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Decision - Dep't of Correction v.

Dep't of Correction v. Gonzalez

OATH Index Nos. 369/06 & 494/06 (June 7, 2006)

Two correction officers found not guilty of charges that they failed to secure their post on the midnight tour in a mental observation housing area. ALJ found officers' testimony to be more credible than that of supervising captain.

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ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of

DEPARTMENT OF CORRECTION

Petitioner

-against-

Respondents

REPORT AND RECOMMENDATION

DONNA R. MERRIS, *Administrative Law Judge*

This disciplinary proceeding was referred by petitioner, the Department of Correction (" Department") pursuant to section 75 of the Civil Service Law. Respondents, Correction Officer and Correction Officer

, are charged with violations of Department rules and regulations governing the securing of posts, obeying lawful orders and providing reports to the Department arising out of an incident that occurred on April 17, 2005 during the midnight tour. Three specifications against Respondent Gonzalez allege: (1) respondent failed to secure her post; (2) she failed to obey a lawful order from a supervisor; and (3) she transmitted a false and/or misleading report concerning the incident in issue. Three specifications against Respondent Williams allege: (1) respondent left his post without permission or authority and failed to secure his post; (2) he failed to obey a lawful order from a supervisor; and (3) he transmitted a false and/or misleading report concerning the incident that occurred on April 17, 2005 (ALJ Exs. 1).

A hearing was held before me on December 9, 2005. At the hearing, petitioner presented three witnesses; Correction Captain . . . , Assistant Deputy . . . and Correction Officer . . . and relevant documents. Respondents presented the testimony of Correction Officer . . . and testified on their own behalf in addition to presenting relevant documents.

For the reasons stated below, I find that the allegations have not been sustained by a preponderance of the credible evidence and should, therefore, be dismissed.

ANALYSIS

The charges in this case arose out of an incident involving the respondents and . . . during the 2300 to 0731 (11:00 p.m. to 7:30 a.m.) tour on April 17, 2005 at the Anna M. Kross Center ("AMKC") on Rikers Island.

The only undisputed testimony in this proceeding establishes that the respondents and Captain Thevenin were on duty, the respondents were stationed in the mental observation housing area referred to as Modular 11 ("Mod 11") and Captain . . . was their immediate supervisor (Tr. 7-8). The midnight tour on April 17, 2005 was the first time that Captain . . . supervised Modular 11 and the respondents. According to the respondents' testimony, they had not met the Captain prior to that evening (Williams: Tr. 91-92; Gonzalez: Tr. 105).

The inmates housed in Mod 11 have been classified by mental health physicians as having mental disease requiring observation during their incarceration. These inmates are housed in a dormitory-type setting as opposed to being housed in individual cells (Laboriel: Tr. 61-63). The physical layout of the unit consists of three posts. The "A" post is an office area surrounded by glass in which is housed necessary equipment, telephones, the "A" log book and keys to the various doors in the area. Respondent . . . was assigned to the "A" post and was the "A" officer on the 11:00 p.m. to 7:30 a.m. tour on April 17, 2005 (Thevenin: Tr. 11-12). On either side of the "A" post is an "A" side and a "B" side, the areas in which the inmates are housed. Respondent . . . was the "B" officer assigned to the "A" side of the unit (Williams: Tr. 90). Correction Officer . . . was the "C" officer assigned to the "B" side of the unit on April 17, 2005 during the midnight tour (Edwards: Tr. 76-77).

Captain Thevenin testified that Mod 11 is referred to by the correction officers as a "hot post" meaning that there is generally a fight on every tour or the

inmates may become out of control. Because of that possibility, the officers on duty there need to be more alert (Tr. 7-8). After roll call at 11:00 p.m. on April 17, 2005, Captain [redacted] gave respondents specific instructions about Mod 11. She instructed that there was to be no inmate movement on the tour; inmates assigned to a bed should remain on their beds; all equipment was to be secured; and there were to be no medical clinic visits unless it was an emergency. In addition, Captain [redacted] instructed that there were to be no more than two inmates permitted to go to the bathroom at any one time. These procedures, according to the Captain's testimony, are Department requirements for the midnight tour on Mod 11 (Tr. 8-9).

When Captain Thevenin made her first visit to Mod 11 following roll call, Respondent [redacted] was speaking with two inmates in the A station. The Captain did not see Respondent [redacted]. The inmates saw the Captain and told Respondent [redacted] that a captain was at the door. They then started to pick up the garbage. Respondent [redacted] opened the door to the A station and Captain [redacted] asked "what [was] going on." The two inmates ran to the A side of the housing area followed by Captain [redacted]. The Captain observed some inmates looking into the A station window; some inmates were getting hot water; and, others were walking around the area. None of these activities, according to Captain [redacted] testimony, were authorized during these late hours. Captain [redacted] asked Respondent [redacted] where Respondent [redacted] was and received no answer. She instructed the inmates that they should be on their respective beds and that there was to be no movement other than going to the bathroom (Tr. 11-13). The inmates responded that they were going to, ". . . set it off on you, Captain. You're going to have a hard night" (Tr. 16). As some forty inmates were raising their voices, the Captain had to also raise her voice to carry over theirs (Tr. 17).

During the commotion, the Captain told the respondents to put the house in order. Neither respondent moved from the doorway or responded to the Captain. The Captain then ordered the respondents into the A station. She outlined the procedures to be enforced during the midnight tour when she is the supervising captain and expressed the danger of having the hot water pots on during the late tour. Respondent [redacted] said to the Captain, "Well, they're not going to do anything on my tour; if they're going to burn anybody with hot water, it can be done at any time of the day or night" (Tr. 17, 19). The Captain then instructed the officers that, on the midnight tour, in order to have control, there is to be no movement among the inmates. If the inmates are on their beds and one or two inmates attempt to attack another inmate, the officers on duty have more control if the remaining inmates are on their beds. The Captain, during this conversation, did not shout at the officers because they were inside the A station and the conversation was meant to be among the three individuals (Tr. 17-18).

As the Captain was talking to the respondents inside the A station, the inmates began banging on the windows. The Captain surmises that more than ten inmates were present at the window(s). The inmates were saying such things as, "What is this, take it to the bed? Who [does] this captain think she is?" (Tr. 18). The respondents stood quietly in the A station and apparently waited for the Captain to finish speaking (Tr. 18).

On April 17, 2005, no inmates were removed from the dormitory nor were any inmates taken to Intake. The probe team was not summoned to Mod 11 on this

occasion. After the Captain finished speaking to the respondents, she signed the book and left the area. When she next returned on April 17, the inmates were in bed, the lights were off and Respondent [redacted] was on his post (Tr. 30).

In specification one, petitioner alleges that, on April 17, 2005, Respondent [redacted] failed to secure her post and that Respondent [redacted] left his post without permission or authority and failed to secure his post (ALJ Exs. 1). The issues are: whether or not the equipment, *i.e.*, the hot pot and the telephones were secure; whether the lights in the dormitory should have been turned off and the night lights turned on; whether or not the inmates were confined to their beds and, whether or not Respondent [redacted] was off post when Captain [redacted] arrived at Mod 11. Specification two alleges that the respondents failed to obey the Captain's lawful order (ALJ Exs. 1).

It is the Captain's testimony that the inmates can retrieve hot water from the hot pot located inside the A station through an opening in a window. Hot water is not available to the inmates on the midnight tour. Captain Thevenin realized, on April 17, 2005, that the hot pot was still turned on because the light on the pot was red. In addition, the lights in the dormitory were all still turned on when she made her first tour. The lights should be turned off and the night lights turned on after the count is completed at 11:30 p.m. or 11:45 p.m. The difficulty with allowing the inmates to move freely on the tour is that the area is then not secure. The free movement allows the inmates to attack one another and interrupts those inmates who want to sleep (Tr. 14-15, Laboriel: Tr. 63-64, once the 11:00 p.m. tour begins, the inmates should be at their beds in the dorm area and should not be allowed inside the A station; the wall telephones and hot pots should be put away in the A station).

According to the Captain's testimony, Respondent [redacted] was not on his post nor was he in the A station when she arrived for the tour. He appeared a "few minutes" into Captain Thevenin's "putting the house in order" (Tr. 15). After Captain [redacted] ordered both respondents into the A station, she asked Respondent [redacted] why he was not on post, why the inmates were walking around and reminded him that she had given instructions as to the procedure on the tour prior to his assumption of the post (Tr. 16).

Respondents deny any wrongdoing.

Respondent [redacted] testified that, on April 17, 2005, he was late for the start of his tour and did not attend roll call. He was about five minutes late and went directly to his post area. Respondent [redacted] stopped at the officers' mess hall, went to the bathroom and arrived at the A side post at approximately 11:25 p.m. (Tr. 91). The record reflects that Respondent [redacted] signed onto the post at 11:20 p.m. (Tr. 103; Pet. Ex. 6). Because he was late and did not attend roll call, Respondent Williams did not receive any instruction from Captain Thevenin during or directly following the roll call. When he reported to his post, Respondent [redacted] did an inmate count that did not match the previous tour count. He counted the inmates a second time continuing to find a discrepancy. Respondent [redacted] went to the A station to retrieve the inmate cards in order to verify his count. When Captain [redacted] arrived for her first tour of the area at 11:45 p.m., Respondent [redacted] was inside the A station reviewing the inmate cards. Respondent [redacted] was also in the A station (Tr. 91-93). In addition, there were two inmates inside the A station who were reporting that two other inmates needed to be removed in order to prevent a slashing or

stabbing. It is a common practice for the officers to bring an inmate or inmates into the A station, particularly when the steady officers are present. By doing so, a potential situation with the inmates may be de-escalated (Tr. 96-97).

When the Captain came into the area, she went to the A side and began to yell at the inmates. She said, "One a bed," and used some four-letter words, such as, "Get the 'f' the bed," "What the 'f' is this?" (Tr. 93). After the inmates started yelling, Respondent [redacted] put the inmate cards down and ran to his post. The Captain came very close to Respondent [redacted] face and asked, "What's going on here? Why are the lights on? Why was (*sic*) you off post?" (Tr. 94). Respondent [redacted] explained to the Captain that the count was off and that he was counting the inmate cards inside the A station. Captain Thevenin told Respondent [redacted] that she had been on the job for sixteen years and that "this" would never happen. Finally, she told Respondent Williams that she is not the type to write people up and that she would give him a break this time. Captain [redacted] later asked the respondents for a report (Tr. 94).

Respondent [redacted] reported to roll call on April 17, 2005 and met Captain Thevenin for the first time. Captain [redacted], according to Respondent [redacted], did not pull the officers aside after the roll call for any specific instructions. Respondent [redacted] arrived at Mod 11 A station about 11:15 p.m. She conducted an inmate count on both the A side and the B side and verified the count with the 3:00 p.m. to 11:00 p.m. tour officer. Once that was completed, she did a razor and equipment count, signed the count slip and began making her logbook entries (Tr. 106).

As Respondent [redacted] had a discrepancy with the inmate count on the A side, he came into the A station to verify his count with the cell locator cards. After he completed his review and verified the count, Respondent [redacted] told Respondent [redacted] that there was an issue with two inmates in the area. Inmates with difficulty are allowed inside the A station in order for the officers to find out, in privacy, what is the issue (Tr. 107-08). As Respondent [redacted] allowed the inmates to come into the A station, Captain Thevenin was at the entrance door, banging to be let in (Tr. 107). Respondent [redacted] opened the door to let the Captain into the A station. As she entered the room, Captain Thevenin saw Respondent [redacted] and started "yelling and screaming" (Tr. 108).

Respondent [redacted] heard some banging as though someone was throwing something at the glass side of the A station. Inmates were not standing around the area. Respondent [redacted] went to the window and saw that the inmates were throwing things, but she was unable to tell from where the objects were coming. The Captain was cursing and said to the inmates that, "this was her house and she's going to run it her way" (Tr. 110). After a "little while," Captain [redacted] went to the B side, which was quiet, and addressed the officers there. Captain [redacted] then signed the log books and left the area. On her second tour of the area, Captain [redacted] gave Respondent [redacted] a written order asking for a report of the incident (Tr. 110; Resp. Ex. 4).

Resolution of these charges rests on a determination of the credibility of the witnesses. In making a credibility determination, this tribunal has looked to "witness demeanor, consistency of a witness' testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness' testimony comports with common sense and human

experience." *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98, at 2-3 (Feb. 4, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998). While the potential motivation for the respective parties to testify falsely is a significant consideration, a credibility assessment is a task of carefully reasoned judgment, aided by all of the foregoing facts. *Dep't of Correction v. Hansley*, OATH Index No. 575/88 (Aug. 29, 1989).

There is little evidence before me from which facts of the event in issue can be found with complete certainty. As a general observation, I found the respondents' testimony to be more credible than the testimony of Captain Thevenin. The evidence shows that Captain Thevenin may have been somewhat overzealous in her reaction to the respondents and the inmates. This conclusion is supported by the testimony of Correction Officer Brent Edwards who, while being a bit confused about the date, recalled that there was no noise coming from the A side prior to the Captain's appearance on either April 17, 2005 or on April 18, 2005. In addition, Officer [redacted] testified that the Captain was "a little loud" on both occasions and that he heard the Captain yelling at the inmates on the A side. It is Officer [redacted]'s opinion that the area was quiet because the respondents were the steady officers there. When the Captain came into the area "[the inmates] livened up a little bit more than they normally do . . ." (Tr. 80-82)

More telling are the actions of the Captain during and following her appearance on the post. Admittedly, Captain [redacted] raised her voice. Clearly, if Officer Edwards came to the door from the B side of Mod 11 because he heard the Captain's voice, the conclusion to be drawn is that her voice was considerably raised. In addition, Captain [redacted] was ordering the inmates to confine themselves to their beds and to remain quiet. Captain [redacted] indicated in her logbook entry at 12:10 a.m. that her instructions to the respondents were to obey all rules and regulations and to stay on post absent proper relief, to keep the night lights on and, that the only movement of the inmates was to be to the bathroom. Captain Thevenin then indicated that all appeared secure (Resp. Ex. B). The entry does not lead to the conclusion that these respondents engaged in misconduct during the Captain's tour. It is undisputed that Captain Thevenin originally intended to not institute disciplinary charges against these respondents. She did not indicate to Assistant Deputy Warden Laboriel that she was disturbed by what she found in Mod 11 at the beginning of the tour until 5:00 a.m. The Deputy Warden instructed Captain [redacted] to write a report and to commence disciplinary action. Finally, the Captain was particularly imprecise about the time that she made her first tour of Mod 11. She made the logbook entry at 12:10 a.m. (Resp. Ex. B), indicated in her report on April 28, 2005 that she made the tour at 2345 hours (11:45 p.m.) (Pet. Ex. 1), and wrote in the memorandum of complaint that she arrived in the Mod 11 housing area approximately 0035 hours (12:35 a.m.) (Resp. Ex. A). When questioned about these discrepancies at the hearing, the Captain testified that all of the recorded times were merely approximations and/or typing errors (Tr. 37). Clearly, if the tour was made after midnight and the situation was as severe as later described by Captain [redacted], a conclusion could be drawn that these respondents may have been derelict in their duty. However, that is not the conclusion to be drawn based on the evidence before me.

It is logical to conclude that, based on the tasks the respondents were performing when the Captain arrived that the time was near the beginning of the

tour. I credited Respondent [redacted] testimony that he was in the process of verifying the inmate count and that he had asked Respondent [redacted] to allow the two inmates to come into the A station to discuss a potential problem. These respondents were steady officers on the post and likely had an established procedure for completing required tasks at the beginning of the tour. Captain [redacted] also believed that she made the tour around 11:45 p.m. Thus, there is substantial evidence to conclude that it was approximately 11:45 p.m. when the Captain came to Mod 11.

Having reached that conclusion and based on the testimony of the Captain ADW Laboriel and the respondents that the inmates were required to be on their beds and quiet on or after 11:45 p.m. and, based on the respondents' testimony that they were engaged in beginning of the tour activities, it is logical to conclude that the respondents were in the process of preparing for lights out. If as the credible evidence indicates, Captain [redacted] arrived at the post at 11:45 p.m., the fact that the lights were on at that moment does not rise to the level of misconduct. There is no evidence that the inmates were out of control. Indeed Officer [redacted] testified that it appeared to him to be quiet until he heard Captain Thevenin shouting. The respondents testified that it was their practice as the steady officers on the post, to turn the lights off at midnight. Petitioner can cite no formal procedure stating that lights were to be turned out at 11:30 p.m. I must be taken into account that Captain [redacted] was only beginning her supervision of this area and this was her first appearance at the post.

The failure to secure the post allegation as to Respondent Gonzalez appears to stem from the undisputed fact that there were two inmates in the A station when the Captain arrived. The respondents explained that they invited the inmates into the A station because there was a threat of violence and they were in the process of diffusing that threat. In addition, the respondents testified that this is often the procedure used in that situation. It is well settled that correction officers are afforded some discretion in these situations and are judged on the reasonableness of their actions under the circumstances. *See Dep't of Correction v. Messina* OATH Index No. 738/92 (July 9, 1992) (the real issue is whether at the time the officer took action he/she acted reasonably). While it is undisputed that generally, on the midnight tour, there is only limited inmate movement, there is nothing in this record to support a conclusion that these respondents acted irresponsibly by attempting to diffuse a potentially violent situation. The fact that Captain [redacted] believed the respondents did not provide an explanation as to the presence of the inmates at the time of the incident is explainable considering the Captain's behavior during her first tour. She was shouting at the inmates and at the respondents. Respondent [redacted] testified credibly that she and Respondent [redacted] were not given an opportunity to explain to the Captain (Tr. 115).

Concerning the issue of whether or not the hot pots remained turned on Captain Thevenin testified that the light on the machine was red, therefore it was on. Respondent [redacted] testified that there was water in the pot, but she did not think it was turned on and that there were no inmates drawing water. Respondent Williams testified that the hot pots were turned off and that the telephones were inside the A station (Tr. 94). In addition, Respondent Gonzalez indicated that one had to be on the opposite side of the A station from where the Captain was standing in order to see whether or not someone was at the hot pot. Moreover

Officer [redacted] testified that he did not see any inmates around the A station glass. The Captain's testimony as to the telephones was vague, indicating only that if they were not secured, the inmates might use them as weapons against each other. On this record, it cannot be concluded with any certainty that the equipment was either being used or not otherwise secured.

The failure to secure the post allegation as to Respondent Williams arises from Captain Thevenin's perception that the inmates were not at their beds and that Respondent [redacted] was off-post when she arrived at 11:45 p.m. Again, the credible testimony of Officer [redacted] that the A side was quiet until the Captain arrived leads to the conclusion that, even if some of the inmates were not at their beds, they were not disorderly. Respondent Williams denies that he was off-post and testified that he was inside the A station when the Captain arrived. This testimony is supported by that of Respondent [redacted]. Both respondents testified that, at 11:45 p.m. when the Captain arrived, Respondent [redacted] was confirming the inmate count with the cell locator cards. In addition, Respondent [redacted] had brought the two inmates into the A station. While Captain Thevenin insists that she did not see Respondent [redacted] inside the A station, Respondent [redacted] testified that it was when the Captain did see Respondent [redacted] inside the A station that she began to shout at him. Clearly, Respondent [redacted] went immediately to the A side when the Captain began to shout at the inmates. It is equally likely that, either Respondent Williams was inside the A station when the Captain arrived and she did not see him there because of her focus on the housing area, or, that Respondent Williams was in very close proximity to the A station/housing area when the Captain arrived and came into the A side immediately. Thus, on this record, it cannot be concluded that Respondent [redacted] was off-post when Captain Thevenin arrived. *Dep't of Correction v. Proberbs*, OATH Index No. 413/92 (Apr. 27, 1992) (where the evidence is equally balanced, the party having the burden of proving its case by a preponderance of the credible evidence has not met its burden).

Finally, while Respondent [redacted] did testify that there were inmates throwing things at the A station window once the Captain arrived on the scene, she testified also that no inmates were standing around the window area. This testimony is supported by that of Officer [redacted], who did not see any inmates at the A side window. It is clear that no action was taken against any inmate as a result of this behavior and the Captain, as noted above, did not believe that any action was required. Indeed, she signed the logbook after giving the inmates and the respondents instructions and indicated that all was secure. Moreover, on each subsequent tour, the area was quiet. These actions by the Captain do not support her testimony that the A side was not secure.

The second specification alleges that these respondents failed to obey a lawful order given by the Captain. Here, Captain [redacted] testified that, during the time she was attempting to put the A side inmates in order, neither respondent came to her aid. It is Respondent [redacted] testimony that the two respondents did nothing to secure the area when the inmates were throwing things because the Captain was just "screaming" and gave no direct order to the officers. Respondent [redacted] did stand up from behind the desk and indicate with her hand that the inmates should stop. The inmates took that as an indication to stop and did so (Tr. 116). Respondent [redacted] testified that Captain [redacted] was

berating him in front of the inmates and it was then that the inmates started shouting and cursing. The Captain took Respondent [redacted] to the A station and apologized for shouting. The inmates then calmed down (Tr. 98). The record is inconclusive as to whether or not Captain [redacted] ordered the respondents to intervene. Clearly, the Captain was giving orders to the inmates. It is more likely that the respondents were waiting for the Captain to stop speaking to the inmates, at which time, it appears that the inmates did calm down, either because Captain [redacted] and Respondent [redacted] moved away from the housing area or because Respondent [redacted] indicated with her hand that they should stop their behavior. Thus, this aspect of the second specification cannot be sustained.

What is in issue is whether or not Captain [redacted] gave specific orders to these respondents following roll call as to the time that lights were to be turned out and what procedure she intended for them to follow during the tour. While it is disputed as to whether or not Respondent [redacted] was at the roll call, Respondent [redacted] was there. Respondent [redacted] did testify that Captain Thevenin did not pull the officers aside after roll call (Tr. 105-06). Notwithstanding the inconsistency in the testimony, Officer [redacted] testified that the Captain, following roll call, instructed the Mod 11 or 12 officers that she wanted one man to a bed during the evening and that the area was no different from the cell area (Tr. 77). ADW Laboriel testified that the dormitory areas such as Mod 11 are treated no differently from the cell areas and that, on the midnight tour, the inmates are locked in their cells.

As noted above, this was the first time that Captain [redacted] was meeting these officers in this location. The Captain testified that there are many officers scheduled for the midnight tour. It is highly likely that the Captain, instead of "pulling the officers aside," merely addressed them briefly directly after other business was completed during roll call, as described by Officer Edwards. While Captain [redacted] testified that she specifically saw Respondent Williams at roll call, her subsequent actions lead to the conclusion that Captain Thevenin was mistaken. The Captain was ambivalent as to whether or not these respondents engaged in misconduct as she did not immediately note in the logbook the behavior she later attributed to them; she did not report any unusual circumstance to the Assistant Deputy Warden until 5:00 a.m. or five hours after the event that she now describes as out-of-hand; she does not deny that she apologized to Respondent Williams; and, there were many officers with whom she was unfamiliar at the roll call. Thus, on this record, it cannot be concluded by a preponderance of credible evidence that Respondent Williams was at the roll call in issue to receive any instruction from Captain [redacted].

Finally, Captain [redacted] admittedly, did not instruct the officers as to specific times that the lights were to be turned out because she assumed that they were aware of the time to turn out the lights. Captain Thevenin instructed only that the officers were to, "make sure the lights are out, the night lights are on" (Tr. 29). Moreover, there is no specific rule governing this issue. The respondents consistently explained that the practice in Mod 11, their steady post, was to turn the lights out at midnight, not at 11:30 p.m. The credible evidence establishes that the respondents were in the process of preparing the inmates for lights out. It is undisputed that neither respondent was on the post before 11:20 p.m. and that there was an issue with the inmate count to which

Respondent . was attending as well as the issue with the two inmates who were reporting on a potentially volatile situation. Respondent who was completing her routine of checking the inventory and making logbook entries. Captain made her tour at the very beginning of the shift while these issues were being handled by the respondents.

The conclusion to be drawn from the credible evidence is that it is more likely than not that Captain , in her first appearance in this area of the facility, was somewhat overzealous in her reaction to what she perceived to be a poor performance on the part of these respondents. Even if the respondents were specifically instructed by the Captain prior to taking the post, the circumstance that it was the beginning of the tour and the credible testimony of Officer Edwards that the inmates were quiet prior to the Captain's appearance dictate a conclusion that the actions of the officers would not rise to the level of misconduct. There is no evidence of any willful or intentional conduct and their actions were not so unreasonable as to be considered negligent. *Dep't of Correction v. Messina* , OATH Index No. 738/92, at 11 (July 9, 1992), *citing Reisig v. Kirby* , 62 Misc. 2d 632, 309 N.Y.S.2d 55, 58 (Sup. Ct. Suffolk Co. 1968), *aff'd* , 31 A.D.2d 1008, 299 N.Y.S.2d 398 (2d Dep't 1969); *McGinagle v. Town of Greenburgh* , 48 N.Y.2d 949, 951, 425 N.Y.S.2d 61, 62 (1979).

Having found that the allegations have not been sustained by a preponderance of the credible evidence, the allegation that each respondent transmitted a false and/or misleading report concerning the incident on April 17, 2005 must also fall.

Accordingly, I find that specifications one, two and three as to each respondent have not been sustained and should, therefore, be dismissed.

Donna R. Merris
Administrative Law Judge

June 7, 2006

SUBMITTED TO:

MARTIN F. HORN
Commissioner

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