

# ***Dep't of Sanitation v. Perez***

OATH Index No. 1994/11 (June 6, 2011)

Sanitation worker guilty of AWOL and out of residence while on supervised sick leave. ALJ recommends a 30-day suspension.

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

*In the Matter of*  
**DEPARTMENT OF SANITATION**

*Petitioner*

*- against -*

**NOEL PEREZ**

*Respondent*

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### **REPORT AND RECOMMENDATION**

**TYNIA D. RICHARD**, *Administrative Law Judge*

This employee disciplinary proceeding was referred by petitioner, the Department of Sanitation ("Department"), pursuant to section 16-106 of the Administrative Code. Petitioner charges respondent, a sanitation worker, with being absent without leave and out of residence during supervised sick leave.<sup>1</sup>

The hearing was conducted before me on May 18, 2011. In addition to its documentary evidence, petitioner presented the testimony of Investigator Ragusa and Supervisor Difrenza. Respondent testified on his own behalf.

Based upon the record of the proceeding, I find respondent guilty of the charged misconduct and recommend a 30-day suspension.

#### **ANALYSIS**

##### **Charge No. 8475 – AWOL**

Respondent is charged with being AWOL on July 25, 2009, for failing to report to work and failing to call in. Respondent did not deny the allegation.

Respondent was scheduled to work the 0600 hours to 1400 hours shift on July 25, 2009. According to Department time and leave records, he failed to report to work or to call to report

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<sup>1</sup> Before the start of the hearing, petitioner withdrew an additional charge, Index No. 8271.

that he would not be coming (Pet. Exs. 2, 3, 4, Tr. 52). Thus, respondent was carried as AWOL. Respondent conceded that he failed to report to work that day. He testified that he woke up extremely late and did not feel well although he did not consider himself to be sick (Tr. 70). He said that he called in and was told that it was too late, he had already been marked “no call no show.” The Absence and Lateness Report does not indicate that he called (Pet. Ex. 4). The report does indicate, however, that this was respondent’s 13th absence in 12 months.

Thus, petitioner proved by a preponderance of the evidence that respondent was AWOL on July 25, the 13th such absence in 12 months.

Charge No. E156891 – Out of residence

Respondent is charged with being away from home without authorization on August 4, 2009, while on supervised sick leave. Respondent claims that he was at home.

Because the Department grants unlimited sick leave, it closely monitors the use of leave. Investigator Ragusa testified that, as an investigator in the Department’s sick leave unit, it is her responsibility to visit the homes of Department employees who are on the medical leave list. Respondent was on that list on August 4, 2009, and Investigator Ragusa was assigned to visit him that day (Tr. 12-13). She was familiar with his address as she had visited before when he was on medical leave. She testified that she knocked on his door and rang the door bell; she also recorded this on her Home Visitation Program Investigator’s Notice (DS 424 Form) (Tr. 15-17, Pet. Ex. 1). She said she also shouted out “sanitation” (Tr. 18). There was no response. It is her practice to wait five minutes – in case the employee is in the bathroom – and then call by phone (Tr. 19). Her records indicate that she called respondent’s telephone number and spoke to him. She testified that she identified herself and asked respondent whether he was at home or where he was; he said “he stepped out” (Tr. 20, 24, 33-34, 45). She hung up the phone, saying nothing more to him. She said she had spoken to him before and recognized his voice. She did not ask him where he went or when he left home. She filled out the DS 424 Form indicating that he was not at home, placed the two required notices in the mail slot in his door, and left (Tr. 20-22). She said she would have waited if he had told her he was in the shower.

Respondent testified that he was at home in the shower when he received the phone call from the investigator (Tr. 73). He said the caller (a female who said “this is sanitation sick leave”) identified herself and said “I’m outside” (Tr. 73). He said the phone connection had some static. He told her “I’m in the shower” and she said “I’m not waiting” and hung up (Tr. 73,

77). When he got out of the shower, he went to the door and found the two notices in his mail slot (Tr. 73-74). He said he was surprised to find the DS 424 Form, which reported that he was not at home at the time of the investigator's visit (Tr. 76-77). Nevertheless, he said, he did not think anything of it and he did nothing to notify the Department that he had, in fact, been at home at the time of the visit. Nor did he try to contact the investigator on his cell phone which had caller ID (Tr. 79). He stated that he did not know who to call (Tr. 76) and that he tried none of the phone numbers provided on the visit form (Tr. 79, 81, Pet. Ex. 1). He said he mentioned this incident to a supervisor at the clinic during his visit the next day, who said that "this happens a lot" (Tr. 76-77).

Respondent conceded that the phone number registered with the Department is his cell phone number and that he does not have a land line (Tr. 28, 72).

I found Investigator Ragusa to be a credible witness with no sign of bias or interest in the outcome of this hearing. *See 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) (in making credibility determinations, the tribunal looks 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."). Her testimony that respondent told her that he had "stepped out" was consistent with her notes on the DS 424 Form she left in respondent's mail slot. Certainly, since respondent's only contact phone number is his cell phone, he could have been anywhere when he spoke to Investigator Ragusa. Juxtaposed against respondent's interest in avoiding a finding of misconduct, I found her testimony more convincing than respondent's denial. She had no reason to lie and no apparent reason to leave upon learning that he was in the shower, if that were the truth. Moreover, respondent could have bolstered his claim that he told her he was in the shower by having made some contemporaneous objection to her failure to wait for him. He did not, even though he was aware of his poor record of attendance and the potential consequences of an additional misconduct charge. Under the circumstances, I found his claim unconvincing.

Accordingly, I find that petitioner established the charged misconduct.

### **FINDINGS AND CONCLUSIONS**

1. Charge No. 8475 is sustained in that, on July 25, 2009, respondent was absent without authorization, in violation of Department rules.
2. Charge No. E156891 is sustained in that, on August 4, 2009, respondent was absent from home during supervised sick leave, without authorization, in violation of sick leave rules.

### **RECOMMENDATION**

In connection with the above findings and conclusions, I obtained and reviewed a summary of respondent's disciplinary record, as provided to me by the Department. Respondent was appointed to his position as a sanitation worker on April 3, 2000. Since then he has been disciplined on 10 separate occasions for numerous time and leave violations including AWOL, out of residence, and inadequate or missing medical documentation resulting in the following penalties: reprimands in 2002 and 2003, a three-day pay fine in 2004, two days' suspension in 2005, a one-day pay fine in 2005, three days' suspension in 2007, a 10-day pay fine in 2007, a 19-day pay fine in 2008, and 20-day and 25-day pay fines in 2009. Indeed, respondent's disciplinary history is significant. His performance evaluations in 2008 and 2009 were "unsatisfactory" overall due to excessive AWOLs and sick leave violations. His 2010 evaluation records an overall "satisfactory" rating with no instances of AWOL and no disciplinary complaints, in contrast to prior years.

Here, respondent has been found guilty of one day's AWOL and one instance of being absent from home during supervised sick leave in violation of sick leave rules, conduct that occurred two years ago in 2009. The Department seeks a penalty of termination for these somewhat minor charges, arguing that respondent's extensive disciplinary history justifies the ultimate penalty. Respondent seeks a lesser penalty and offered mitigating testimony.

Respondent acknowledged his poor time and leave record and testified that it was due to child care difficulties. He and his wife both work and had for years used the services of a neighbor and friend to babysit their two children, ages one and four years in 2009 (Tr. 60-62). The babysitter often cancelled on short notice leaving the couple to scramble for babysitting coverage, which responsibility often fell to respondent and led to his frequent requests for childcare emergency leave (Tr. 63). When his problems reached their apex in 2009, he filed for

hardship and was given a new work shift, on nights, to alleviate the child care burden (Tr. 64, 66). As a result, he is less frequently absent and has improved his sick leave status to the A category, from his prior status in the chronic absence or C category (Tr. 68).

Supervisor Difrenza, who supervised respondent periodically over a three-year period, characterized him as a good worker (Tr. 53-54). He noted respondent's previous time and leave problems and confirmed that he has improved his attendance record since 2008, when he first met him, to the A category from the C category (Tr. 55).

This mitigation evidence was not contradicted by petitioner.

For unauthorized absence from home during supervised sick leave, employees have received penalties of three to 10 days, depending upon their prior history. *See Dep't of Correction v. Odle*, OATH Index No. 118/07 (Dec. 22, 2006) (three days for sick leave out of residence where employee had unblemished disciplinary record); *Dep't of Sanitation v. Smalls*, OATH Index No. 270/01 (Nov. 3, 2000), *modified on penalty*, Comm'r Dec. (Nov. 13, 2000), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD02-31-SA (Apr. 26, 2002) (CSC upholds five days' suspension); *Gugliucci v. Dep't of Sanitation*, NYC Civ. Serv. Comm'n Item No. CD91-91 (June 21, 1991) (10-day suspension imposed on employee with prior sick leave violations who was found guilty of being out of residence). Penalties for an unauthorized absence typically range from one to seven days of suspension. *See, e.g., Dep't of Sanitation v. Sosa*, OATH Index No. 1527/05 (Aug. 12, 2005) (four-day penalty per time and leave violation where employee had past record of similar misconduct); *Dep't of Sanitation v. Ambrosino*, OATH Index No. 1553/03 (Sept. 2, 2003) (two days AWOL resulted in four-day suspension), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD05-73-D (Sept. 20, 2005) (CSC reduces penalty to one-day suspension); *Dep't of Sanitation v. Raheb*, OATH Index No. 1529/03 (Aug. 29, 2003), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD04-84-SA (Nov. 23, 2004) (seven-day suspension for taking emergency leave due to undocumented medical emergency). In accordance with the principal of progressive discipline, penalties are increased when an employee has a history of misconduct for the same offense, as respondent does here. Indeed, precedent has recognized that termination for time and leave violations may be appropriate when such violations are abusive. *See Pell v. Bd. of Education*, 34 N.Y.2d 222, 239-40 (1974) (upholding police officer's termination for being out of residence on two occasions while engaging in outside employment when he should have been at home on sick leave).

Despite substantial prior discipline, I do not find termination warranted in this case having been convinced that respondent has reformed himself and reversed a pattern of poor performance in his time and attendance since the commission of this misconduct two years ago. It is significant that his record of attendance in 2010 reflects the turnaround he described in his testimony. His record contains no additional time and leave violations since 2009. By creating a record of compliance with time and leave requirements, he has demonstrated a commitment to the Department that was previously lacking. I find termination to be excessive under these circumstances. *See Dep't of Sanitation v. Bello*, OATH Index No. 266/02 (Dec. 21, 2001) (termination unwarranted despite sanitation worker's eight prior penalties where significant mitigation was shown).

I therefore recommend a 30-day suspension for the misconduct proven, which should adequately address the need for progressive discipline.

Tynia D. Richard  
Administrative Law Judge

June 6, 2011

SUBMITTED TO:

**JOHN J. DOHERTY**  
*Commissioner*

APPEARANCES:

**CARLTON LAING, ESQ.**  
*Attorney for Petitioner*

**ALAN COHEN, ESQ.**  
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