Dep't of Transportation v. K.M.

OATH Index No. 1997/11 (July 29, 2011), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 11-96-SA (Dec. 27, 2011)

Petitioner proved that respondent was absent without leave for sixteen days. Ten-day suspension without pay recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF TRANSPORTATION
Petitioner
- against -
K.M.[1]
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

The Department of Transportation brought this employee disciplinary action under section 75 of the Civil Service Law against respondent, a highway repairer, alleging that he was absent without leave (AWOL) for seventeen days and excessively late on ten occasions. Prior to the hearing, petitioner withdrew an additional allegation of lateness.

At the two-day hearing, petitioner relied upon documentary evidence and the testimony of two supervisors, Louis Garzia and Paul Schwartz. Respondent testified in his own behalf and also relied on documentary evidence. For the reasons below, I find that petitioner proved that respondent was AWOL for sixteen days and recommend a ten-day suspension without pay. The excessive lateness charge and one of the AWOL charges should be dismissed.

ANALYSIS

Background

Respondent has worked for the agency since 1985. He is assigned to the Bronx and works in crews of two or three highway repairers who maintain bridges and overpasses

(Schwartz: Tr. 170). Respondent's supervisors describe him as a good worker with a poor attendance record (Garzia: Tr. 45, 149; Schwartz: Tr. 171). The charges allege that respondent has been AWOL on multiple occasions and habitually late for work (ALJ Ex. 1). For example, petitioner alleged that on one occasion respondent left work early, without permission, to visit an ill relative at a hospital and on another occasion was AWOL and went on a two-week vacation after supervisors had denied his request for leave without pay.

Respondent did not dispute that he was AWOL for several days and late for work on ten occasions. He attributed his attendance issues to medical conditions, including diabetes, high blood pressure, and hepatitis C (Tr. 12, 199-200). Respondent argued that supervisors denied his requests for leave without pay because of his high sick leave usage. Thus, respondent argued, supervisors penalized him for documented illnesses. He also argued that supervisors failed to warn him that his latenesses were unapproved and could result in disciplinary action.

AWOL (Charge I, specification 1)

Petitioner alleged that respondent was AWOL on the following days:

Date	Days Absent
August 14, 2009	1
April 29, 2010	1
May 3, 2010	1
May 17, 2010	1
June 22, 2010	1
August 25, 2010	1
September 13 – 24, 2010	11

The evidence showed that respondent was absent from work without permission on each of those days (Pet. Exs. 1, 2, 3; Garzia: Tr. 67; Schwartz: Tr. 172). For four of those days, August 14,

[1] At respondent's request, over petitioner's objection, his name has been withheld for publication to protect his privacy because this report and recommendation discusses his medical records, including personal matters. *See Dep't of Citywide Admin. Serv. v. H.M.,* OATH Index No. 1670/04 at 1 n.1 (July 26, 2004); 48 RCNY § 1-49(d).

2009, May 3, 2010, May 17, 2010, and June 22, 2010, respondent failed to offer specific explanations for his absences. Those AWOL charges should be sustained.

For April 29, 2010, respondent claimed that he went to the agency's Manhattan offices to drop off documents for a worker's compensation claim (Tr. 293). According to respondent, he sustained an injury four months earlier and nobody sent the paperwork to the right place (Tr. 205, 293). Respondent testified that he told Garzia that he was going to submit the paperwork instead of reporting for work (Tr. 233-34). The next day, respondent gave Garzia a note confirming that he went to the agency's Manhattan offices (Tr. 205-06; Resp. Ex. B).

I did not credit respondent's testimony that he told Garzia in advance that he was going to file paperwork. If respondent had given such notice, it is doubtful that Garzia would have approved the absence. It is more likely that Garzia would have directed respondent to report to work and make other arrangements for submitting the documents. It is also unlikely that respondent took all day to submit the paperwork. Respondent testified that he arrived at the Manhattan office at 9:00 a.m., the note he later gave to Garzia did not include any times, and he offered no plausible explanation for his failure to return to work (Tr. 233; Resp. Ex. B). The credible evidence established that respondent unilaterally elected to miss work on April 29, 2010, without authority to do so. This charge should be sustained.

As for August 25, 2010, the evidence showed that respondent reported for work at 7:35 a.m. (Pet. Ex. 2). Shortly after 10:00 a.m., his wife called and asked him to take her to a Connecticut hospital to see her brother (Pet. Ex. 7). Respondent informed his supervisors that his brother-in-law was undergoing a biopsy (Pet. Ex. 7). At the hearing, respondent explained that his brother-in-law had been treated for unknown blood disorder "and he wasn't looking good" (Tr. 209). Respondent testified that he feared it was a "life or death" situation (Tr. 210).

Garzia denied respondent's request for emergency leave because their unit was short-staffed, respondent had taken the previous day off, and respondent only had less than an hour of accumulated annual leave (Pet. Ex. 7; Tr. 79). According to Garzia, it would have disrupted operations for respondent to leave work that day (Tr. 79).

Even though supervisors denied his request for emergency leave, respondent left work at 10:30 a.m. without logging out and he took his wife to the hospital to see her brother (Tr. 243; Pet. Ex. 7). The next day, respondent produced a doctor's note confirming that he visited his brother-in-law at the Yale-New Haven Transplant Center on August 25, 2010 (Tr. 208; Resp. Ex.

C). According to the doctor, the presence of respondent and family members was important to the patient's well being (Resp. Ex. C).

At the hearing, petitioner argued that respondent engaged in deception, "Respondent would have us believe that this was an emergency that he had no knowledge that his brother-in-law was in the hospital" (Tr. 298). That argument is mistaken. There was no deception. Respondent's wife called out of concern for her brother and respondent left work to take her to the hospital. There is no evidence that respondent engaged in deceit or mislead anyone.

In limited situations, this tribunal has found that no misconduct occurred where an employee was absent from work following denial of request for emergency leave. *See Dep't of Correction v. Elam*, OATH Index No. 873/03 at 8 (June 17, 2003) (summarizing cases). Typically, unauthorized absences are excused where an employee must make emergency child care arrangements and no alternatives are available. *See, e.g., Human Resources Admin. v. Bobb*, OATH Index No. 406/92 at 9 (July 2, 1992) (no misconduct for early departure where employee notified supervisors that young child had been sent home due to sudden illness); *Dep't of Correction v. Woodyear*, OATH Index No. 167/86 at 12-13 (Sept. 2, 1986) (absence excused where employee was unable to obtain babysitter for young child on short notice during a holiday). In other cases, an absence following denial of emergency leave has been deemed a technical violation, punishable with no more than a reprimand. *See, e.g., Allen v. Dep't of Sanitation*, NYC Civ. Serv. Comm'n Item No. CD 91-71 at 3 (May 3, 1991) (violation sustained and penalty of reprimand imposed in light of understandable concern for health and safety, where employee took pregnant wife to a hospital but evidence did not show that there was an emergency).

Here, the facts are similar to a childcare emergency. Faced with the choice of staying at work or rushing to the bedside of a seriously ill family member, respondent chose to be with his family. Maybe respondent could have told his wife to make other travel arrangements or he could have waited until the end of his shift, but those were not realistic alternatives. I credit respondent's testimony that he considered this a life and death situation. Only once before in his 25-year career had he asked to leave early due to an emergency (Tr. 283). Because this was an exceptional circumstance, the AWOL charge for August 25, 2010 should be dismissed.

As for respondent's absences from September 13 to September 24, 2010, the evidence showed that, on September 2 or 3, 2010, respondent asked Garzia for two weeks unpaid leave to

begin on September 13 (Tr. 89). According to Garzia, respondent said that he was "physically and mentally tired" and needed time off to rest due to his diabetes (Tr. 89, 122, 140; Pet. Ex. 9). Garzia told respondent that there would be "no problem" as long as he provided medical documentation (Tr. 89). The next day, respondent told Garzia that he would be "up front" with him (Tr. 89). Respondent revealed that he had booked a family vacation to Nigeria and he showed Garzia the airline tickets (Tr. 89, 122; Pet. Ex. 9). Garzia said that he lacked authority to authorize two successive weeks without pay and he consulted with his supervisor, Schwartz (Tr. 90). Schwartz denied respondent's request for unpaid leave (Tr. 90).

Garzia testified that, if respondent had an available leave balance, there would have been no problem with the leave request and, previously, respondent had received leave without pay (Tr. 123). However, Garzia denied this request for two weeks unpaid leave because of respondent's recent poor attendance (Pet. Ex. 9).

Respondent did not report for work from September 13 to 24, 2010 (Tr. 90; Pet. Ex. 9). On the afternoon of September 24, 2010, he called in and said that he had to attend a wedding in Nigeria and he could not get back to work due to passport problems (Pet. Ex. 9; Tr. 91). Respondent returned to work on September 27, 2010 (Tr. 91).

At the hearing, respondent testified that the procedure for obtaining vacation approval at his work location was to write it in on an office calendar "and it would be automatic" (Tr. 213). He claimed that he made an entry on the calendar at least ten days in advance of his planned vacation (Tr. 214). Respondent conceded that he initially told Garzia that he needed time off to deal with "ailments" (Tr. 216). At first, respondent did not think Garzia had a problem with the request (Tr. 216). However, when respondent later mentioned the airline tickets, Garzia felt that he had been lied to and he denied the leave request (Tr. 216-17). Garzia told respondent to take the issue up with Schwartz (Tr. 221). Respondent conceded that he spoke to Schwartz and that Schwartz said that he would get back to him (Tr. 247). On Friday September 10, 2010, respondent learned that his request for unpaid leave had been denied (Tr. 225, 247-48). He went on the trip anyway, without notifying his worksite (Tr. 225, 248).

Respondent testified that he accompanied three other people on the trip and he had made a final, non-refundable payment on September 2, 2010 (Tr. 223-24). The cost of the trip, including airfare and accommodations, was approximately $20,000 (Tr. 223; Resp. Ex. C). Respondent also argued that the trip was health related (Tr. 218, 294).

Based on this evidence, the AWOL charge should be sustained. There is no credible evidence to support respondent's claim that he assumed that he could take time off simply because he made an entry on a calendar. As respondent's actions demonstrate, he knew that he needed supervisory approval before he could take a lengthy two-week unpaid leave. Moreover, respondent's initial request for time off was somewhat misleading. He told his supervisor that he needed time off for health reasons and made no mention of his travel plans. Respondent, who provided extensive documentation for every doctor and hospital visit, offered no proof that this trip was for medical reasons (Tr. 274-76). Indeed, there was some evidence that the purpose of the trip was to attend a wedding (Pet. Ex. 9; Tr. 91).

Respondent mistakenly assumed that supervisors would grant his request for unpaid leave and he paid for an expensive trip without first receiving proper approval for time off. The trip obviously required some planning and, to be on the safe side, respondent should have requested his unpaid leave well in advance. But he failed to do so. As a result, respondent faced a difficult decision when supervisors denied his leave request. He could report to work and forfeit thousands of dollars of non-refundable vacation expenses, or he could go on his trip as planned and face disciplinary charges for insubordination.

It is understandable why respondent went AWOL, but having made that choice, he should recognize that he committed misconduct. To hold otherwise, would wrongly suggest to respondent and other employees that they can take time off whenever they feel like it without regard to an employer's staffing needs. That is not reasonable. Under similar circumstances, where employees make vacation plans before receiving approval for time off, this tribunal has consistently upheld AWOL charges. *See Health & Hospitals Corp. (Lincoln Medical & Mental Health Ctr.) v. Davis,* OATH Index No. 1573/08 at 4 (May 8, 2008) (employee responsible for awaiting authorization before taking the time off); *Fire Dep't v. Rozenblyum,* OATH Index No. 1738/03 at 6-7 (Jan. 21, 2004), *modified on penalty*, Comm'r Dec. (Dec. 21, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD05-53-SA (Aug. 26, 2005) (misconduct to go on vacation after leave request denied, due to insufficient leave balances, even though employee had already purchased airline tickets); *Dep't of Parks & Recreation v. McPartlin,* OATH Index No. 240/87 at 17-18 (Oct. 1, 1987) (same). There is no reason for a different result here.

There is also no merit to the suggestion that respondent should be entitled to take two weeks off because supervisors had penalized him for taking documented sick leave. Respondent

receives 24 annual days and 12 paid sick days per year (Tr. 148; Pet. Ex. 10). If that was insufficient, respondent could have sought an additional 12 weeks of unpaid leave under the Family Medical Leave Act (FMLA). *See* 29 U.S.C. § 2612 (a)(1)(d) (Lexis 2011). Although respondent had sought and received 700 hours of FMLA leave in 2005, he did not do so during 2010 (Garzia: Tr. 46, 94).

Respondent, who had exhausted his leave balances, did not have an absolute entitlement to take unpaid leave whenever he chose (Pet. Ex. 10). When he made his request for unpaid leave his supervisors had the right to deny that request, and they elected to do so. Because respondent failed to report to work from September 13 to September 24, 2010, he was AWOL. The charge should be sustained.

Excessive Lateness (Charge IV, specification 1).

The amended petition charged respondent with the following ten instances of lateness:

Date	Minutes Late
July 9, 2009	28
September 29, 2009	8
October 6, 2009	8
June 17, 2010	15
June 29, 2010	37
July 1, 2010	6
July 13, 2010	19
August 6, 2010	30
August 30, 2010	183
September 8, 2010	9
Total	343

Although the Department's rules provide that employees shall not be "excessively or habitually late or absent from work or assigned duties," excessive or habitual lateness is not defined. Dep't of Transportation Code of Conduct §34 (May 1995). Hence, the Citywide Employee Lateness Policy applies. *See* NYC Charter § 814(a)(10) (Lexis 2011); *see also Dep't*

of Housing Preservation & Development v. Jones, OATH Index No. 1068/00 at 9 (July 7, 2000). That policy provides for a five-minute grace period and defines excessive lateness as seven or more late arrivals. A lateness is not counted if more than twelve months elapse before the next lateness. The policy requires an immediate supervisor to meet the employee after the fourth unauthorized lateness to explain the lateness policy and develop methods to help the employee avoid future lateness. The employee must be warned of possible disciplinary action following the fourth, fifth, and sixth unauthorized latenesses. Citywide Employee Lateness Policy, Personnel Services Bulletin No. 410-1R (eff. April 17, 2000).

Here, documents introduced by petitioner entitled "Record of Employee Lateness and Conferences," indicate that disciplinary action may be taken when the employee is late for the seventh time (Pet. Exs. 4, 5). Timekeeping records and an absence control calendar showed that respondent was late on ten occasions (Pet. Exs. 1, 2, 3; Tr. 24-27, 49-51). Respondent did not dispute that he arrived late for work ten times. He argued that his latenesses should be excused because of his diabetes and he did not receive notice that his latenesses could result in discipline.

It is unclear whether respondent's latenesses were caused by his diabetes. At the hearing, respondent had no specific recollection of any particular day that he was late for work. Instead, he testified that he routinely checked his blood-sugar level and blood pressure (Tr. 198). If the levels were not within normal range, he called in and reported that he would be late for work, and he took medication or waited for his blood pressure to lower (Tr. 198-99). On other occasions, he was late for work because he had to stop by a hospital to drop off a urine sample for testing (Tr. 198, 232). Respondent provided extensive documentation when he took a sick day, but he offered no documentation for any of the ten latenesses (Garzia: Tr. 109, 134; Resp. Ex. D). Although respondent previously obtained an accommodation regarding working conditions, he never requested a flexible time schedule as a reasonable accommodation under the Americans With Disabilities Act (Tr. 201). *See* 42 U.S.C. § 12112(b)(5)(A).

According to Garzia, respondent usually attributed his lateness to transportation delays or his need to take blood pressure medication (Tr. 64, 104). Respondent conceded that at least one lateness may have been due to transportation problems (Tr. 203). Because respondent offered vague, inconsistent, and uncorroborated explanations for his latenesses, they were not excusable. *See Human Resources Admin. v. Metz*, OATH Index No. 1000/02 at 3 (Dec. 20, 2002) (rejecting generalized claim that latenesses were due to side effects of medication, despite evidence that

employee may have suffered from a disability); *see also Health & Hospitals Corp. (Metropolitan Hospital Ctr.) v. Ricketts*, OATH Index No. 2386/09 at 5 (June 22, 2009) (denying claim that time and leave violations were due to diabetes, where no ADA accommodation sought).

Respondent's challenge to the lack of proper notice has more merit. Garzia testified that he gave respondent multiple oral and written warnings regarding his latenesses (Tr. 51-54, 60-63, 105, 297). Respondent conceded that he received some verbal and written warnings, but he insisted that he was never told that his absences were not approved and he never received final warnings that he could face disciplinary charges. He also claimed that there was no discussion at conferences; he was simply told to sign a box on a form (Tr. 200, 226-27, 262-63).

Petitioner relied on a pair of documents, entitled "Record of Employee Lateness and Conferences," to show that respondent received proper notice (Pet. Exs. 4, 5). On the first form, the signature next to the space for "third and final warning" is unclear and respondent testified that he did not recognize it (Pet. Ex. 4; Tr. 226). On the second form, there is no employee signature in the space provided for "third and final warning" and respondent expressed doubt about the signature next to the second warning (Pet. Ex. 5; Tr. 231).

Respondent's self-serving claim that he did not recognize two signatures was unpersuasive. However, there were other material discrepancies with the documentary evidence. The form indicates that Garzia gave respondent second and third warnings on October 6, 2010 (Pet. Ex. 4). Garzia claimed that he gave the warnings on October 6, 2009 and he inadvertently wrote the year as "2010" (Pet. Ex. 4).

There are two problems with that explanation. First, giving two warnings on the same day is inconsistent with the Citywide Employee Lateness Policy, which is designed to give clear, progressive warnings that continued lateness could result in disciplinary action. Moreover, I was not persuaded that Garzia gave respondent any warnings in October 2009. If he issued the warnings in January or February, it would make sense that he would write the wrong year. But it does not make sense that he would write "2010" in October of 2009. And it makes less sense that he would repeat that error twice on the same day.

Perhaps Garzia made a simple clerical mistake, but there was other evidence that raised doubt about his written warnings. The day that respondent left work early to attend to his ill brother-in-law, Garzia filled out a "record of progressive discipline" (Pet. Ex. 8). Under the heading "Supervisory Record of Verbal Warning" there is a pre-printed line stating, "I reminded

the employee that this is a violation of the code of conduct and/or rules and regulations. We agreed to the following correction" (Pet. Ex. 8). Next to that line, Garzia wrote that respondent is "constantly reminded" of his excess absences from work (Pet. Ex. 8). At the hearing, Garzia conceded that he did not speak to respondent after he left work early and they never had a conference about that incident (Tr. 82, 84). Thus, contrary to the wording of the form, respondent did not receive a "verbal warning" and he never reached an agreement with Garzia regarding corrective action (Pet. Ex. 8; Tr. 82).

Minor deviations from the Citywide Employee Lateness Policy can be excused if an employee clearly received notice that continued absences could result in disciplinary action. *See, e.g., Jones*, OATH 1068/00 at 11 (strict compliance with notice requirement not necessary where employee was late on 33 occasions in eighteen months and conceded that she had a prior lateness problem, did not contest the charges, and did not dispute receipt of notices).

Here, the non-compliance with the notice requirement is more problematic. Given the importance of the written warnings, the material discrepancies undermine confidence in those documents. To be sure, some of respondent's latenesses were substantial and he knew that supervisors were displeased. However, it is unclear when or how Garzia warned respondent that he could face disciplinary charges for excessive lateness.

Furthermore, the evidence of habitual lateness was underwhelming. Seven latenesses qualify as excessive and respondent was late for work ten times in fourteen months, but four of those latenesses were less than ten minutes each. This is not like *Jones*, where the employee clearly knew that continued lateness could result in disciplinary charges. Thus, failure to comply with the citywide notice policy was prejudicial. Because petitioner failed to prove substantial compliance with the Citywide Employee Lateness Policy, the charge of excessive lateness should be dismissed.

Duplicative Charges (Charge II, specification, 1; Charge III, specification 1; Charge IV, specification 2; Charge V, specification 1; Charge VI, specifications 1, 2; Charge VII, specification 1; Charge VIII, specification 1; Charge IX, specification 1.

The remaining charges repeat the factual allegations discussed above. Duplicative charges based upon specifications that were not proved should be dismissed. Those charges

based upon proven claims are sustained, but are not considered in the penalty recommendation. *See Dep't of Transportation v. Mendez,* OATH Index No. 384/05 at 4 (Jan. 19, 2005).

FINDINGS AND CONCLUSIONS

1. Petitioner proved that, except for August 25, 2010, respondent committed misconduct when he was absent without leave, as alleged in Charge I, specification 1.

2. Petitioner failed to prove that respondent was subject to disciplinary charges for being excessively late for work, as alleged in Charge IV, specification 1.

3. The remaining charges are duplicative.

RECOMMENDATION

After making the above findings, I reviewed a summary of respondent's personnel history. Respondent began working for petitioner in 1986. He has no prior disciplinary record and his performance evaluations rated his work as good or outstanding. According to his most recent evaluation, he is a hard worker who needs to improve his attendance.

Petitioner seeks a 20-day suspension without pay (Tr. 296). Respondent argued that, because of mitigating circumstances, the most severe penalty should be a reprimand (Tr. 16-17). Because respondent was repeatedly AWOL, a suspension is appropriate. However, the penalty sought by petitioner is excessive in light of the mitigating circumstances. *Admin. for Children's Services v. Solomon*, OATH Index No. 1343/04 at 2-3 (June 21, 2004) (ten-day suspension without pay for two-week AWOL, where respondent offered mitigating evidence); *Board of Education v. Mays,* OATH Index No. 1360/90 (Nov. 7, 1990), *modified on penalty,* President Dec. (July 17, 1991) (two-week suspension without pay for 64 latenesses in light of substantial mitigation); *Metz,* OATH No. 1000/02 at 4-5 (ten-day suspension for time and leave violations where employee suffered from serious medical condition).

Petitioner's penalty request was based on the assumption that it had proved all of the charges. Because petitioner failed to prove all of the charges, a lesser penalty is appropriate. Furthermore, there is no dispute that respondent is a hard-working employee with 25 years of experience and an unblemished disciplinary record. Nor is there any dispute that respondent

suffers from a number of serious medical conditions, including diabetes, high blood pressure, and hepatitis C. Although respondent has extensive sick leave usage, he routinely documents all of his medical absences. And despite his medical conditions, respondent continues to perform strenuous work under difficult circumstances.

There is also some mitigation regarding the AWOL charge. Most of the AWOLs were in September 2010, when respondent went on a family vacation. Respondent mistakenly assumed that his request for unpaid leave would be approved and his request was denied after he had incurred substantial, non-refundable expenses. That is not a defense to the charge, but respondent's dilemma is certainly understandable.

Respondent's unauthorized absences cause undue disruption. He works in a small unit and the absence of one person adversely affects the entire crew (Tr. 92, 123, 177-79). And respondent should recognize that continued attendance problems could lead to further disciplinary charges and more substantial penalties. But at this point, in light of respondent's spotless disciplinary record, his 25 years of service, and other mitigation, no useful purpose would be served by a lengthy suspension.

Accordingly, I recommend that respondent be suspended without pay for ten days.

Kevin F. Casey
Administrative Law Judge

July 29, 2011

SUBMITTED TO:

JANETTE SADIK-KHAN
Commissioner

APPEARANCES:

DENETRA D. WILLIAMS, ESQ.
Attorney for Petitioner

FAUSTO E. ZAPATA, JR., ESQ.
Attorney for Respondent