is made on an employee's paycheck, the check is cancelled and a supplemental check is issued. Respondent had to make an Employee Time Report ("ETR") adjustment and document all of the changes before signing it. Mr. DeVito then had to give an approval before respondent could manually key the information into PMS and the supplemental check could be issued by the Office of Payroll Administration ("OPA"). As a result of respondent's mistake, Mr. Menjivar, the payroll officer, had to make an extra trip to OPA to pick up the supplemental check once it was ready and then distribute it to the employee (Tr. 115-17, 383).

Mr. DeVito was at a loss to explain exactly how respondent caused the payroll error because they were unable to track precisely what she had done. Respondent had revised the schedule and annual leave issue correctly, but made some additional adjustments on her own after she made the correction. Mr. DeVito testified that a number of transactions went through the system and that he and respondent are the only two with the ability to execute these

transactions. Mr. DeVito further testified that since he did not make any adjustments to Mr. Nasaralla's records, he concluded that respondent must have (Tr. 116-18; 125).

Respondent's adjustments to Mr. Nasarella's time records caused him to be overpaid in one check and then underpaid in the two subsequent paychecks. After Mr. DeVito realized that Mr. Nasaralla was being overpaid on the first check the Department issued a supplemental check to correct the error. Mr. DeVito decided to wait to see if the system would self-correct itself and instructed respondent to not make any adjustments. After discovering that Mr. Nasaralla's second check was an underpayment, Mr. DeVito realized that respondent had gone into the system and tried to fix the overpayment despite being told to leave it alone, resulting in the subsequent underpayments. As a result, Mr. Nasaralla received three supplemental checks in a row (Pet. Ex. 35; Tr. 125-30, 385).

If an error is made, the data will not interface properly with PMS. As the timekeeper, respondent has been instructed to check the daily report generated by PMS to find out if all of the transactions that were inputted into the system the day before were implemented properly. Respondent never reported that there was a problem with Mr. Nasaralla's data entries in PMS. Instead, the mistakes were caught by Mr. Menjivar, who brought it to respondent's attention. Respondent did not acknowledge the mistakes, but rather told Mr. Menjivar that there must be something wrong with the system, attributing it to a virus in the CityTime system. The adjustments, however, were not made in CityTime, but in PMS. Moreover, Mr. DeVito contacted some of the administrators at CityTime to determine whether a virus had infected their system and was told that there were no viruses or serious issues with CityTime servers during the time in question (Pet. Ex. 35; Tr. 125-30, 386).

Respondent testified that Mr. Nasaralla's supervisor contacted her because she wanted to change Mr. Nasaralla's schedule. Respondent explained that she had to delete all of the leave and overtime requests from Mr. Nasaralla's records so that the schedule could be changed. Afterwards, she would have to override the schedule to put all of the leave and overtime requests back in the system. After Mr. Nasaralla's schedule was changed, both his supervisor and he had trouble inputting the leave requests. CityTime kept giving them error messages and would not allow them to do it. Respondent went to their offices to see if she could fix the problem on their computers, but was unable to do so. She also attempted to correct it on her computer but was

unsuccessful. Respondent tried to issue Mr. Nasaralla a supplementary check, but that did not work either because certain “regional” information was missing. Respondent could not find Mr. Nasaralla’s original information in the system. She asked Mr. Nasaralla for it, but he could not remember it. It took three paychecks for her to find the original information (Tr. 450-51, 507-08).

According to respondent, Mr. Nasaralla also complained that he lost 30 minutes of his leave request after they straightened out the situation. Respondent requested a special report from PMS to see if all of Mr. Nasaralla’s transactions were processed. She filled out the request for the report three times but nothing happened. Then it printed out nine pages and stopped. Respondent testified that Mr. DeVito attempted to get the report as well but was unable to retrieve it. As a consequence a supplementary check was issued. Respondent subsequently contacted CityTime to discover what happened and was told that she would have to put her request in writing. Respondent testified that she did not have permission to do this, so she relayed the information to her supervisors (Resp. Ex. B; Tr. 452, 507-09).

Respondent’s account of what took place was somewhat disjointed and confusing. Moreover, it differs from that of Mr. DeVito and Mr. Menjivar. Mr. DeVito was a very credible witness. He testified for a day and a half. During that time, Mr. DeVito was very professional, consistent, and straightforward. He did not exaggerate his answers. Although Mr. DeVito’s frustration with respondent’s work product was rather evident, he did not appear to harbor any animus towards her. Furthermore, his testimony was corroborated by Mr. Menjivar who was also very credible. Respondent, on the other hand, tended to embellish her testimony and notwithstanding the language barrier, her testimony was confusing and non-responsive at times. As such, I credit Mr. DeVito’s and Mr. Menjivar’s version of events with respect to this incident.

The Department is relying on circumstantial evidence to establish that respondent committed misconduct. A finding of misconduct can be established in a disciplinary proceeding solely by circumstantial evidence. *Dep’t of Sanitation v. Guastafeste*, OATH Index No. 658/00 at 10 (May 1, 2000), *aff’d*, 282 A.D.2d 398 (1st Dep’t 2001). Circumstantial evidence is defined as “evidence of a collateral fact that is, of a fact other than a fact in issue, from which, either alone or with other collateral facts, the fact in issue may be inferred.” *Dep’t of Sanitation v. Ivy*, OATH Index No. 2376/00 at 17 (May 3, 2001), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 02-07-SA

(Mar. 22, 2002) (quoting *Dep't of Transportation v. Mascia*, OATH Index No. 403/85 at 8 (May 30, 1986)). However, in order to establish a fact in issue based on circumstantial evidence, “the fact upon which it is sought to base an inference must be shown and not left to rest in conjecture. If and when the fact is shown, it must then appear that the inference drawn is the only one that is fair and reasonable.” *Ridings v. Vaccarello*, 55 A.D.2d 650, 651 (2d Dep’t 1976).

The Department has met its burden of establishing that respondent was responsible for making the errors that caused Mr. Nasaralla to be overpaid once and underpaid twice. Mr. DeVito and respondent were the only two people who could have entered information into the system affecting Mr. Nasaralla’s time records. Mr. DeVito credibly testified that he did not make any changes to Mr. Nasaralla’s records while respondent admitted to trying to fix the problem in Mr. Nasaralla’s computer as well as her own. Despite an inability to track the exact changes that respondent had made to Mr. Nasaralla’s records, the only fair and reasonable inference to be drawn is that respondent incorrectly made an adjustment in the system that led to timesheet errors and incorrect payments.

It is also of some import that again respondent did not follow her supervisor’s instructions. Mr. DeVito instructed respondent not to make any adjustments to see if the system would self-correct, but respondent disregarded this directive and went into the system to make some adjustments. Accordingly, I find respondent guilty of failing to properly remove a leave request error, which resulted in additional timesheet errors and incorrect payments for Mr. Nasaralla in February 2009.

March 27, 2009

Respondent was charged with failing to comply with her supervisor’s instructions when she approved an employee’s annual leave without pay without having first received the Commissioner’s approval on March 27, 2009 (ALJ Ex. 1). When an employee needs to take time off from work but has no leave available, the employee needs to charge their leave to another leave balance, such as leave without pay. Special leave requests must be processed through a series of approvals, including a direct supervisor, assistant commissioner, disciplinary advocate, and senior manager. Once all of these approvals are obtained, final approval must then be granted by the Commissioner of the agency. Once the leave without pay is approved by the

Commissioner, the employee can submit the request in CityTime. If the employee makes the request through CityTime first, the request will not be finalized until timekeeping actually receives the special leave form signed by the Commissioner. All Department employees were notified about this policy in a memo that was issued on June 27, 2008 (Pet. Ex. 26; Tr. 85-86, 88, 262, 273-74).

On March 27, 2009, Celeste Sykes, an inspector for the Department, requested leave without pay on March 17, 2009, due to childcare issues. Respondent approached Mr. DeVito the same day to discuss Ms. Sykes' leave request. She informed Mr. DeVito that it had only been partially approved. Respondent expressed concern that Ms. Sykes would receive a commissioner's check because pay calc date was approaching and the leave had not been finally approved by the Commissioner. Mr. DeVito expressly instructed respondent to wait until the Commissioner's final approval was received. He explained to respondent that it would work out because Ms. Sykes is a salaried employee, as opposed to being per-diem, so a regular check would be issued anyway. If the final approval from the Commissioner had not been received in time, timekeeping would simply hold on to Ms. Sykes' check until the approval was finalized. Respondent, however, did not follow Mr. DeVito's instructions (Tr. 97-99, 262-63, 312-13).

According to CityTime's request history, a partial approval of the leave was given by Robert Bodgas, Ms. Sykes' supervisor, and a final approval was given by respondent on March 27, 2009. Respondent disregarded Mr. DeVito's directive and the Department's policy. Ms. Sykes' special leave form had not been approved by the Commissioner until April 8, 2009. Despite this, respondent issued a final approval for the leave without pay in CityTime on March 27, 2009, the very same day she was told by Mr. DeVito not to do it (Pet Exs. 27, 28, 30; Tr. 89-93).

Surprisingly, approximately four hours after improperly finalizing Ms. Sykes' leave without pay, respondent sent an e-mail to Mr. Bodgas, explaining the special leave policy and notifying him that he improperly approved special leave requests. Indeed, the e-mail reads,

You approved Leave without Pay for Celeste Sykes for a total of 2 days and 4 hours and 30 min on 3/14 and 3/21 timesheets. Please submit the Special Leave Request form with all signatures authorizing this leave immediately. The agency's policy on leave without pay, is that an employee must receive final approval from the Commissioner (as well as other signatures following the chain of command) via the above-

mentioned form *before* any leave without pay is approved in CityTime. Please let me know. Thank you. (emphasis in the original).

(Pet. Exs. 28, 29, 30; Tr. 93-95). It is apparent from the e-mail that respondent understood the policy but chose not to abide by it.

Respondent testified that she thinks that she was right, but admits that she was very confused about Ms. Sykes' request for leave without pay. Ms. Sykes did not fill out her timesheet on time, so respondent sent an e-mail to Mr. Bogdas inquiring about it. Mr. Bogdas called respondent to inform her that he would fill out the timesheet for Ms. Sykes and that he already had sent the special form to the main office. Respondent admitted that she did not receive the form, but relied on Mr. Bogdas' representation that everything was okay. Respondent testified that she asked Dorlene Cotton, Director of Human Resources, if she had received the form and she had not. Respondent was confused and did not know what had happened to the form. According to respondent, Ms. Cotton instructed her to send an e-mail to the field office to ask about the form. She sent the e-mail to inquire, but she had already approved the leave, thinking perhaps that Mr. DeVito had received the form. Respondent expressed frustration that she was accused of doing something wrong when she only relied on Mr. Bogdas having told her that he had sent the form (Pet. Ex. 29; Tr. 444-46, 496-99, 501-02).

Respondent understood the policy regarding special leave requests and made a conscious and deliberate decision to disregard it. Indeed, she even asked Mr. DeVito how she should proceed and he gave her a very clear answer. It appears that she did not like or agree with her supervisor's decision, so she choose not to follow his instructions. Instead, she decided to do what she thought was best and willfully disregard her supervisor's directive. Accordingly, I find respondent guilty of failing to comply with her supervisor's instructions when she approved Ms. Sykes' leave without pay without having first received the Commissioner's approval on March 27, 2009.

Respondent is further charged with failing to lock two per diem employees' timesheets as instructed by her supervisor on March 27, 2009 (ALJ Ex. 1). Per diem employees are paid at an hourly rate, causing their paychecks to be processed differently than salaried employees. Specific information must be input into per diem employees' timesheets for them to get paid for the particular days that they worked. If salaried employees do not fill out their timesheet, their

paychecks would still be automatically issued. In contrast, per diem employees will only get paid for the days for which they have been given final approval on their timesheets (Tr. 99, 274-76).

Mr. DeVito had given respondent instructions on how to process a per diem employee's timesheet. The most important factor in processing a per diem's timesheet is obtaining final approval. If final approval is not given, the employee's check will be incorrect and fail to accurately reflect the number of hours that the employee worked that week. Respondent, as the timekeeper, was responsible for requesting that per diem employees complete their timesheets and supervisors issue final approvals (Tr. 99-100).

Mr. DeVito would regularly ask respondent how many per diem timesheets had not been submitted or completed for the week. Respondent would give him a list of names and he would instruct her to "go after them" to try to complete final approval by pay calc. If a final approval was not given by pay calc, respondent was responsible for locking the timesheet to make sure that the transactions or hours worked will not be altered (Tr. 101).

If the timesheet is not given a timely final approval the per diem employee will not be paid for that particular week in the upcoming biweekly paycheck. Instead, the per diem will have to wait until the subsequent check is issued to be paid. For instance, if the final approval is late for a particular week, the next paycheck will include only one week of pay and the subsequent check will include three weeks of pay. Similarly, if the timesheet is not locked and the supervisor issues a final approval after pay calc, the transactions entered into CityTime will not interface properly with PMS and the paycheck will not properly reflect the amount of time that the per diem employee worked (Tr. 101-02, 103-05, 277-78).

On March 27, 2009, respondent spoke with Mr. DeVito about final approvals for two per diem employees, Melvin Barnes and Loida Arias. Despite repeated instructions to lock out per diem employees' timesheets, respondent failed to lock Mr. Barnes' timesheet and his supervisor gave a final approval after pay calc. As a result, Mr. Barnes was going to be paid for only one week of work in the April 3, 2009, paycheck and for three weeks of work in the April 17, 2009, paycheck. To correct the problem, respondent had to go back into PMS and actually pull out the five extra days that were mistakenly included in the April 17 paycheck. With respect to Ms. Arias' timesheet, respondent failed to lock it until a week after pay calc. Mr. DeVito gave

respondent specific instructions that the timesheet needed to be locked out by the end of pay calc on March 27, but respondent did not lock it until March 30 (Pet. Exs. 32, 33, 34; Tr. 107-09, 112-13, 313).

Respondent acknowledged that Mr. DeVito had told her to lock the two timesheets and that she did not do so. She testified that one of the two employees had not filled out the timesheet yet. Respondent called the supervisor to follow up. The supervisor told her that she was working on the timesheet. Since it was pay calc, so long as the timesheet was approved by 7:00 p.m., CityTime would process it and the employee would get paid. Respondent decided to leave the timesheet open so that the supervisor could give a final approval in hopes it would be done by 7:00 p.m. With respect to the other employee, the supervisor was working in the field that day, so respondent decided to leave the timesheet open just in case he came back to the office that evening to approve the timesheet. Respondent testified that she does not believe she did anything wrong, she was only trying to give the employees an opportunity to be paid with a regular check and avoid having timekeeping process supplementary checks (Tr. 448-49, 502-07).

Once again, respondent was given a directive and she was required to follow it. Instead, she chose to do what she wanted to do regardless of Mr. DeVito's instructions and the Department's protocol. Her reasoning for leaving the timesheets open is insufficient to justify her willful disregard of her supervisor's instructions. As the timekeeper, respondent is not only responsible for enforcing timekeeping rules, she must follow them as well. Moreover, this was not her decision to make. The decision had already been made by Mr. DeVito, her supervisor, who gave respondent very clear guidance on what to do. Her responsibility at the point was to do as she was directed. Accordingly, I find respondent guilty of failing to lock two per diem employees' timesheets as instructed by Mr. DeVito on March 27, 2009.

April 14, 2009

Respondent was charged with failing to follow her supervisor's instructions regarding the proper method for charging the Commissioner's leave for April 6, 2009 (ALJ Ex. 1). Commissioner Mintz had thought that he did not have enough leave to cover his time out of the office on a particular date so he submitted it as leave without pay. On April 14, respondent asked Mr. DeVito for instructions on how to handle the situation. They met for approximately

ten minutes while Mr. DeVito explained that the Commissioner is a manager, so timekeeping can not approve leave without pay until he has exhausted every minute of his leave balances. The Commissioner had four hours and 40 minutes of annual leave left, which meant that only two hours and 20 minutes had to be charged to leave without pay. This would require two timekeeping transactions. Since CityTime will only process time in 15-minute increments, Mr. DeVito instructed respondent to enter it as four hours and 30 minutes of annual leave and two hours and 30 minutes of leave without pay in CityTime. Respondent would then need to make a manual adjustment to delete the remaining ten minutes of annual leave in PMS (Tr. 134-36).

Respondent made the adjustments as directed by Mr. DeVito. She then decided to do some further tinkering with the Commissioner's timesheets. As a manager, the Commissioner has managerial flex time, which requires him to work a 35-hour week over the course of five days. If he works 35-hours in four days and does not report for work on the fifth day, he must use leave to cover the fifth day despite having already worked 35 hours that week. In contrast, if he already worked 35 hours over the course of four days and worked for just a few hours on the fifth day, he would not need to use any of his leave to cover the remainder of the fifth day. Respondent noticed that the Commissioner had worked extra hours on the other days he was in the office that week. Respondent decided to use the extra hours the Commissioner worked towards his leave on the fifth day to minimize the amount of leave without pay he would have take. Respondent was incorrect in her assessment and made the adjustments without discussing it first with Mr. DeVito. As a result, Mr. DeVito had to go into the system and make another adjustment to correct respondent's error. Otherwise, the Commissioner would have been paid an incorrect amount and his leave balances would have been wrong (Pet. Exs. 37, 39, 40; Tr. 136-39, 144-46).

Mr. DeVito issued a disciplinary memo about this incident on May 7, 2009. Respondent replied in writing on May 11, 2009, stating that she had caught her mistake and was about to correct it, but Mr. DeVito corrected it before she had an opportunity to rectify it (Pet. Ex. 38; Tr. 141-42).

Respondent testified that the Commissioner did not have enough time in his leave balances to cover an entire day off. Respondent acknowledged that she spoke with Mr. DeVito, who told her to use whatever balances he had left take the rest of the time as leave without pay.

Respondent explained that she followed Mr. DeVito's instructions, but became confused because the Commissioner is a manager and has managerial flex time. Respondent believed that if the Commissioner worked more than 35 hours during the week, the extra time could be allotted to cover the portion of his day off that he did not have enough leave for. As a consequence, she changed the leave without pay to managerial flex time. Respondent testified that she realized the next day that this was incorrect and that she should not have changed it, but Mr. DeVito caught the mistake before she had a chance to fix it herself. When pressed on the dates of making the incorrect entry and when it was corrected by Mr. DeVito, respondent acknowledged that Mr. DeVito made the change two days later, rather than the next day and she had still not corrected her mistake on her own (Tr. 456-57, 511-12).

Respondent is guilty of not following her supervisor's instructions with respect to the Commissioner's leave without pay. Respondent had been given very clear and precise directions on how to deal with the situation. She initially implemented what she had been told to do, but on her own, decided that she would disregard Mr. DeVito's directions because she had a better way to handle the situation. Respondent was wrong. As a timekeeper, she should have been aware of the rules regarding managerial flex time and should never have tried to adjust the Commissioner's time in this manner. Respondent's testimony that she had caught the mistake on her own was not credible and was not corroborated by the system records. If she had actually caught the mistake the following day, as she testified, she would have had time to fix the problem before Mr. DeVito stepped in to correct it. Accordingly, I find respondent guilty of failing to follow her supervisor's instructions regarding the proper method for charging the Commissioner's leave for April 6, 2009.

June 5, 2009

Respondent was charged with failing to notify her supervisor at least one hour in advance of her starting time that she would be absent for the day (ALJ Ex. 1). On June 5, 2009, the agency held its annual summer meeting. The Human Resources unit is responsible for preparing for the meeting, including setting up the chairs as well as all the logistics. The Commissioner held this particular meeting in a park in lower Manhattan. All Department employees were required to attend (Tr. 209-13).

Respondent did not report to work on June 5, 2009, and never requested leave in advance for that date. At approximately, 10:45 a.m. that morning, respondent contacted Mr. DeVito and left a message on his voice-mail informing him that she would not be reporting to work that day. The summer meeting is a very big event which involves the entire agency. There were only five employees in the Human Resources unit at the time and they were instructed to arrive at work between 7:30 and 8:00 a.m. because of the extra work that needed to be done to set up for the meeting. Respondent's non-appearance without advanced notice caused a hardship for the Human Resources unit (Pet. Ex. 64; Tr. 209-13, 337).

The sick leave policy requires employees to call in at least one hour before their start time to inform their supervisor that they will not be reporting to work due to an illness. Respondent's work schedule is from 9:00 a.m. to 5:00 p.m., but she has one hour of flex time, which allows her to report to work by 10:00 a.m. (Pet. Ex. 64, 68; Tr. 211-12, 339-41).

Respondent admitted to not calling her supervisor one hour in advance of her start time to inform him that she would not be reporting to work. She testified that the day before, however, she was not feeling well and spoke with Ms. Cotton to let her know. Respondent testified that Ms. Cotton had given respondent permission to leave early that day. The following day she felt even worse and decided to go to the doctor. She was very weak and was unable to use the cell phone in the doctor's office because of the medical equipment. She further stated that she really was not thinking about calling her supervisor because she felt so poorly. After taking some medicine prescribed by the doctor, she felt well enough to call Mr. DeVito on her way home from the doctor's office to let them know she would not be coming to work. She obtained a doctor's note to document her visit (Resp. Ex. D; Tr. 483-84, 530-32).

Dorlene Cotton, Director of Human Resources, testified that on June 4, 2009, respondent did indeed tell her that she was not feeling well. Respondent did not, however, indicate during their conversation that she needed to see a doctor or that she would not be reporting to work the next day. Ms. Cotton's testimony was corroborated by Mr. DeVito, who recalled that respondent had told Ms. Cotton that she was not feeling well on June 4, 2009. He further testified that respondent did not inform either himself or Ms. Cotton that she had a doctor's appointment or that she would not be reporting to work the following day (Tr. 288, 337-38).

I found Ms. Cotton's and Mr. DeVito's testimony credible that while respondent did inform Ms. Cotton that she was feeling ill on June 4, respondent did not indicate that she would not be coming in the next day. Considering the size and importance of the event that the Human Resources unit was responsible for on June 5, it is reasonable to conclude that Ms. Cotton would have recalled if respondent said that she would not be reporting to work on June 5.

Respondent's testimony with respect to this charge was unpersuasive. Respondent is the Department's timekeeper and is fully familiar with the Department's time and leave rules. She knew that she was required to call in one hour before her start time, but did not do so. I found her testimony that she was too sick to call Mr. DeVito to be incredible. She managed to call the doctor's office to make an appointment and was able to get herself to the doctor. There is no reason that she or a family member, for that matter, could not have called Mr. DeVito beforehand.

Furthermore, although the Department did not make a point of this, the doctor's note itself is a bit suspicious. The date on the top of the note and the one next to the doctor's signature appears to have been written over, it appears as though June 4 had been originally written, and then had been changed to June 5. In addition, the body of the note indicates that respondent was seen by the doctor on June 4, yet respondent testified that she went to the doctor on June 5. It is ironic that someone who works as a timekeeper and whose job includes reviewing the adequacy of doctors' notes, would submit a note that looked this suspicious. If this was really a mistake by respondent's doctor, as she contended, it is surprising that she did not ask the doctor to write a new note with correct dates (Resp. Ex. D; Tr. 530-33).

Respondent's incredible testimony coupled with the way the note was written leaves the impression that she wanted to avoid coming to work on June 5, 2009, so that she did not have to participate in setting up for the agency's summer meeting. Respondent waited until 10:45 a.m. before she called in, which was after the summer meeting had already started and Mr. DeVito was out of his office. Accordingly, I find respondent guilty of failing to notify her supervisor at least one hour in advance of her starting time that she would be absent for the day on June 5, 2009.

August 25, 2009

Respondent was charged with violating her supervisor's instructions when she sent a grammatically incorrect e-mail to an agency employee without first seeking review of the e-mail text by a supervisor and failing to follow instructions from her supervisor by prematurely canceling a sick leave request on August 25, 2009 (ALJ Ex. 1). Mr. DeVito has had several discussions with respondent about sending unclear e-mails to employees of the agency. Respondent speaks English as a second language and makes a number of grammatical errors when writing e-mails. Indeed, employees have complained to Mr. DeVito that they have had trouble understanding her e-mails. As a consequence, respondent has been instructed to forward all of her drafted e-mails to Mr. DeVito or to Dorlene Cotton, the Director of Human Resources, prior to sending it out to the intended recipient so that they can make any necessary edits or corrections. Mr. DeVito testified that even with this process he sometimes encounters problems because he can not understand what respondent is trying to say either. He will often ask her questions to determine what she meant to say. In an effort to help her communicate better and improve her work performance, respondent was enrolled in two courses – Managing Multiple Priorities and Successful Workplace Communication (Pet. Exs. 42, 67; Tr. 146-47, 255, 301, 311-12, 333-37, 342, 370).

On August 25, 2009, respondent sent an e-mail to John Browne without submitting it to Mr. DeVito for review beforehand. The e-mail read,

Good morning. Your SL document didn't acceptable, because it didn't have letterhead and medical personnel signature. Please bring another document or change leave request as SL undocumented. I return your doctor's note by interoffice mail.

(Pet. Ex. 43). Besides the grammatical errors, the e-mail was incorrect.

Since Mr. Browne's leave request was for documented sick leave, Mr. Browne's supervisor must approve the note, as well as the timekeeper, before his timesheet can be properly processed. Undocumented sick leave would not require a second approval from the timekeeper, but it behooves an employee to document sick leave absences. The City has implemented an absence control program, which is a point system based on the number of undocumented sick leave days an employee uses within a specified period of time. If there are too many undocumented absences, the employee may be subject to discipline (Tr. 150).

Respondent had shown Mr. Browne's doctor's note to Mr. DeVito earlier that day. The note had the wrong date on it and was not on the doctor's letterhead. Mr. DeVito testified that he had directed respondent to approve the leave request anyway and give Mr. Browne an opportunity to bring another note. Mr. DeVito further testified that he has also previously instructed respondent both verbally and in writing that in general she is to approve documented sick leave requests prior to receiving the doctor's notes to avoid delays in processing the employee's timesheet. Respondent disregarded Mr. DeVito's instructions with respect to Mr. Browne's leave and cancelled the request. Mr. Browne eventually submitted an acceptable doctor's note and a new leave request had to be created by respondent because she cancelled the initial request (Pet. Exs. 10, 42, 43, 44, 45, 46; Tr. 148-50, 154-58, 281, 284, 365).

Respondent denied any misconduct. She testified that she could not accept Mr. Browne's initial medical note because it was not dated or on office letterhead. Respondent brought the note to Mr. DeVito, who agreed that it was not a proper note. Respondent returned Mr. Browne's timesheet with comments explaining that the note was not acceptable. Mr. Browne did not respond, so respondent spoke with Mr. DeVito, who told her that the note needed to be returned and Mr. Browne needed to read the comments written on his timesheet in the CityTime system. Respondent waited one more day, but had still not heard back from Mr. Browne so she went to Mr. DeVito again for advice. Mr. DeVito instructed her to call Mr. Browne to speak with him directly. Respondent tried to reach Mr. Browne all day, but to no avail. Respondent then decided to send Mr. Browne an e-mail, but Mr. DeVito had already had left for the day and was unavailable to review what she had written. She sent the e-mail to Mr. Browne anyway and the next day when Mr. DeVito corrected her e-mail, she tried to retract the one she had already sent but it was too late (Tr. 459, 513).

Respondent testified that she cancelled the leave request because the note was unacceptable and later learned that Mr. Browne had submitted a new note that was properly filled out and on letterhead. Respondent denied ever seeing the new note and speculated that it had been given directly to Mr. DeVito. Respondent believes that she did nothing wrong because she was never shown the new note and the original note was "not valid." According to respondent she acted appropriately under the circumstances since documented sick leave requires that a valid note be submitted within five days of returning from sick leave. During cross-

examination, however, respondent acknowledged that Mr. DeVito had told her to approve Mr. Browne's note and she decided on her own to void it out because she believed it was invalid (Tr. 460-61, 514-15).

Respondent's testimony about why she had sent the e-mail to Mr. Browne without first obtaining approval from Mr. DeVito was incredible. Respondent's explanation sounded embellished and exaggerated in an attempt to justify why she needed to send the e-mail immediately without being reviewed. Respondent's counsel argued that respondent is being targeted and disciplined because she does not speak English well. The record does not support this conclusion. To the contrary, the Department tried to assist respondent in improving her communication and e-mail skills by sending her to classes. In addition, it provided her with an accommodation by reviewing her e-mails and editing them. Her supervisors had also suggested to her that she pursue courses on her own to improve her English spoken and written communication skills. Respondent has not been charged with speaking or writing English incorrectly, she has been charged with not following instructions from her supervisor.

Respondent was given a very simple directive. All of her e-mails need to be reviewed by her supervisor before they are sent out to Department employees. Respondent created a very convoluted story to justify why she did not follow her supervisor's instructions but it does not excuse her conduct. There was no immediacy to the situation and she could very well have waited for Mr. DeVito to review her e-mail to Mr. Browne before she sent it out. Accordingly, I find respondent guilty of violating her supervisor's instructions when she sent a grammatically incorrect e-mail to Mr. Browne without first seeking review of the e-mail text by Mr. DeVito.

With respect to rejecting the doctor's note and cancelling Mr. Browne's leave, it is undisputed that respondent was told to approve the leave and she decided to cancel it. Respondent admitted that she thought the note was invalid and she refused to accept it regardless of what she was directed to do by Mr. DeVito. Accordingly, I find respondent guilty of failing to follow instructions from her supervisor by prematurely canceling Mr. Browne's sick leave request.

October 8, 2009

Respondent was charged with failing to approve a documented sick leave request in accordance with her workflow instructions (ALJ Ex. 1). Respondent was instructed verbally and in writing to approve leave requests on a daily basis. A timesheet can not be finalized in CityTime if respondent has not approved a leave request for that particular time period (Tr. 160-61, 267-68).

On October 8, 2009, respondent sent an e-mail to Juan Orozco at 4:23 p.m., notifying him that the timesheets for two of his subordinates, Isaiah Dobson and Precious Bonaparte, had been submitted but were awaiting his final approval. Mr. Orozco responded at 4:32 p.m., that he was unable to approve Mr. Dobson's timesheet because respondent had not yet approved the documented sick leave and that can only be done by the timekeeper. Respondent approved Mr. Dobson's sick leave after Mr. Orozco's response at 4:44 p.m., 12 minutes after Mr. Orozco sent her his e-mail (Pet. Exs. 47, 48, 49; Tr. 161-64, 167-68).

Respondent testified that she is not guilty of this charge. She explained that employees need to fill out leave requests and that they need to be submitted to their supervisors first for approval and then the timesheets need to be submitted to their supervisors for approval. Respondent recalled that Mr. Dobson filled out his leave request and the timesheet, but did not submit the timesheet to Mr. Orozco. As a result, respondent did not see the leave request. Respondent sent Mr. Dobson a reminder e-mail that his timesheet was still in draft status. In response, Mr. Dobson sent respondent his timesheet, she saw his leave request and approved his leave the following day (Resp. Ex. C; Tr. 463).

Respondent's testimony on this matter was nonsensical. Mr. Orozco approved Mr. Dobson's leave request on September 29, 2009 at 5:40 p.m. Once he approved the leave it immediately went into respondent's workflow as the timekeeper and she should have seen it the following day on September 30. If she was following her supervisor's directives and office protocol, she should have approved the leave request on September 30. Respondent somehow overlooked it and instead requested a final approval of Mr. Dobson's timesheet from Mr. Orozco on October 8. Mr. Orozco had to point out to respondent that he could not finalize the timesheet without her secondary approval of Mr. Dobson's documented sick leave request. This is information that respondent was privy to and should have already been aware of. Her approval

of the leave twelve minutes after Mr. Orozco's e-mail emphasizes that she had no idea that the leave request had been sitting in her workflow for ten days (Pet. Ex. 48). Respondent failed to do her job properly. Accordingly, I find respondent guilty of failing to approve a documented sick leave request in accordance with her workflow instructions on October 8, 2009.

Respondent was further charged with negligently sending an e-mail to the wrong supervisor requesting approval of an employee's timesheet on October 8, 2009 (ALJ Ex. 1). Respondent sent an e-mail to Carmen Gil requesting that she approve Sasha Frederick's timesheet. However, it is Renee King, not Ms. Gill who is Ms. Frederick's supervisor. Mr. DeVito was surprised respondent had made this error because the supervisor's name is listed on the top of the employee's timesheet. At the top of Ms. Fredrick's timesheet it clearly identifies Ms. King as her supervisor. Indeed, Ms. Gil's name is nowhere to be seen on Ms. Frederick's timesheet (Pet. Exs. 49, 50, 51; Tr. 164-68, 285).

Respondent stated that she did nothing wrong and that this charge is ridiculous. She testified that each supervisor has a backup supervisor to cover their work when they are out of the office. Respondent insisted that she knew that Ms. Frederick's supervisor was Ms. King and that she tried to reach Ms. King several times during the day but was unsuccessful, so she presumed Ms. King was out for the day. Since it was pay calc, respondent was concerned that Ms. Frederick would not be paid unless her timesheet was approved. Respondent looked in CityTime to figure out who Ms. King's back-up supervisor was and discovered that it was Ms. Gil. She sent Ms. Gil an e-mail requesting that she approve Ms. Frederick's timesheet, but Ms. Gil instead replied that she was not Ms. Frederick's supervisor (Tr. 470, 472, 517-19).

Respondent was charged with negligently sending the e-mail to the wrong supervisor. Respondent maintained that she knew all along that Ms. King was Ms. Frederick's supervisor and that she purposely, not negligently, sent the e-mail to Ms. Gil because she could not find Ms. King. The Department did not dispute respondent's contention that Ms. Gil is Ms. King's back-up supervisor. Respondent's testimony with respect to this incident is credible and logical. I find that respondent was not negligent in this instance since she intended to send the e-mail to Ms. Gil. It certainly would have been clearer to Ms. Gil, if respondent had mentioned why she was sending the e-mail to her. Nevertheless, this is not misconduct. Respondent did not violate any rules or directives in sending the e-mail to Ms. Gil and the Department did not establish what

the protocol is for having timesheets approved when the employee's supervisor is out of the office. Accordingly, I find that this charge should be dismissed.

November 2009

Respondent was charged with failing to immediately deduct advanced annual and sick leave from two employees as instructed by her supervisor (ALJ Ex. 1). Advanced annual or sick leave is leave that an employee may request if there is not enough time available in their leave balances. There are special steps required to process advanced annual leave. The leave must be requested on a special leave form that must go through a series of approvals. Once the advance leave is granted, it goes into a "tickler" file. As new leave is accrued the advanced leave will be deducted from it until the advanced leave is paid off. This is done through PMS, but it interfaces with CityTime. The deductions do not occur automatically. The timekeeper is responsible for making manual leave adjustments to deduct the accruals (Tr. 175-77).

The practice had been to adjust the accruals on employees paying off advance leave on the 16 of the month. Since the accruals were going into the system on the 9 or 10 of the month, a decision was made to deduct the accruals as soon as they appear in the system to avoid confusing employees as to how much available leave they actually have. Mr. DeVito had noticed that leave had accrued for two employees, Mitchell Kent and Mageed Mahmoud. A few days later, on November 12, 2009, Mr. DeVito instructed respondent to make the manual leave adjustments that day. If the manual adjustment is not made, the employee can go into CityTime and use accrued leave, even though they still owe time for the advanced leave. Respondent failed to deduct the accrued leave on November 12 as instructed. Indeed, respondent did not deduct the leave until November 17 (Pet. Exs. 44, 52, 53; Tr. 177-83).

Respondent testified that she generally follows Mr. DeVito's instructions but at times she has to respond in an emergency situation when he is not available. In this instance, however, respondent maintained that she was not given clear instructions and that the date to deduct the accruals keeps changing. Respondent did not recall Mr. DeVito telling her to deduct the accrual on the 9 (Tr. 475-77, 520).

With respect to this charge, I found Mr. DeVito's testimony to be far more credible than respondent's. Mr. DeVito's explanation of the process was very clear. Mr. DeVito

acknowledged that the date to deduct accruals was changed. Mr. DeVito, however, not only clearly stated the new policy and effective date for doing the deduction, he provided respondent with an explanation as to why they changed the policy. Regardless, even if respondent was correct that the policy was frequently being changed, it really is of no consequence. It would still be respondent's responsibility to do as she is directed. If procedures or protocols are changed, it is incumbent upon respondent to track the changes and follow the latest policy. Respondent did not follow the new protocol and disregarded her supervisor's instructions by waiting five days after she was directed to process the deductions. Accordingly, I find respondent is guilty of failing to immediately deduct advanced annual and sick leave from two employees as instructed by her supervisor on November 12, 2009.

Respondent is further charged with failing to change an employee's undocumented sick leave to documented sick leave despite receiving and filing the employee's doctor's note in November 2009 (ALJ Ex. 1). Every month, Mr. DeVito sends out the undocumented sick leave report to supervisors to assist them in implementing the Absence Control Policy. When Patricia Kanfer's supervisor, Ana Rolan, noticed Ms. Kanfer's name on the report for an undocumented sick leave, she sent her an e-mail. Ms. Kanfer told her supervisor that she had already submitted a note to timekeeping and the supervisor, in turn, informed Mr. DeVito. As a result, Mr. DeVito went into the timekeeping files and found Ms. Kanfer's leave request form with the doctor's note attached to it. If a note is submitted, respondent needs to do a final approval of the documented sick leave and then file the note in the employee's file. Instead, respondent filed the leave form printed out from CityTime saying that the absence was undocumented despite the fact that she stapled the doctor's note to the paperwork (Pet. Exs. 54, 55, 56; Tr. 183-191).

Respondent testified that this was a "big headache for her." Ms. Kanfer had filled out the leave request as undocumented and then forgot to submit it to her supervisor. Shortly after, the screens for CityTime were changed and it was necessary to click on a different tab to see the leave request. Respondent helped Ms. Kanfer navigate through the new screens and they discovered that the leave request was still in draft status and had never been submitted to her supervisor. They submitted it and her supervisor approved it. Respondent further testified that she did not receive the doctor's note for the leave until weeks later, after Ms. Kanfer's timesheet had already been approved. She tried to change the leave from undocumented to documented,

but it did not go through. At the end of her explanation, respondent reluctantly admitted that she may have made a mistake while trying to change the leave status and did not notice the error (Tr. 478-79, 521-23).

Respondent again blamed someone else for her mistake. In this instance she attributed the problem to CityTime and to Ms. Kanfer. Her testimony that she tried to change the leave but it did not go through is troubling. If respondent was having an issue with the leave form being processed, she should have sought assistance, which she did not. Moreover, it is insufficient for respondent to enter information into the system and sit back and hope for the best. Respondent is the timekeeper and is responsible, amongst other things, ensuring that employees' leave balances are accurate. Respondent should be checking her data entries and confirming that the information she entered into the system was entered properly and processed correctly. Respondent did not do this here. Accordingly, I find respondent guilty of failing to change an employee's undocumented sick leave to documented sick leave despite receiving and filing the employee's doctor's note in November of 2009.

December 3, 2009

Respondent was charged with failing to input leave for an employee as instructed by her supervisor, resulting in an overpayment on the employee's December 11, 2009 paycheck (ALJ Ex. 1). Sometime after Thanksgiving 2009, Mr. DeVito had a meeting with respondent and Mr. Menjivar regarding an issue with Julia Agosto's leave. Ms. Agosto had not filled out her leave properly and it was not interfacing correctly in CityTime. CityTime was incorrectly reflecting that Ms. Agosto had a negative leave balance in her estimated leave balance bank. Mr. DeVito directed respondent to lock up Ms. Agosto's timesheet in CityTime and to make a manual adjustment in PMS, indicating that Ms. Agosto had one day of leave without pay (Pet. Exs. 57, 58, 71; Tr. 191-193, 388, 402).

Respondent filled out the adjustment form and Mr. DeVito approved it. Respondent, however, only partially entered the adjustment in PMS on December 3, 2009. Respondent had entered the date before Thanksgiving, but did not enter the date after Thanksgiving, which was supposed to be leave without pay. When the payroll report came out the following week, Mr. Menjivar, who was aware of the situation, noticed that Ms. Agosto received a full paycheck,

indicating that she was paid for the day after Thanksgiving, which she was not entitled to. Ms. Agosto should have received a check for nine days, not ten. The reason Ms. Agosto's paycheck was incorrect was because respondent did not make the changes for the day after Thanksgiving until December 9, which was after pay calc. If the information is changed or inputted into the system after pay calc, the new information is not reflected in the employee's check. Mr. DeVito discussed the situation with Ms. Agosto and they agreed to let the check go and simply deduct one day of pay from her following check (Pet. Exs. 57, 58, 59, 60, 61; Tr. 17, 193-204, 389, 402-03, 412).

When asked if she was guilty of this charge, respondent replied, "I don't know. Maybe I guilty, maybe no, because it's complicated." (Tr. 479). Respondent testified that she did not know about the problem until she was notified about it by Mr. Menjivar. At the meeting, she was told to fill out a regular timesheet for Ms. Agosto and lock the timesheets in CityTime. Respondent testified,

I fill out the timesheets by old system, but the problem was it was mechanical mistake because short employee was part time so I fill out this because part time person and second one, I try fill out just part time either, so in this case, it's last minute, I recognize this is full time person

(Tr. 479-80). When asked to clarify what this meant, respondent insisted that two employees were involved with this charge, not just Ms. Agosto. After referring to her notes, however, she was unable to identify who she thought the second employee was. Respondent further testified that she had caught her own mistake on Friday, but it was after 7:00 p.m. on pay calc so it was too late to make the change. As a result, she prepared a supplementary check the following week and corrected the mistake from the previous week. During cross-examination, respondent was referred to a pay calendar for 2009 and realized that she had input the adjustments on December 3, but pay calc was not until the following day, Friday, December 4. Respondent did not have an explanation why she did not make sure on December 4 that the information she had inputted on December 3 was correct. She concluded that she must have made a mistake (Tr. 481-82, 524-29).

As in previous charges, respondent was given precise and clear instructions from her supervisor which she did not follow. Unlike some of the other charges, respondent did not intentionally refuse to follow Mr. DeVito's directions in this instance. Here, respondent simply

failed to do it. Respondent testified that it was complicated. The only thing that appears complicated, however, is her explanation for why she did not do it. Mr. DeVito's instructions seemed relatively simple and processing the request, if done properly, appears to be a straightforward process. Respondent just did not do it. Perhaps she forgot to do it or she did not understand what needed be to done. Either way, the result was the same, the request was not processed. Respondent's attempt to blame the computer system by indicating that this was "a mechanical mistake" was not credible. This was not a mechanical mistake, it was human error. Accordingly, I find respondent guilty of failing to input leave for Ms. Agosto as instructed by Mr. DeVito, resulting in an overpayment on Ms. Agosto's December 11, 2009 paycheck.

December 11, 2009

Respondent was charged with failing to inform the payroll officer that an employee's paycheck was to be held because his timesheet was still in draft status (ALJ Ex. 1). If an employee's timesheet is still in draft status, the employee's paycheck will not be released by payroll. On the Wednesdays prior to paychecks being issued, respondent is supposed to alert Mr. Menjivar if any of the paychecks need to be held because an employee's timesheet is still in draft status. Respondent gives Mr. Menjivar a list with highlighted names on it. If the employee's name is highlighted, that person's paycheck should not be released (Tr. 204-09, 250-51, 286-87, 314, 392-96).

At some point after payday, Mr. Menjivar, who was trying to clear up another issue in CityTime for Nicholas Dumont, noticed that Mr. Dumont's timesheet for the period relating to the just released paycheck was still in draft status. Mr. Dumont's name, however, was not highlighted on respondent's list. Mr. Dumont's check should not have been released, but respondent never notified Mr. Menjivar to hold it. Both Mr. DeVito and Mr. Menjivar sent e-mails to respondent to inquire about what occurred, but respondent never replied to either. Three days after the paycheck was already distributed, respondent verbally told Mr. Menjivar to hold onto Mr. Dumont's check because he had not completed his timesheet yet (Pet. Exs. 26, 63, 69, 70; Tr. 204-09, 250-51, 286-87, 314, 392-96).

Respondent testified that she printed out the report and simply missed Mr. Dumont's name on the list. Respondent shrugged the mistake off and stated that nobody is perfect. She

attributed the mistakes to having too much work to do (Tr. 482). However, respondent's mistake was far from minor and resulted in an employee being improperly paid. Accordingly, I find respondent guilty of failing to inform Mr. Menjivar that Mr. Dumont's paycheck was to be held because his timesheet was still in draft status.

Misconduct Versus Incompetence

The Department charged respondent with both misconduct and incompetence with respect to all of the charges, with the exception of failing to call in one hour before her starting time, for which she was only charged with misconduct. In order for an employer to establish misconduct, there must be some showing of fault on the part of the employee. The conduct must be shown to be willful or intentional, *Reisig v. Kirby*, 62 Misc. 2d 632, 635 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008 (2d Dep't 1969), or the product of negligence or carelessness, *McGinagle v. Town of Greenburgh*, 48 N.Y.2d 949, 951 (1979). *See also Dep't of Sanitation v. Edgar*, OATH Index No. 2228/01 (Dec. 3, 2001) ("... there must be a showing of fault, through either intentional misconduct, reckless conduct or neglect.").

In contrast, incompetence is defined as either the inability to perform one's job or the persistent unwillingness or failure to do the work. *Law Dep't v. Stanley*, OATH Index No. 1540/05 at 4 (June 15, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD06-08-SA (Jan. 9, 2006). As distinct from misconduct, fault on the part of the employee is not necessarily required to establish incompetence. It is enough for petitioner to prove only that respondent is unable to meet the minimally acceptable threshold requirements of the duties of her title. *Employers Retirement System v. Myrick*, OATH Index No. 505/95 (Apr. 11, 1995).

Respondent's supervisors expressed dissatisfaction with respondent's work because of the number of mistakes that she makes on a regular basis. They complained about the intensive amount of supervision and instruction respondent required. Her supervisors testified that they spend an inordinate amount of time assisting respondent in performing her tasks and correcting the many mistakes that she makes, thereby diverting their time away from their own tasks. They further cited respondent's stubbornness, resistance to following directions, and failure to communicate clearly. They questioned respondent's skills and aptitude and asserted that she has comprehension issues with respect to the CityTime system. In addition, the Department

maintains that respondent's mistakes have real consequences affecting the other employees' payroll and leave balances.

While the Department acknowledged that respondent does indeed have a lot of work to do, she is assisted by Mr. DeVito whenever she requests help. Additionally, the Department maintained that respondent actually has less work to do after the implementation of CityTime. The computerization of the timesheets and the system synching with PMS eliminated one of the most time consuming aspects of respondent's job, which was manually entering the data from 300 timesheets into PMS. Now the employees are responsible for entering their own time into CityTime, making respondent's role more of a housekeeping function, reviewing the employees' entries and cleaning up their errors.

Respondent acknowledged that she has made mistakes but contends that it is because of the overwhelming amount of work that she is required to do as the only timekeeper for 300 employees. She insisted that she is a very hard worker who often stays late doing overtime just so she can catch up with her work and send out e-mail reminders to employees about their timesheets. In addition, respondent repeatedly maintained that she was not given the Time and Leave regulations for the agency and that CityTime is difficult to work with. Respondent attributed her mistakes to simply being human. She testified repeatedly that her primary concern is trying to ensure that the employees are paid on time.

Inna Yampolsky, respondent's daughter, corroborated her mother's testimony. Ms. Yampolsky testified that her mother would discuss her job with her all of the time. Respondent would come home late from work and complain that there was a lot of stress at work and that she was always trying to catch up with something because there was a lot of follow up involved, correcting things. Indeed, Ms. Yampolsky testified that shortly after her mother moved into a new office location, she tried to take her mother out to lunch on one occasion, but her mother was so busy that she could not go. Instead, Ms. Yampolsky stayed and helped her mother with her filing. Ms. Yampolsky acknowledged that her mother's English is not as strong as it could be, but she tries to help her improve her communication skills by speaking with her only in English. In addition, she helps her mother write memos in English so that they are clear (Tr. 373-74).

The Department disputed respondent's contention that she is overworked and needs to stay late working overtime just to keep up with her workload. Several witnesses testified that respondent has been observed and reprimanded in the past for playing computer games and surfing the internet, which respondent adamantly denied. Mr. DeVito testified that respondent has been provided with every resource that she requires to perform her job. He explained that the Department is using the citywide time and leave regulations which were made available to respondent as well as other resources. While there was a general consensus that CityTime is an imperfect timekeeping system that is difficult to work with at times, respondent's supervisors maintain that respondent has more difficulty with it than she should. They stressed that there are a number of resources available to respondent from CityTime to make the system more understandable and that respondent has had extensive training. The Department contended that respondent is incompetent and incapable of doing her job properly.

Respondent, on the other hand, maintained that she is competent, citing good ratings on her performance evaluations. For the period of March 8, 2006 through December 31, 2006, respondent received an overall rating of "good." For the period of January 1, 2007 through December 31, 2007, respondent received an overall rating of "good minus." On this performance evaluation, respondent received individual ratings of "good plus," "good," "good minus," and two "conditionals" in two categories, which referenced her failure to double check her work, her disorganization, and the numerous errors she was making. For the period of January 1, 2008 through December 31, 2008, respondent received an overall rating of "conditional" with individual ratings of "very good" in one category, "good" in one category, "conditional" in two categories and "unsatisfactory" in one category. The 2008 performance evaluation coincided with the charges that are the subject of this proceeding.

Performance evaluations are only one of several factors to consider in determining incompetence. Often, cases of incompetency involve complaints about a respondent's performance over a substantial period of time and anecdotal testimony about various incidents. In the present case, respondent's supervisors provided detailed and credible testimony regarding respondent's communication problems and inability to perform simple tasks. The testimony presented was extensive and corroborated by contemporaneous e-mails and memorandum informing respondent that her work performance was unacceptable.

The Department maintained that respondent's ability to perform her job functions declined with the introduction of the CityTime system in October 2007, which is reflected in her performance evaluations. Performance evaluations, when filled out accurately, are often good indicators of an employee's competence. Here, respondent's performance evaluations are getting worse. The nature of respondent's job has changed with the introduction of CityTime. While the Department considered her performance in the past to be "good," she is no longer performing the same tasks and functions. Respondent will not be able to go back to her old job functions because they have been updated and replaced with a web based automated timekeeping system. If respondent were to stay in the role of timekeeper she would have to continue to work with CityTime, which has clearly been demonstrated to be problematic.

On the surface, it appears that respondent is guilty of misconduct to a certain degree. There were several instances in which respondent was directed to do something by her supervisor and either refused or failed to do it. At a deeper level, however, the pattern of persistently refusing or failing to do work as directed, coupled with respondent's inability to perform basic functions of her job, leads me to conclude that respondent is not really guilty of misconduct, but of instead, guilty of incompetence.

As defined above, incompetence is either the inability to perform one's job or the persistent unwillingness or failure to do the work. To an underlying degree, respondent is unable to perform certain job functions because of her inability to use the CityTime system properly despite a significant amount of training. With respect to the specific charges, during her testimony respondent indicated that a situation was either complicated or that she was confused five times. On four occasions she acknowledged that she simply failed to do something or just made a mistake. Respondent's inability to perform her job properly is significant, but her persistent unwillingness to do her job as directed is equally important. In relation to four of the charges, respondent testified that she understood what her supervisors instructed her to do, but chose not to do it because she thought she was right or she knew better. Her persistent unwillingness to perform her job constitutes incompetence, rather than misconduct. Respondent's incompetence has had an adverse effect upon the workplace. *See Financial Information Services Agency v. Boritz*, OATH Index No. 744/91 (Apr. 16, 1991). Based on the credible evidence presented, petitioner successfully demonstrated that respondent failed to meet

the minimally acceptable threshold requirements of the duties of her title. Accordingly, I find respondent guilty of incompetence with respect to 13 of the charges related to her timekeeping duties and guilty of misconduct with respect to the charge regarding her failure to call in at least one hour before her starting time.

FINDINGS AND CONCLUSIONS

1. Petitioner established by a preponderance of the credible evidence that on October 8, 2008, respondent disobeyed her supervisor's instructions not to send e-mail reminders to employees to complete their timesheets
2. Petitioner established by a preponderance of the credible evidence that in December 2008, respondent failed to promptly approve an employee's request for vested annual leave as instructed by her supervisors.
3. Petitioner established by a preponderance of the credible evidence that in February 2009, respondent failed to properly remove a leave request error, which resulted in additional timesheet errors and incorrect payments.
4. Petitioner established by a preponderance of the credible evidence that on March 27, 2009, respondent failed to comply with her supervisor's instructions when she approved an employee's leave without pay without having first received the Commissioner's approval.
5. Petitioner established by a preponderance of the credible evidence that on March 27, 2009, respondent failed to lock two per diem employees' timesheets as instructed by her supervisor.
6. Petitioner established by a preponderance of the credible evidence that on April 14, 2009, respondent failed to follow her supervisor's instructions regarding the proper method for charging the Commissioner's leave for April 6, 2009.
7. Petitioner established by a preponderance of the credible evidence that on June 5, 2009, respondent failed to notify her supervisor at least one hour in advance of her starting time that she would be absent for the day.

8. Petitioner established by a preponderance of the credible evidence that on August 25, 2009, respondent violated her supervisor's instructions when she sent a grammatically incorrect e-mail to an employee without first seeking review of the e-mail text by her supervisor.
9. Petitioner established by a preponderance of the credible evidence that on August 25, 2009, respondent failed to follow instructions from her supervisor by rejecting an employee's doctor's note and prematurely canceling his sick leave request.
10. Petitioner established by a preponderance of the credible evidence that on October 8, 2009, respondent failed to approve a documented sick leave request in accordance with her workflow instructions.
11. Petitioner failed to establish by a preponderance of the credible evidence that on October 8, 2009, respondent negligently sent an e-mail to the wrong supervisor requesting approval of an employee's timesheet.
12. Petitioner established by a preponderance of the credible evidence that on November 12, 2009, respondent failed to immediately deduct advanced annual and sick leave from two employees as instructed by her supervisor.
13. Petitioner established by a preponderance of the credible evidence that in November 2009, respondent failed to change an employee's undocumented sick leave to documented sick leave despite receiving and filing the employee's doctor's note.
14. Petitioner established by a preponderance of the credible evidence that on December 3, 2009, respondent failed to input leave for an employee as instructed by her supervisor, resulting in an overpayment on the employee's December 11, 2009, paycheck.
15. Petitioner established by a preponderance of the credible evidence that on December 11, 2009, respondent failed to inform the payroll officer that an employee's paycheck was to be held because his timesheet was still in draft status.

RECOMMENDATION

Upon making the above findings and conclusions, I requested and reviewed a copy of respondent's personnel file in order to make an appropriate penalty recommendation. Respondent has worked for the City of New York since February 10, 1997. She was hired by the Department as a timekeeper on March 7, 2005. During her five-year tenure with the Department, respondent has received a few warning memoranda but has never been formally disciplined. In December 2007, respondent, along with the rest of the Human Resources Division, received praise for their work on the agency's winter meeting. Respondent received an overall rating of "conditional" on her 2008 performance evaluation, an overall rating of "good minus" on her 2007 evaluation, and an overall rating of "good" on her 2006 evaluation.

Most of the cases involving a prolonged and persistent pattern of unsatisfactory work performance have resulted in the employees being either terminated or demoted. *See Human Resources Admin. v. Hampton*, OATH Index No. 517/08 (Dec. 12, 2007) (recommended demotion for a clerical employee who consistently demonstrated an inability to properly carry out required tasks, even after receiving detailed instructions from her supervisors); *Myrick*, OATH 505/95 (recommended termination for a computer associate who repeatedly and insubordinately failed to perform his job functions); *Dep't of Finance v. Smalls*, OATH Index No. 316/94 (Jan. 27, 1994) (recommended demotion for a supervisor of cashiers who repeatedly failed to do assigned tasks in a proper and timely fashion and committed various instances of insubordination, but deemed able to perform a less demanding position); *Dep't of Buildings v. Almodovar*, OATH Index No. 833/91 (July 18, 1991) (recommended termination for a boiler inspector who issued baseless violations and defied directions from supervisors); *Bd. of Education v. Cook*, OATH Index No. 733/90 (Apr. 9, 1990) (recommended termination for a food services manager who failed to keep accurate records, complete reports, manage ordering food supplies, and observe nutritional guidelines); *Dep't of Consumer Affairs v. Zakzouk*, OATH Index No. 219/90 (Dec. 22, 1989), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 90-96 (Oct. 25, 1990) (recommended termination for an inspector who falsified time entries, wrote baseless violations, and disobeyed orders).

Here, respondent has been found guilty of 13 instances of incompetence and one instance of misconduct. Respondent has basic comprehension problems with the CityTime system that

she is required to use to perform her job. But, more significantly, respondent has an issue with authority. Respondent's supervisors have recognized her shortcomings and have made attempts to work with her to improve her performance and communication skills. They have given her detailed written instructions and precise verbal directions yet respondent still manages to fall short. In some instances respondent's difficulties go beyond her inability to understand certain functionalities of CityTime to her persistent unwillingness to follow her supervisors' directives. Respondent has repeatedly acknowledged that she was given instructions and understood the instructions, but chose to disregard them. Respondent believed that she had a better way to do it or simply thought her supervisor was mishandling the situation. Unfortunately, respondent's way of handling the situation on her own was usually incorrect.

In some cases of incompetence, employees are not adequately put on notice that there was a problem with their performance. Either they received superlative evaluations in an effort to spare their feelings or the supervisors were unclear with their instructions and/or feedback. *See Transit Authority v. Wong*, OATH Index No. 1866/08 at 25 (Aug. 28, 2008) (respondent's supervisors gave him mixed messages about his work and over-inflated evaluations skewing respondent's perspective regarding his capabilities and performance). Here, respondent was put on notice as early as 2005 that there were issues with her work. The Department took great pains to document problems with respondent's performance, stating repeatedly in warning memoranda that she committed misconduct and was demonstrating incompetence. Respondent was warned in each of these memos that she could be subject to disciplinary action in the future if her performance did not improve. Instead of working on improving her performance, respondent rejected the criticism as false or ridiculous and complained of being overworked and persecuted.

The Department has requested that respondent be terminated. Respondent argued for a dismissal of the charges, but if a finding of guilt was made, she requested demotion, rather than termination. In this instance, however, demotion would be inappropriate. Respondent's problems go beyond comprehension issues. This situation can not be resolved by simply placing respondent in a lower job title to perform easier tasks with increased supervision. To the contrary, increased supervision may be counterproductive for respondent because she is persistent in her refusal to do the job as directed. Unfortunately, respondent's unwillingness to follow instructions can not be rectified by moving her to another job title.

Accordingly, I recommend that respondent be terminated from her position with the Department.

Kara J. Miller
Administrative Law Judge

August 12, 2010

SUBMITTED TO:

JONATHAN MINTZ
Commissioner

APPEARANCES:

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