Dep't of Buildings v. Lamitola

OATH Index No. 871/12 (Mar. 5, 2012)

After waiving his right to participate in a disciplinary hearing, a Plan Examiner was found to have committed various acts of misconduct. Termination from employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF BUILDINGS
Petitioner
-against-
ANTHONY LAMITOLA
Respondent

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORGNIOTTI, *Administrative Law Judge*

This disciplinary proceeding was referred by petitioner, the Department of Buildings ("DOB") pursuant to section 75 of the Civil Service Law. Petitioner alleges that Anthony Lamitola, a Plan Examiner, engaged in misconduct between April 8, and November 9, 2011, including damaging DOB property, refusing to participate in various mandatory work-related activities, being absent without authority, and engaging in discourteous conduct (ALJ Ex. 1).

A hearing was held on February 2, 2012. Upon respondent's failure to appear, proper proof of service of the charges and the notice of hearing was submitted (Pet. Ex. 1; Tr. 8). In addition, petitioner advised that respondent was currently at his work location and I spoke with him by telephone on the record. I explained to respondent the nature of the proceedings, his right to be present for the hearing which would go forward in his absence, and that petitioner was seeking his termination from employment. I further advised him that I would entertain a request for an adjournment so that he could consult with his union, retain counsel, or appear on another day to defend against the charges. Respondent indicated that he was aware of the hearing and did not wish to participate (Tr. 4-6). Following the call, I found that the jurisdictional prerequisites for finding respondent in default had been met (Tr. 9) and an inquest was held.

At the inquest, petitioner submitted documentary evidence and the testimony of Mr. Montana, Chief Plan Examiner for the Bronx Borough office, and Mr. Agostino, DOB's acting Executive Director for The Office of Internal Audit and Discipline ("IAD"). I find that petitioner sustained the charges and recommend that respondent be terminated from his employment.

ANALYSIS

Between March and September 2011 respondent was a Plan Examiner and licensed architect in DOB's Bronx Borough office. Respondent had been temporarily reassigned from the Manhattan offices and Mr. Montana was his supervisor (Tr. 17; Pet. Ex. 23). It is unclear from the record where respondent is currently located.

In the regular course of his duties, respondent reviews and evaluates construction plans for compliance with DOB's building code, meets with professionals and filing representatives to resolve objections raised in plan examination, conducts field inspections and advises DOB about the structural stability of buildings, advises professionals, filing representatives, and members of the public about DOB's rules and regulations, completes relevant reports, and performs ministerial work and special projects as required (Tr. 8-10, 55; Pet. Ex. 29).

Respondent received a copy of DOB's code of conduct on September 2, 2009 (Pet. Ex. 2). Respondent is charged with the following rule violations summarized below:

1(E) – Engaging in disorderly or disruptive behavior.
3(A) – Being uncivil or discourteous in relations with a supervisor or fellow employee.
3(I) – Damaging, losing, or improperly using City property.
3(K) – Rendering improper or unauthorized services.
3(P) – Being absent from an assigned work location without authorization.
3(U) – Neglect of duty.
3(W) – Refusing to obey a direct order.
3(X) – Engaging in conduct prejudicial to good order and discipline.
4(C) – Improperly interfering with the operation or use of City equipment or supplies.
4(D) – Causing or permitting damage to be caused to City equipment or supplies.
7(A) – Failing to comply with promulgated time and leave procedures.
8(A) – Failing to comply with written directives promulgated by IAD.
8(B) – Failing to comply with a direct order issued by IAD.
8(C) – Answering questions posed by IAD in a palpably evasive or untruthful manner.
8(D) – Interfering with, obstructing, or otherwise hindering an investigation by IAD.
9(A) – Failing to follow DOB's standards of conduct, rules, orders, directives or procedures.

Allegations regarding respondent's misconduct were referred to IAD for investigation. Respondent initially refused to appear for interviews with IAD. On May 19, 2011, respondent

was interviewed by Mr. Agostino and another IAD employee. The interview was taped (Pet. Ex. 3A). Since respondent did not appear for the hearing, his version of the events is gleaned from the interview, his emails, and the testimony of witnesses to whom respondent spoke.

Charge I – Destruction of DOB Property

Petitioner alleges that on April 8, 2011, respondent took apart a DOB printer without authorization and rendered it inoperable and irreparable in violation of rules 3(I), 3(K), 3(X), 4(C), 4(D), and 9(A) (ALJ Ex. 1, Charge I).[1]

According to Mr. Agostino, he received a complaint that on April 8, 2011, respondent took it upon himself to take apart a DOB printer that was jammed and made it worse by rendering it in operable (Pet. Ex. 28). In the IAD interview respondent admitted taking the printer apart to resolve a paper jam and that in doing so he dropped the toner part onto the floor (Tr. 80). Respondent also stated that after failing to clear the jam he did not inform anyone that the printer was broken and left it the way it was (Tr. 80-81, Pet. Exs. 3A, 3B). Photos show pieces removed from the printer and strewn about (Pet. Ex. 28). It was later determined that the printer could not be repaired (Tr. 81; Pet. Ex. 28).

While it is possible that the printer was already damaged when he tried to use it, respondent's attempts to fix the printer, dropping the toner part, leaving it in shambles, and failing to notify anyone that it was not working constitutes misconduct as charged. *See Dep't of Sanitation v. Yovino***,** OATH Index No. 1145/05 at 7 (Aug. 30, 2005), *appeal dismissed*, NYC Civ. Serv. Comm'n Item No.CD08-01-O (Jan. 24, 2008) (damage to property is misconduct where it renders the property unusable or eviscerates its intended purpose).

Charges II, IV, VII, VIII, X, XI, and, XIV – Insubordination/Neglect of Duty

Petitioner alleges seven charges where respondent was insubordinate and/or neglected his duties in violation of rules 1(E), 3(P), 3(U), 3(W), 3(X), 8(A), 8(B), 8(D), and 9(A).[2] These charges should be sustained except for those specifications that concern rule 1(E).

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[1] Because a civil service employee may not be punished twice for one instance of misconduct, insofar as respondent's specific acts violated more than one provision of the Handbook, the charges are duplicative and will be treated as one charge for purposes of penalty throughout this decision. *Dep't of Probation v. Dixon***,** OATH Index No. 156/11 at 9 n. 1 (Nov. 30, 2010).

[2] Charge VI was withdrawn as duplicative of Charge II (Tr. 104).

An employer must prove three elements to establish a charge of insubordination: (1) that an order was communicated to the employee and the employee heard and understood the order; (2) the contents of the order were clear and unambiguous; and (3) the employee willfully refused to obey the order. *Dep't of Homeless Services v. Chappelle*, OATH Index No. 1918/07 at 3 (Aug. 30, 2007).

Petitioner alleges that respondent refused to report four times for mandatory overtime in May 2011 (ALJ Ex. 1, Charge II). Mr. Montana and Mr. Agostino testified that Plan Examiners are required to work mandatory overtime (Tr. 17, 82). In April Mr. Montana informed his staff that there would be mandatory overtime once a week in May (Tr. 19-20). The overtime was required to allow the office to be open from 5 to 8 p.m. once a week to offer better customer service and alleviate some of the outstanding workload (Pet. Ex. 8).

Mr. Montana testified that respondent failed to attend mandatory overtime scheduled for May 5 or 12 (Tr. 31; *see* Pet. Ex. 8). Mr. Montana also testified that on May 19 he reminded respondent of mandatory overtime taking place that night and respondent stated in a "pleasant tone" that he would not be there (Tr. 22; Pet. Ex. 4). Mr. Montana followed up with an email ordering respondent to attend (Tr. 22; Pet. Ex. 5) but respondent left the office at 4:00 p.m. (Tr. 23; Pet. Ex. 6). On May 25, Mr. Montana sent an email to nine recipients, including respondent, reminding them of mandatory overtime the next night (Tr. 25-26; Pet. Ex. 7). The following night respondent left at 4 p.m., without attending the required overtime or letting his supervisor know that he would not be there (Tr. 27; Pet. Ex. 7).

In the interview with Mr. Agostino, respondent admitted that he did not perform overtime as requested. He told Mr. Montana on the first day he started in the Bronx that he would not do any overtime because he did not want to leave after dark and had a long trip home to Long Island. Mr. Agostino asked respondent if he had looked into working at another location, such as in Queens, but respondent replied in a "combative" manner that he "just wasn't going to do it" (Tr. 82-83; Pet. Exs. 3A, 3B).

Petitioner also alleges that respondent refused to attend three mandatory training sessions in May and June 2011 (ALJ Ex. 1, Charges IV, VIII, X). As licensed professionals, Plan Examiners are required to receive training on relevant subjects so that they can perform the essential functions of their job (Tr. 36-37). Training occurs during the work day (Tr. 40, 85).

Mr. Montana scheduled respondent for "Tier-2" training on May 18, 2011, in Manhattan. When he spoke to respondent, respondent refused to attend saying he did not want to go there from the Bronx (Tr. 40; Pet. Ex. 12). An attendance sheet for the training confirms respondent's absence (Pet. Ex. 13).

Mr. Montana also testified that on June 17, 2011, respondent was required to attend a "Cost Evaluation Training" in Manhattan (Tr. 41). He notified respondent, as he did all his staff, by sending an email appointment through Microsoft Outlook (Tr. 43; Pet. Ex. 14). Respondent did not accept the appointment and did not attend the training. When Mr. Montana asked why he failed to attend, respondent answered: "[t]here will be plenty of time for explanations" (Pet. Ex. 15; Tr. 44-45).

On June 6, 2011, Mr. Montana sent an email reminding his staff of an all-day training on "Damage Assessment" at the end of the month at Floyd Bennett Field. Respondent was scheduled to attend on June 27 (Tr. 50; Pet. Ex. 16). On June 24, respondent was sent an email reminder that included information about the time, location, directions, and agenda for the program (Tr. 51; Pet. Ex. 19). Respondent was the only staff member who did not attend (Pet. Ex. 18). When Mr. Montana asked why he did not attend, respondent replied that he did not want to go (Tr. 52-53). He told another supervisor that he forgot (Pet. Ex. 17).

In the IAD interview, respondent admitted knowing about the trainings and stated that he was not going because it was "too much time on the subway train" to go to Manhattan after being in the Bronx and that it was "ridiculous" (Tr. 85-86; Pet. Ex. 3B).

Petitioner alleges that on May 23, 2011, respondent refused to perform an inspection (ALJ Ex. 1, Charge VII). On May 23, the Chief Inspector emailed Mr. Montana to request a professional to accompany an inspector to a building where a fire had occurred to evaluate the stability of the structure. Mr. Montana ordered respondent to perform the evaluation. Respondent refused stating that it was not within his job duties because he had been transferred from Manhattan to handle an existing backlog, not for any other function. Mr. Montana contacted the Chief in Manhattan who said he never told respondent such a thing. Mr. Montana told respondent that he was to perform the same duties as the other licensed professionals in the office. Respondent did not perform the inspection (Tr. 55-57; Pet. Ex. 20).

In the taped interview, respondent admitted that he did not perform the assignment and stated that he did not want to "put my life in jeopardy" because he did not feel safe doing

inspections in the Bronx (Tr. 86; Pet. Ex. 3A, 3B). Mr. Agostino offered respondent options to help him feel safer – such as using a DOB vehicle, going with an inspector, or only going to certain neighborhoods. Respondent rejected all these options. Even when Mr. Agostino explained that respondent need not enter a building that he thinks is unsafe, respondent stated, "I am going to refuse to perform inspections" (Tr. 87; Pet. Ex. 3A, 3B).

Petitioner alleges that respondent twice refused to attend a medical appointment with a city doctor when ordered to do so (ALJ Ex. 1, Charge XI). Based on conduct enumerated in the charges, respondent was ordered to undergo a medical examination by a psychiatrist (Tr. 94). On June 23, 2011, respondent was served with a directive to do so, as well as papers explaining the basis for the order (Pet. Ex. 29). After missing the first appointment, respondent was ordered by IAD via email to go to a rescheduled appointment later that day. Respondent refused stating "there will be no medical examination done on this body until I decide one is necessary" (Tr. 94-95; Pet. Ex. 30). No medical examination was performed (Tr. 98).

Finally petitioner alleges that respondent refused to attend fact-finding interviews as ordered by IAD on November 3 and 9, 2011 (ALJ Ex. 1, Charge XVI). By email dated October 27, 2011, respondent was ordered to appear at IAD on November 3, 2011 (Pet. Ex. 31; Tr. 101). Respondent replied that the notice should be sent to his union, because he would not attend (Pet. Ex. 31). The scheduling notice was served on the union, as requested, although a representative from the union reported that respondent was not cooperating with them (Tr. 101-02). When respondent did not attend the November 3 interview, he was personally served with a second notice for an interview on November 9 (Pet. Ex. 32). He did not attend this interview (Tr. 103).

Here, the record supports a finding that respondent was ordered to work mandatory overtime, attend required training sessions, and perform a site inspection. These orders were clear and unambiguous and respondent refused to obey them. In the IAD interview respondent admitted to receiving these orders and that he refused them (Pet. Exs. 3A, 3B). Blatant refusal to obey an order which has been clearly communicated by a superior is the very definition of insubordination and is serious misconduct. *Human Resources Admin. v. Johnson*, OATH Index No. 637/01 at 9-10 (July 12, 2001); *see also Dep't of Consumer Affairs v. Rowland*, OATH Index No. 1743/07 at 2 (Oct. 19, 2007) (refusal to obey a direct order to attend a work-related function is misconduct).

I also find that respondent's refusal to comply with clear and unambiguous orders to appear for medical evaluation and participate in a fact-finding interview constitutes misconduct as charged. *See Health and Hospitals Corp. (Bellevue Hospital Center) v. Samuel,* OATH Index No. 243/07 at 6-7 (Dec. 20, 2006) (respondent's willful refusal to undergo psychiatric evaluation was misconduct); *Dep't of Housing Preservation & Development v. Brannon,* OATH Index No. 1230/11 at 10, 12 (Aug. 22, 2011) (respondent's failure to appear at two investigatory interviews that he was properly notified of and ordered to attend was misconduct).

To the extent petitioner alleges that respondent's conduct constituted disorderly or disruptive behavior in violation of rule 1(E), there is insufficient evidence to support these charges. Disorderly conduct is not any disagreement or refusal, but one that exceeds the bounds of decorum and discretion. *See Health & Hospitals Corp. (Elmhurst Hospital Center) v. McKenzie*, OATH Index No. 740/11 at 5 (Mar. 9, 2011) *citing Human Resources Admin. v. Bichai*, OATH Index No. 211/90 (Nov. 21, 1989), *aff'd*. N.Y. Civ. Serv. Comm'n Item No. CD 90-54 (June 15, 1990). It appears that in each instance respondent refused the orders in a calm and orderly fashion.

Charges III and IX – Absences Without Authority

Petitioner alleges that respondent left work without approval three times in May 2011. Mr. Montana testified that respondent has a 9:00 a.m. to 5:00 p.m. work schedule with a one hour flextime which means he can come to work at 8:00 a.m. and leave at 4:00 p.m. In order to leave before 4:00 p.m., respondent would have to get approval from Mr. Montana (Tr. 33-34 Pet. Ex. 2 at 28). Timesheets show that on May 10, 11, and 12, respondent left work at 3:23 p.m., 3:18 p.m., and 3:10 p.m., respectively (Tr. 34; Pet. Ex. 9). Email exchanges between Mr. Montana and his supervisor, Mr. Plumey reveal that respondent took half hour lunches and left a half hour early without getting permission (Pet. Ex. 11; Tr. 35). When Mr. Montana and Mr. Plumey attempted to discuss this with respondent, he put on his coat and left saying it was 4:00 p.m. (Tr. 35; Pet. Ex. 11). On May 13 respondent told Mr. Montana that he was entitled to use his time as he saw fit (Tr. 69-70; Pet. Ex. 25). In the IAD interview, respondent stated that as long as he worked seven hours in a day, it did not matter which hours they were and that he could leave early if he only took a half hour for lunch. Respondent also acknowledged that he

ceased this practice when Mr. Montana stopped approving his time sheets (Tr. 84; Pet. Exs. 3A, 3B).

The evidence shows that respondent did not have permission from his supervisors to leave early, thus, his early departure was unauthorized. *Transit Authority v. Coaxum*, OATH Index No. 1565/97 at 17-18 (Sept. 5, 1997) (where policy requires an employee to get permission to change his lunch schedule and leave work early, failure to do so is misconduct). This charge should be sustained with respect to rules 3(P), 3(U), 3(X), and 9(A), and dismissed with respect to rule 1(E) because there is no evidence that this conduct was disorderly or disruptive.

In Charge IX respondent is alleged to have been absent without official leave ("AWOL") on June 20, 21, and 22, 2011 (ALJ Ex. 1). The code of conduct requires employees to call their supervisor within the first hour of work if unable to report as scheduled or be considered AWOL for the day (Pet. Ex. 2 at 32). Time and leave records show that respondent was AWOL on the three days in question (Pet. Ex. 21; Tr. 59). Mr. Montana testified that respondent did not request the time off and did not call as required (Tr. 59; 64-65; Pet. Ex. 23). When respondent returned to work, Mr. Montana asked him to provide an explanation but respondent did not give a direct response (Tr. 58). When Mr. Plumey spoke to respondent, he claimed that he called the Borough Manager (Tr. 62; Pet. Ex. 22). An email from the Borough Manager indicated that he did not receive a call from respondent (Pet. Ex. 22).

The evidence shows that respondent was AWOL in violation of rules 3(P), 3(X), 7(A), and 9(A). *Yovino,* OATH No. 1145/05 at 8-9 (no-call, no-show absence without authorization is misconduct). However, the charges should be dismissed with respect to violation of rules 1(E) and 3(W) since there is no evidence that respondent's conduct caused a disruption or that he failed to obey a direct order.

Charges V, XII, XIII – Discourteous Conduct

Petitioner alleges that on three occasions respondent was discourteous, unresponsive, or uncooperative in violation of rules 1(E), 3(A), 3(X), 8(C), 8(D) and 9(A).

Petitioner alleges that on May 19, 2011, respondent failed to cooperate with IAD by being unresponsive, discourteous, and uncooperative in answering questions (ALJ Ex. 1, Charge V). Mr. Agostino testified that he informed respondent that rules 8(C) and 8(D) of the code of conduct require him to answer IAD's questions and that he failed to do so (Tr. 88; Pet. Ex. 2 at

19). A review of the taped interview supports these charges. For example, in responding to a question about his normal start time, respondent would not give a clear answer, but merely said that he gets to work before 8 o'clock. Respondent only answered when asked directly if his hours were 8:00 a.m. to 4:00 p.m., at which time he affirmed that they were (Tr. 84). When asked if he had discussed his concern about being in the Bronx after dark with his supervisor, he stated "no comment" (Pet. Exs. 3A, 3B). When asked whether he had refused to do a job assignment, respondent said that the work was assigned to him in error, and when asked to clarify, said "I'm not going to help you" (Pet. Exs. 3A, 3B). In response to other questions, respondent said "I'm not going to tell you that" and "do your own research" (Pet. Ex. Exs. 3A, 3B). When informed by Mr. Agostino that he must answer the questions or face discipline, respondent answered "do what you have to do" (Tr. 90).

Accordingly, I find that respondent was uncooperative, evasive, argumentative, combative, and disorderly with IAD as charged. *Dep't of Correction v. DiTommaso*, OATH Index No. 143/83 at 15 (Nov. 1, 1983) (failing to answer investigators fully was misconduct even absent proof that the investigation was hampered).

Petitioner also alleges that respondent was unprofessional and discourteous on June 28, 2011, when communicating about the order to attend a medical examination (ALJ Ex. 1, Charge XII). In an email to IAD about the rescheduled time, respondent wrote, "what makes you think you're entitled to demand that I take a medical physical with a doctor of your choosing?" and that his medical condition was "none of your business" (Tr. 97-98; Pet. Ex. 31). Mr. Agostino testified that he read the email and found it rude (Tr. 98).

I find that respondent was discourteous as charged except that there is no evidence that he was disorderly. Language need not be profane to be discourteous, but merely outside the bounds of appropriate workplace behavior. *See Triborough Bridge & Tunnel Auth. v. Bell***,** OATH Index No. 1635/08 at 6 (June 3, 2008), *adopted*, Acting President's Decision (July 11, 2008) (calling a customer "dude" was discourteous behavior and misconduct for a toll taker).

Finally, petitioner alleges that respondent was unprofessional and discourteous to Mr. Montana in an email about his timesheets (ALJ Ex. 1, Charge XIII). Time sheets must be submitted according to schedule in order for employees to receive their pay on time (Tr. 66). On June 28, 2011, Mr. Montana sent an email reminding respondent and another employee to complete their time sheets so that they could be approved (Pet. Ex. 24). Respondent replied

"VERY FUNNY – THIS IS SERIOUS BUSINESS AND YOU'RE TRYING TO BE CUTE" (Pet. Ex. 24). Mr. Montana testified that he found this response confusing and unprofessional (Tr. 66). I agree and the charge should be sustained with the exception of the specification involving rule 1(E).

FINDINGS AND CONCLUSIONS

1. Petitioner demonstrated that respondent damaged a DOB printer on April 8, 2011, as alleged in Charge I.
2. Petitioner demonstrated that respondent refused to participate in mandatory overtime in May 2011 as alleged in Charge II, except petitioner failed to demonstrate that respondent violated rule 1(E).
3. Petitioner demonstrated that respondent refused to attend mandatory training on May 18, and June 17, and 27, 2011 as alleged in Charges IV, VIII, and X, except petitioner failed to demonstrate that respondent violated rule 1(E).
4. Petitioner demonstrated that respondent refused to perform an inspection on May 23, 2011, as alleged in Charge VII, except petitioner failed to demonstrate that respondent violated rule 1(E).
5. Petitioner demonstrated that respondent refused to attend a medical examination on June 28, 2011, as alleged in Charge XI, except petitioner failed to demonstrate that respondent violated rule 1(E).
6. Petitioner demonstrated that respondent refused to attend IAD interviews on November 3, and 9, 2011 as alleged in Charge XIV, except petitioner failed to demonstrate that respondent violated rule 1(E).
7. Petitioner demonstrated that between May 2 and 14, 2011, respondent left work without authorization as alleged in Charge III, except petitioner failed to demonstrate that respondent violated rule 1(E).
8. Petitioner demonstrated that respondent was absent without approval on June 20 through 22, 2011, as alleged in Charge IX, except petitioner failed to demonstrate that respondent violated rules 1(E) and 3(W).
9. Petitioner demonstrated that respondent was discourteous and failed to answer questions posed by IAD on May 19, 2011, as alleged in Charge V.
10. Petitioner demonstrated that respondent was discourteous on June 28, 2011, as alleged in Charges XII and XIII, except petitioner failed to demonstrate that respondent violated rule 1(E).

RECOMMENDATION

Upon making these findings, I obtained and reviewed an abstract of respondent's work history for purposes of recommending an appropriate penalty. Respondent has been employed by DOB since 2005. He has no disciplinary record.

Respondent has been found to have damaged city property, refused to accept orders from his supervisors, was absent without authority, and engaged in discourteous conduct. Petitioner asks for a recommendation that respondent be dismissed from his employment. While the damage to the printer was relatively minor, I agree that this penalty is appropriate based on the other misconduct.

The assignment of personnel within a title is within the discretion of the appointing authority. Charter § 1102; Admin. Code § 12-307(a); *Transit Auth. v. Dowd,* OATH Index No. 247/98 at 6 (Oct. 1, 1997); *Dep't of Parks & Recreation v. Baugh,* OATH Index No. 249/85 at 6 (Oct. 11, 1985), *aff'd,* 160 A.D.2d 617 (1st Dep't 1990). It is the most fundamental obligation of an employee to report for work as scheduled and to perform the work assigned in a courteous manner. Respondent has made clear that he is unwilling to perform work that he finds unacceptable.

Intractable refusal to perform fundamental job duties and acknowledge the authority of superiors to assign job tasks requires termination. *Health and Hospitals Corp. (Bellevue Hospital Center) v. Tanvir,* OATH Index No. 797/10 at 9 (Dec. 17, 2009) (termination for employee who refused assignments and was absent without authorization); *Health and Hospitals Corp. (Coler-Goldwater Specialty Hospital and Nursing Facility) v. Ramsey,* OATH Index No. 1248/05 at 22 (Nov. 9, 2005) (termination, noting, "Important in considering penalty is that the respondent appeared indifferent that his behavior was insubordinate or had negative ramifications upon the workplace."); *Human Resources Admin. v. Agran,* OATH Index No. 515/07 at 9 (Jan. 26, 2007), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD07-81-A (July 27, 2007) (termination, noting, "respondent starkly refuses do any of the work for which she is being paid -- perhaps the most fundamental demand of any employer.").

Respondent's supervisors met with respondent several times to discuss his conduct and each time respondent refused to accept any responsibility for his actions and his insubordinate and discourteous conduct continued. Moreover, respondent's refusal to accept responsibility for his actions, change his ways, or acknowledge his supervisors' authority was on full display in the

IAD interview. Respondent's refusal to appear for the hearing and offer any mitigation further supports the conclusion.

Respondent's attempts to dictate what he will accept from his employer and his statements that he will continue to refuse orders that are not to his liking leave no room for alternatives to his dismissal. *Strokes v. Albany*, 101 A.D.2d 944, 945 (3d Dep't 1984); *Bd of Education v. Green*, OATH Index No. 820/90 at 16-17 (July 13, 1990. Under the circumstances the principles of progressive discipline do not preclude termination for a first instance of misconduct. *Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Rivera*, OATH Index No. 1669/10 at 11 (Apr. 7, 2010); *Office of Management & Budget v. Perdum*, OATH Index No. 998/91 at 28 (June 17, 1991) (19-year employee with no prior record terminated for repeated insubordination and incompetence, where he demonstrated no willingness to change); *see also Keith v. NYS Thruway Auth.*,. 132 A.D.2d 785, 786 (3d Dep't 1987 (long and unblemished record does not foreclose dismissal from employment).

Despite respondent's lack of disciplinary history, the requested penalty is not so disproportionate to the sustained misconduct as to be shocking to one's sense of fairness. *Pell v. Board of Education*, 34 N.Y.2d 222 (1974). Accordingly, I recommend that respondent be terminated from his employment.

Alessandra F. Zorgniotti
Administrative Law Judge

Dated: March 5, 2012

APPEARANCES:

KEVIN SCHULTZ, ESQ.
Attorney for Petitioner

No appearance by or for respondent.