Sanitation worker found guilty of being absent without leave 20 times within an 11-month period and disobeying an order. 65-day suspension recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
- against -
ERIK CHEUNG
Respondents

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORGNIOTTI, Administrative Law Judge

This disciplinary proceeding was referred by petitioner, the Department of Sanitation (“DOS”), pursuant to section 16-106 of the Administrative Code. Respondent, Erik Cheung, a sanitation worker, is charged with being absent without leave (“AWOL”) on 20 occasions and with failing to obey a supervisor’s order (ALJ Ex. 1).

A trial was conducted on May 3, 2017. Petitioner submitted documentary evidence and called two DOS witnesses. Respondent testified on his own behalf, admitted the charges, and claimed that was unable to come to work because he had trouble sleeping. For the reasons below, the charges are sustained. Respondent should be suspended for 65 days.

ANALYSIS

Respondent has worked in the Manhattan 3 garage since 2007, when he became a sanitation worker (Tr. 34). He does not have a steady shift (Tr. 44).

In 20 separate complaints covering an 11-month period, respondent is charged with being AWOL. Deputy Chief Chorny testified that, as part of his duties, he reviews time and leave records and is familiar with the records of sanitation workers in Manhattan 3. He reviewed documentary evidence and testified that between April 22, 2016, and March 28, 2017,
respondent was AWOL from his shift on 19 occasions and was absent from his assigned location for two hours and 30 minutes on another occasion (Tr. 6-16; Pet. Exs. 1, 2).

Respondent testified that he is 35 years old and lives with his parents. He gives them money to help with expenses (Tr. 30). Respondent admitted the AWOL charges and testified that starting in 2014 he had trouble sleeping for unknown reasons. He took over-the-counter medications to help him sleep during the day when he was working the night shift and had trouble waking up even with an alarm clock. Respondent testified that he went to doctors and a psychiatrist at DOS’s direction but that they found nothing wrong with him. Respondent testified that he also went to the Employee’s Assistance Program but because he was not taking any prescription drugs or drinking alcohol, he did not need their help (Tr. 34-40, 48-50).

Respondent testified that he wants to keep his job as a sanitation worker and that since his last complaint in March, he has not missed any work. Respondent stated that he plans to come to work and does not take sleep medications prior to his shift. Recently has not had any sleep issues and has not missed work (Tr. 40-45). Respondent testified that while a steady shift would help him, he is too junior to get one and he has not filed for a hardship (Tr. 45-47).

There is no dispute that respondent was AWOL on 20 occasions as charged and these complaints are sustained.

Respondent is also charged with failing to obey a supervisor’s order. Supervisor Amon testified that on November 12, 2016, at approximately 4:00 a.m. he saw respondent parked in a sanitation truck on the service road to the Cavanta-Essex disposal facility. Amon asked respondent if he was okay and instructed him to proceed to the facility and dump his truck. Amon testified that respondent started the engine, made a U-turn, and left without dumping his truck. Amon followed respondent to a traffic light. At the light, respondent exited his truck and approached Amon. Respondent asked Amon, “What’s the matter?” When Amon asked him why he had not gone to the dump, respondent replied that he would dump the truck later. Respondent returned to his truck and drove off. Amon testified that, using a GPS device, DOS located respondent driving towards Newark, New Jersey. Respondent returned to the facility and dumped the truck about 30 or 40 minutes later (Tr. 20-27; Pet. Ex. 3).

Respondent admitted that he did not dump the truck as directed. Respondent testified that he delayed dumping the truck because he had to use the bathroom (Tr. 50-51).
Respondent’s excuse that he did not obey Supervisor Amon’s order to dump the truck because he had to go to the bathroom was not credible. When Amon gave the order, respondent was parked at the side of the road and he made no mention that he had to go to the bathroom. The charges that respondent failed to obey Supervisor Amon’s order should be sustained.

**FINDINGS AND CONCLUSIONS**

1. Petitioner demonstrated that respondent was absent without leave on 20 occasions within an 11-month period.

2. Petitioner demonstrated that on November 12, 2016, respondent failed to obey an order.

**RECOMMENDATION**

Upon making these findings, I reviewed an abstract of respondent’s disciplinary history for purposes of recommending an appropriate penalty. Respondent has been employed as a sanitation worker since October 2007. Between 2007 and 2013 respondent had no disciplinary issues. In 2015 respondent pled guilty and accepted a one-day suspension for being AWOL and late. On April 7, 2016, respondent pled guilty to charges relating to the misuse of agency property in 2013 and discourteous behavior in 2015 and accepted a two-day suspension. On April 27, 2016, respondent pled guilty to 12 time-and-leave violations and failure to obey an order. He accepted a 20-day suspension. In 2014 and 2015 respondent received unsatisfactory evaluation ratings because of his AWOLs and in 2013 his rating was conditional for his time-and-leave violations. The prior evaluations provided were satisfactory.

Petitioner seeks respondent’s termination from employment for his current AWOL’s and insubordination. Respondent asks that he be allowed to keep his job and be given a penalty that is short of termination. For the reasons below, respondent be suspended for 65-days and given a final warning that any further misconduct will lead to termination of his employment.

Past cases involving insubordination have generally ranged between five- and 10-day suspensions. *See Dep’t of Sanitation v. Venning, OATH Index No. 763/11 at 27 (Jan. 28, 2011)* (five-day suspension for disobeying order to complete route); *Dep’t of Sanitation v. Pulliam, OATH Index No. 1976/08 at 8-9 (Oct. 20, 2008)* (10-day suspension for disobeying order and an additional five-day penalty for using Department vehicle without authorization); *Dep’t of Sanitation v. James, OATH Index No. 593/08 at 11-12 (Jan. 4, 2008)* (eight-day suspension for
sanitation worker who refused two orders to remove items from his truck and place them into the hopper); *Dep’t of Sanitation v. Neal*, OATH Index No. 1318/05 at 5-6 (June 16, 2005) (six-day suspension for worker who refused to tow disabled truck).

Similarly, penalties for AWOL charges generally range from three to ten days per incident, depending on the employee’s disciplinary history. See, e.g., *Dep’t of Sanitation v. Kaplan*, OATH Index No. 403/12 at 10 (Jan. 6, 2012), aff’d, NYC Civ. Serv. Comm’n Item No. CD 12-30-SA (June 6, 2012) (10-day suspension for AWOL violation because respondent offered no defense and had a history of similar misconduct); *Dep’t of Sanitation v. Straker*, OATH Index No. 400/12 at 9 (Dec. 6, 2011) (seven days’ suspension for AWOL and one undocumented emergency leave, for a total penalty of 77 days’ suspension, where long-term employee had been disciplined on nine prior occasions for similar misconduct); *Dep’t of Sanitation v. Cunningham*, OATH Index No. 2507/11 at 20-22 (Nov. 10, 2011) (40-day suspension for violation of emergency or sick leave rules on five occasions and one charge of AWOL, where seven-year employee had received six prior disciplinary penalties); *Dep’t of Sanitation v. Figueroa*, OATH Index Nos. 940/10 (Apr. 26, 2010) & 1914/10 (June 3, 2010), aff’d, NYC Civ. Serv. Comm’n Item No. CD 11-47-A (July 12, 2011) (33-day suspension for two occasions of AWOL and three violations of sick leave rules where long-time employee had six prior disciplinary penalties, primarily for violating attendance and sick leave rules).

Termination from employment for being AWOL is usually reserved for employees with long-term continuous absences or employees who have been disciplined multiple times for time-and-leave violations and continue to amass excessive violations. See, e.g., *Dep’t of Environmental Protection v. Robinson*, OATH Index No. 2150/16 (June 23, 2016) (termination from employment for employee who was continuously absent for more than seven months); *Health & Hospitals Corp. (Lincoln Medical and Mental Health Ctr.) v. Acosta*, OATH Index No. 1787/14 (July 23, 2014) (termination from employment where respondent recently served 45 and 60-day suspensions for similar time and leave violations); *Dep’t of Sanitation v. Ayala*, OATH Index No. 1437/01(Aug. 13, 2001), aff’d, NYC Civ. Serv. Comm’n Item No. CD02-69-SA (Sept. 11, 2002) (termination for respondent with an extensive record of time-and-leave violations).

Respondent is a 10-year employee with a moderate disciplinary record that consists mostly of time-and-leave violations. For the first seven years of his employment with DOS, respondent was a good employee who had no apparent issues at work. In 2014, something
happened and he started missing work due to claimed sleep problems. Respondent visited various doctors and no medical or mental conditions were identified that would cause these issues. It is notable that respondent did little to provide this tribunal with reasonable assurances that he will not miss work in the future except to say that he would come to work. However, since the commencement of this disciplinary case, respondent has not missed any work. Thus, it is apparent that he can come to work and be a productive employee. Petitioner argues that respondent should be terminated from employment because the only thing getting him to come to work is the threat of termination and that as soon as he is restored to work he will revert to his pattern of unscheduled absences. While this may be true, termination from employment at this stage would be inconsistent with the concept of progressive discipline.

“It is a well-established principle in employment law that employees should have the benefit of progressive discipline wherever appropriate, to ensure that they have the opportunity to be apprised of the seriousness with which their employer views their misconduct and to give them a chance to correct it.” Dep’t of Transportation v. Jackson, OATH Index No. 299/90 at 12 (Feb. 6, 1990); see also Dep’t of Sanitation v. Shinnick, OATH Index No. 1466/07 at 13-14 (June 29, 2007) (termination inappropriate for sanitation worker, who failed to maintain records and supervise subordinate, who previously had received only seven day suspension for similar misconduct).

In balancing the Department’s substantial interest to deter time-and-leave abuses and ensure a reliable work force, respondent’s light and relatively recent disciplinary history, and the principals of progressive discipline, a substantial suspension for each infraction is warranted. Dep’t of Sanitation v. Beecher, OATH Index No. 569/04 at 24 (Dec. 16, 2004), aff’d, NYC Civ. Serv. Comm’n Item No. CD 06-06-SA (Jan. 9, 2006) (where charges arise from complaints that are separately drafted, served, and filed, a separate suspension penalty of up to 30 days may be invoked for each charge); Dep’t of Sanitation v. Parker, OATH Index No. 1049/04 at 9 (Aug. 3, 2004) (construing Administrative Code section 16-106 to permit the imposition of separate penalties for each act of misconduct).

Under the circumstances, respondent should be suspended three days for each of the sustained AWOL charges and five days for the insubordination charge. The recommended penalty should impress upon respondent the need to follow the Department’s rules or risk being
terminated from employment. Respondent should use the time of his suspension to address the underlying cause of his absences so that he can return to work without any future discipline.

Accordingly, respondent should be suspended for 65 calendar days without pay.

Alessandra F. Zorgniotti
Administrative Law Judge

May 16, 2017

SUBMITTED TO:

KATHRYN GARCIA
Commissioner

APPEARANCES:

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