

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: September 24, 2026

CV-25-1581

In the Matter of SETH GOLDSTEIN,
Petitioner,

v

MEMORANDUM AND JUDGMENT

TOWN OF NISKAYUNA,
Respondent.

Calendar Date: August 19, 2026

Before: Garry, P.J., Fisher, Powers, Corcoran and Ryba, JJ.

Luibrand Law Firm, PLLC, Latham (Kevin A. Luibrand of counsel), for petitioner.

Bailey, Johnson & Peck, PC, Albany (Ryan P. Bailey of counsel), for respondent.

Corcoran, J.

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Schenectady County) to review a determination of respondent terminating petitioner's employment.

Petitioner was working as a systems administrator for respondent in 2022 when he oversaw the transition to a new telephone system for its offices. In April 2024, it was discovered that certain office telephones had been enabled to record the user's conversation in contravention of a Niskayuna Town Board resolution prohibiting such recording except for calls made to "the Police Department for purposes of police investigations." Following an investigation, a disciplinary charge was filed against petitioner alleging three specifications of misconduct and incompetence. The specifications alleged that petitioner had: (1) "disrespected and disregarded" the

resolution prohibiting the recording of nonpolice telephone lines in some manner; (2) failed to ensure that the recording feature remained generally disabled and allowed confidential calls involving the town attorney and others to be recorded; and (3) failed to prevent internal calls from being recorded without the participants' knowledge or authorization. After a hearing conducted pursuant to Civil Service Law § 75 (1), the Hearing Officer sustained the charge and recommended termination. Respondent adopted the findings and terminated petitioner's employment. Petitioner commenced this proceeding to annul the determination, seeking reinstatement, back pay and benefits. Respondent joined issue, after which the proceeding was transferred to this Court (*see* CPLR 7804 [g]).

"Pursuant to Civil Service Law § 75 (1), a civil service employee shall not be removed or otherwise subjected to any disciplinary penalty except for incompetency or misconduct shown after a hearing upon stated charges" (*Matter of Kohn v County of Sullivan*, 214 AD3d 1058, 1059 [3d Dept 2023] [internal quotation marks and citations omitted]). The employer bears the burden of proving misconduct or incompetency and any determination of same "must be based on the written charges" and specific factual findings (*Matter of Melillo v City of Mount Vernon*, 223 AD3d 669, 671 [2d Dept 2024], citing *Matter of Kiyonaga v New York State Justice Ctr. for the Protection of People with Special Needs*, 204 AD3d 1351, 1353-1354 [3d Dept 2022]). To be sure, our review of that determination is limited to whether substantial evidence supports the determination (*see Matter of Moon v County of Columbia*, 243 AD3d 1043, 1045 [3d Dept 2025]; *Matter of Brooks v New York State Dept. of Corr. & Community Supervision*, 218 AD3d 1096, 1098 [3d Dept 2023]; *Matter of Minckler v Sullivan County*, 216 AD3d 1343, 1344 [3d Dept 2023]). We cannot conduct that review unless the hearing officer makes sufficiently specific factual findings to identify the basis for the determination, however, nor may we supply factual findings that are absent (*see Matter of Morgan v Warren County*, 191 AD3d 1129, 1130-1131 [3d Dept 2021]). As the Hearing Officer here did not provide the requisite specificity, we annul the determination and remit for further proceedings.

The undisputed hearing evidence reflected that petitioner was the contact person with Fluent Voice, the telephone vendor selected for the project, in setting up respondent's new telephone system in 2022. There is also no question that telephone calls to nonpolice extensions – including calls to the town supervisor, the town supervisor's confidential secretary and the town attorney – were being recorded in 2024 despite the resolution prohibiting such. What transpired between those two points in time, however, was far less clear.

The hearing included testimony from both petitioner and a Fluent Voice employee involved in the system's implementation to the effect that petitioner alerted Fluent Voice to the recording restrictions imposed by the Town Board, did not ask for recording to be activated on all telephones and transmitted a spreadsheet identifying the specific telephone lines that should be recorded. The Fluent Voice employee further testified that a network engineer at Gabbit, the telephone vendor that acquired Fluent Voice when the phone system was being implemented and for whom she briefly worked, told her that he planned to enable recording on the entire system due to his company's technical limitations regardless of respondent's desire. Petitioner testified to another possible explanation, stating that the then-town supervisor asked him how to turn on recording capability on certain telephone lines after the system went live and that she enabled recording on the town attorney's line and the other phones in the town supervisor's work unit. Notably, the town attorney confirmed in her testimony that such a request had been made by the town supervisor, adding that the town supervisor had the ability to activate that recording on her own.

An information technology consultant retained by respondent to investigate the situation uncovered no electronic trail to establish how the recording started and, notably, found no *evidence* of wrongdoing by petitioner. The investigator nevertheless concluded that petitioner acted with gross negligence because a Gabbit attorney – who the investigator mistakenly believed was an engineer – advised the investigator, without any supporting proof, that petitioner asked Gabbit during the initial setup to enable recording for all of respondent's telephone lines for one year; petitioner and the Fluent Voice employee directly contradicted this claim. Even the investigator acknowledged, however, that several others could turn recording on and off and that the town supervisor might have been one of those individuals.

Thus, there were sharp factual disputes regarding petitioner's alleged culpability, if any, that the Hearing Officer needed to resolve. Although the Hearing Officer stated generally that he found the testimony of respondent's witnesses more credible than that of petitioner and the Fluent Voice employee, he did not make sufficient factual findings to permit meaningful review. The Hearing Officer failed to discuss each misconduct specification separately and never stated the factual findings he relied upon to establish each finding of guilt. This failure was particularly glaring when distinguishing between intentional and negligent misconduct, as the Hearing Officer never determined when, how or why telephone calls were improperly recorded and left doubt as to whether he faulted petitioner for intentionally disregarding the town resolution when the telephone system was set up, for later advising the town supervisor how to turn recording on in

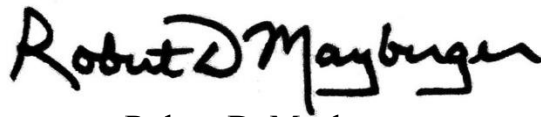
violation of that resolution, or for negligently failing to monitor the telephone system in general. The absence of adequate findings further obscured whether the Hearing Officer inappropriately shifted the burden of proof from respondent to petitioner; he cursorily acknowledged that respondent bore the burden of proof but then faulted petitioner for not documenting his engagement with Gabbit or the town supervisor's inquiry about how to activate recording on certain extensions. Absent specific factual findings as to what occurred and an explanation of the basis for sustaining each specification, we cannot determine whether substantial evidence supports the determination. Accordingly, the determination "must be annulled and the matter remitted for the development of appropriate findings" (*id.* at 1130).

In order to assist the Hearing Officer in rendering an adequate decision upon remittal, we briefly address petitioner's remaining arguments to clarify the applicable legal principles. As respondent bears the burden to establish the charged misconduct under Civil Service Law § 75 (2), petitioner's failure to call the town supervisor or provide documentary evidence to corroborate her request for assistance in activating the recording feature on certain telephone lines is immaterial absent some showing that an adverse inference would be appropriate (*see People v Gonzalez*, 68 NY2d 424, 428 [1986]; *Noce v Kaufman*, 2 NY2d 347, 353 [1957]; *Matter of Gongola v Szado*, 85 AD2d 853, 854 [3d Dept 1981]). The Hearing Officer should also be mindful that "seriously controverted" hearsay evidence, like Gabbit counsel's purported claim that petitioner had requested that recording be enabled initially on all telephone lines during installation, cannot constitute substantial evidence for the determination by itself (*Matter of ExceedLLC, LLC v Department of State Div. of Licensing Servs.*, 233 AD3d 1392, 1394 [3d Dept 2024] [internal quotation marks and citations omitted]; *see Matter of C&C Tobacco/Chuck's Gas Mart, Inc. v Tompkins County Whole Health*, 233 AD3d 1237, 1238 [3d Dept 2024]).

Garry, P.J., Fisher, Powers and Ryba, JJ., concur.

ADJUDGED that the determination is annulled, without costs, and matter remitted to respondent for further proceedings not inconsistent with this Court's decision.

ENTER:

A handwritten signature in black ink, reading "Robert D. Mayberger". The signature is written in a cursive, flowing style with a large initial "R" and a stylized "D".

Robert D. Mayberger
Clerk of the Court