Dep't of Environmental Protection v. Post

OATH Index No. 1420/12 (Aug. 21, 2012), *adopted*, Comm'r Dec. (Sept. 4, 2012)

Sewage treatment worker committed misconduct by being absent without authorization on three occasions and speaking disrespectfully and profanely to a supervisor. Respondent was further found to be incompetent due to excessive absence. Termination of employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Petitioner
-against-
BRIAN POST
Respondent

REPORT AND RECOMMENDATION

JOAN R. SALZMAN, *Administrative Law Judge*

This disciplinary action was referred by petitioner, the Department of Environmental Protection ("DEP" or the "Department") pursuant to Section 75 of the Civil Service Law. The Department alleges that Brian Post, a sewage treatment worker, engaged in misconduct and is incompetent to perform his duties due to excessive absence (ALJ Ex. 1). Charge I alleges that respondent violated agency rule E(24) by being absent without authorization ("AWOL") on three occasions in the fall of 2011. Charge II states that respondent violated rule E(6) by engaging in conduct prejudicial to good order and discipline when he allegedly spoke disrespectfully to a supervisor in March of 2012. In a third charge, the Department claims that respondent is incompetent because he was absent on 279 of 369 work days, or 76% of the scheduled work time during the 18-month period from September 22, 2010, through March 21, 2012 (ALJ Ex. 1).

A hearing was held before me on May 25, 2012. Petitioner called three witnesses and introduced documentary evidence. Respondent testified on his own behalf. The record closed on July 2, 2012, after both sides submitted post-trial briefs.

ANALYSIS

Charge I: AWOL's Alleged on October 5 and 6, and November 18, 2011

In Charge I, respondent is alleged to have violated Rule E(24) of the Department's Uniform Code of Discipline (the "Code of Discipline"), which states that employees "shall not, except when authorized, absent themselves from nor leave their assigned work location and/or tour of duty." The Department charges that respondent was AWOL on three days in 2011: October 5 and 6, and November 18. Respondent admitted at trial that he failed to follow the agency requirements that he submit satisfactory documentation of his absences on the first two dates and timely documentation as to the third (Tr. 69-72). Therefore, he could not successfully dispute these charges.

Plant Superintendent Zainool Ali, who has supervised respondent for approximately six years at the 26th Ward sewage treatment plant (Tr. 24-25), explained the absence procedure as follows: if an employee is going to be absent, he is supposed to call in before his shift starts to notify the facility (Tr. 27). Within five days of his return to work, the employee must bring documentation justifying the absence (Tr. 27, 30). The employee would then submit that documentation to Mr. Ali, who has the authority to approve or disapprove it (Tr. 24, 27). If the documentation is late, improper, or missing, the employee is deemed AWOL (Tr. 41-43). Respondent agreed that this was the procedure (Tr. 69).

CityTime is the Department's electronic timekeeping system which has been in use since February 2011 (Tr. 10-11). A CityTime printout for October 2 through October 8, 2011, shows that respondent was absent on October 5 and October 6, 2011 (Pet. Ex. 4; Tr. 29). Respondent submitted a doctor's note, dated October 11, 2011, which indicates that respondent "was disabled for work" between October 7 and 16, 2011, and would be able to return to work on October 17, 2011 (Pet. Ex. 4; Tr. 30). This note says nothing about October 5th or 6th. As Mr. Ali explained, respondent submitted no leave documentation for October 5th or 6th. Mr. Ali, therefore, disapproved leave for those two dates and deemed respondent AWOL (Tr. 30, 41).

Respondent admits that he was absent on those dates and that the note he provided said nothing about the 5th or 6th of October (Tr. 61-62, 69, 71-72). He suggests that the doctor simply made a mistake, one respondent did not notice because the Department never informed him that his note was rejected (Tr. 62-63). Respondent's attempt to shift the blame to the Department for the note being erroneous, according to respondent, because it omitted any

reference to October 5 and 6, 2011, is unavailing. Respondent personally submitted the note (Tr. 29), which is entirely legible (Pet. Ex. 4). The lack of information regarding October 5th and 6th is apparent. If respondent hands in paperwork without even reviewing it, as his testimony implies, this cannot be the Department's responsibility. Charge I, specifications 1 and 2, with respect to October 5 and 6, 2011, is sustained. I find that respondent was AWOL on those days.

The CityTime printout for November 13 through November 19, 2011, indicates that respondent was absent on November 18, 2011, a Friday (Pet. Ex. 5; Tr. 31). On November 28, 2011, respondent made a retroactive request for leave for November 18, 2011. He attached a signed note dated November 18, 2011, from his father indicating that respondent was taking care of him on that day (Pet. Ex. 5). Respondent explained that his father, who is 85, was not feeling well that day and was possibly having angina or a heart attack (Tr. 63). Respondent testified that he requested "EV" or "emergency vacation" and that such requests had been granted in the past based on similar notes written by family members (Tr. 63; *see* Pet. Ex. 5).

Mr. Ali testified that because respondent was categorized as chronically absent, he was required to provide a doctor's note for any further absence (Tr. 33), and that respondent had been told before that family notes were not acceptable (Tr. 42). Moreover, the leave request for November 18 was disapproved because it was submitted more than five days after respondent returned to work. Thus, Mr. Ali found the note from respondent's father "unacceptable" documentation under departmental rules for two reasons: it did not come from a professional and it was late. Accordingly, he marked respondent AWOL for November 18, 2011 (Pet. Ex. 5; Tr. 32-33).

Because respondent admitted that the note from his father was untimely (Tr. 71), he was AWOL on November 18, 2011, whether or not he understood or had been notified that a family note was unacceptable. To the extent that there is even arguably any open issue as to respondent's understanding of the documentation he was required to submit, the question turns in part on a credibility assessment. In determining credibility, this tribunal considers factors including "witness demeanor, consistency of a witness' testimony, supporting and corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness' testimony comports with common sense and human experience." *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 4, 1998), *adopted*, Comm'r Dec. (Feb. 17, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998).

Respondent testified that he remained at home because he thought his father was having a heart attack or angina -- a potentially fatal medical crisis. Yet, there was no evidence that respondent took his father to an emergency room or even to a doctor, and he had no medical note to document this serious illness. This testimony was implausible; it did not comport with common sense and human experience. Moreover, respondent had a motivation to dissemble, to avoid discipline. I credit Mr. Ali's testimony over respondent's on this point and find that Mr. Ali had previously told respondent that notes from family members were not acceptable. Mr. Ali appeared to have no personal animus toward respondent. His undisputed description of respondent's chronic absenteeism supports the contention that medical documentation was required, as provided in the Department's *Employee Handbook* at 20-21 (requiring medical documentation for lengthy absences, for employees who are on an absence control step, or on request of a supervisor).[1] The Department has proved Charge I, specification 3 alleging that respondent was AWOL on November 18, 2011.

Charge I should be sustained in its entirety.

Charge II: Discourtesy/Profanity

In Charge II, respondent is charged with violating Rule E(6) of the Department's Code of Discipline, which states that employees "shall not conduct themselves in a manner prejudicial to good order and discipline." As defined in the Code, "conduct prejudicial to good order and discipline" includes "the use of improper language . . . toward a superior, fellow employee, or member of the public." Code of Discipline, § D(5). "Improper language" means language that is "obscene, indecent, abusive, intimidating, profane, or uncivil." Code of Discipline, § D(12).

This charge involves an encounter between respondent and his supervisor, Mr. Ali, in the administrative office trailers located about 200 feet away from the plant (Tr. 26). On March 2, 2012, between 9:00 and 10:00 a.m., Mr. Ali saw respondent in an office trailer (Tr. 33-34). The day before this, Mr. Ali's supervisor, Ravi Basant, Division Chief, East Operation, had instructed him not to permit respondent to enter the facility until further notice (Tr. 36-37; Pet. Ex. 6). When Mr. Ali saw respondent, Mr. Ali approached him (Tr. 37). What happened next is disputed by the parties.

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[1] I have taken official notice of the agency Code of Discipline and of its *Employee Handbook* pursuant to 48 RCNY § 1-48 (Lexis 2012).

Mr. Ali testified that before he had a chance to say anything, respondent held up his hand and said, "[D]on't speak to me, speak to my lawyer, I don't have to talk to you," or words to that effect (Tr. 37).[2] As respondent proceeded to leave the trailer, Mr. Ali stated "I am still the plant superintendent here, you have to speak to me" (Tr. 37, 43). As respondent was walking out of the trailer towards the parking lot, respondent said, "[Y]ou're nothing but a fucking asshole" (Tr. 37). Mr. Ali reported the matter to his boss, who instructed him to memorialize it. Mr. Ali did so. His memorandum, dated March 12, 2012, in evidence, confirms Mr. Ali's recollection of the incident shortly thereafter and indicates that William Abreu, another DEP employee and supervisor, witnessed the incident. Mr. Ali wrote that this type of treatment of a supervisor in front of fellow employees was humiliating and should not be encouraged (Pet. Ex. 6; Tr. 38).

Mr. Abreu, a supervisor assigned to the same plant as respondent, also testified at trial and confirmed that he witnessed the incident. He corroborated Mr. Ali's version of events. Mr. Abreu has worked at the plant for eight years and knows respondent as a co-worker there (Tr. 48). On March 2, 2012, Mr. Abreu was going to the trailers to do some office work. As he went to the door, respondent was leaving. When they were about a foot apart, Mr. Abreu heard respondent call Mr. Ali a "fucking asshole" (Tr. 49). Mr. Abreu testified that respondent's back was to Mr. Ali, who was only three feet away from respondent and still in the trailer (Tr. 52). All three men were in the trailer and respondent was on his way out. Although respondent did not speak in a particularly loud tone of voice (Tr. 49), both Mr. Ali and Mr. Abreu heard the remark. The same day, at the request of Mr. Ali, Mr. Abreu wrote a short memorandum describing the incident (Pet. Ex. 7; Tr. 50). It is telling that Mr. Abreu's memorandum, created within 45 minutes after the event (Tr. 50), recorded the statement he heard as clearly directed specifically to Mr. Ali:

> To whom this may concern I am writing this letter to inform that I was a witness of an altercation between Brian post [*sic*] and Zainool Ali which occurred at the main office approximately 10:00 am in which Brian post [*sic*] made a very nasty remark saying "<u>you fucking ass hole</u>" towards Ali which were [*sic*] very disturbing to Zainool Ali and me.

(Pet. Ex. 7) (emphasis in the original).

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[2] On cross-examination, Mr. Ali expressed respondent's comments similarly as "[D]on't speak to me, speak to my lawyer, I have an attorney now. You're not allowed to speak to me" (Tr. 43).

Respondent denied cursing at all, then admitted he did indeed say at least part of the comment with which he is charged. He testified that on March 2, 2012, he went to the plant to collect his paycheck and to submit a leave request and note (Tr. 65). When Mr. Ali saw respondent, he questioned why respondent was at the plant and, according to respondent, told the staff member handling respondent's paperwork at the window, "[D]o not accept nothing from this person, have him escorted off the plant. Call security" (Tr. 65). Respondent thought Mr. Ali was belligerent and arrogant; he said to Mr. Ali, "[D]on't talk to me, talk to my lawyer" (Tr. 65). Respondent then contradicted himself repeatedly about what he actually said that day. At first, he categorically denied using any profane language: "I mean I didn't say nothing, nothing. I swear on my life. I never said anything bad to this gentleman" (Tr. 66). But in the next breath, respondent admitted he likely uttered at least part of the comment with which he was charged. He testified that he turned and left, and, as he was walking out, might have said something under his breath, "like 'what an idiot'" (Tr. 66). He then denied using two profane terms together: "I would never say 'fucking asshole' in my life. I don't curse at all. But I don't do that. That's not the way I was brought up. That's not me" (Tr. 66). He promptly reversed course and admitted that he "probably said 'asshole,'" but hastened to add: "Not fucking though, asshole, but not to him and not to anybody else" (Tr. 66).

Compared to Mr. Ali's testimony, which was corroborated by supervisor Abreu and confirmed in the two contemporaneous memoranda, respondent's testimony was self-contradictory and defensive. Respondent admitted that he knew of no reason for which Mr. Abreu would invent his testimony, and that the two men have always gotten along in the past (Tr. 77-78). Respondent's testimony reveals that he did intend to call Mr. Ali an "asshole" or an "idiot," but contended that he did not intend for Mr. Ali to hear him (Tr. 66). In essence, respondent admitted using an expletive and another insult, but denied using a second profanity. Respondent's evasiveness calls this testimony into question. *Dep't of Environmental Protection v. Ginty*, OATH Index No. 1627/07 at 11 (Aug. 10, 2007), *adopted*, Comm'r Dec. (Aug. 20, 2007).

In addition, respondent's testimony that Mr. Ali was "yelling and screaming and cursing" (Tr. 76) was against the weight of the evidence. Respondent called no witnesses who were working in the trailer and who, he contended, heard the exchange. I find Mr. Abreu's testimony that it was respondent who spoke profanely and angrily more credible, as Mr. Abreu had no

demonstrable reason to vilify respondent. There was no record of animosity between Mr. Ali and respondent (Tr. 40; 46-47). I find that respondent more likely than not directed comments to his supervisor, Mr. Ali, on March 2, 2012, in the presence of another supervisor, calling Mr. Ali, "you fucking asshole."

Not every disagreement with a supervisor constitutes misconduct, "even if voices are raised and emotions are vented." *Admin. for Children's Services v. Goldman*, OATH Index No. 985/12 at 6 (July 3, 2012), *adopted*, Comm'r Dec. (July 13, 2012); *Transit Auth. v. Nixon*, OATH Index No. 2131/96 at 16-17 (Mar. 31, 1997). Directing profanity to a supervisor, as respondent did here, is sanctionable misconduct, *Human Resources Admin. v. Bichai*, OATH Index No. 211/90 at 11 (Nov. 21, 1989), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 90-54 (June 15, 1990), and calling the supervisor "asshole" or "you fucking asshole" is insulting and profane. "A subordinate may disagree with his superior, even vehemently -- provided that he does so decorously and discreetly -- but he may not curse at or otherwise abuse his supervisors . . . ." *Bichai*, OATH 211/90 at 14.

Calling a supervisor an "idiot," were that the only insult respondent uttered, is not profane, but it is fundamentally disrespectful and improper language. This is an *ad hominem* attack that undermines the supervisor's authority. *Health & Hospitals Corp. (North Bronx Healthcare Network) v. Wolfe*, OATH Index No. 2844/08 at 7 (Sept. 8, 2008), *adopted*, NYC HHC Dec. (Oct. 27, 2008) ("stupid" and "dummy" are fundamentally disrespectful words); *Triborough Bridge and Tunnel Auth. v. Lewis*, OATH Index No. 1592/03 at 5 (Feb. 10, 2004), *adopted*, Labor Relations President Dec. (Feb. 27, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 05-19-SA (Apr. 25, 2005) (public comment by an officer that a sergeant was getting "dumber and dumber by the day" was an unambiguous act of disrespect.). That respondent used profanity towards Mr. Ali while there were others in the office disrupted the workplace. "An employee has the right to disagree with a supervisor, even vehemently, and he may voice such disagreement so long as it does not contain profanity, or threats, or disrupt office operations." *Wolfe*, OATH 2844/08 at 6.

Here, I find that respondent did direct profanity at his supervisor, within earshot of another supervisor, exacerbating the rudeness he displayed in the workplace. But even if respondent had not directly cursed at Mr. Ali, his conduct would be improper. "[T]he use of profanity generally constitutes *per se* discourtesy and disrespect." *Wolfe*, OATH 2844/08 at 6-7.

The use of the profanity shown here was misconduct. *Dep't of Sanitation v. Bonafede,* OATH Index No. 2124/11 at 2, 5 (Nov. 1, 2011), *adopted*, Comm'r Dec. (Dec. 8, 2011), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD-12-38M (July 27, 2012) (profane remark to a supervisor that their Chief could "go fuck his mother" constituted misconduct); *Dep't of Sanitation v. Scope,* OATH Index No. 2199/04 at 8 (Mar. 24, 2005) (while speaking with one supervisor about two others, sanitation worker's use of the phrase "tell [them] to go fuck themselves" was misconduct).

Both Mr. Ali and Mr. Abreu heard respondent's remark and understood it to refer insultingly to Mr. Ali. I find that respondent's language violated the Code of Discipline because it was abusive, profane, disrespectful, and uncivil. *See* Code of Discipline, §§ D(5) and D(12).

Moreover, respondent's statement, "don't talk to me, talk to my lawyer" was also a violation of the Code of Discipline. Respondent was on work property and Mr. Ali was a supervisor with authority over him. This conduct was disrespectful. *Health and Hospitals Corp. (Woodhull Medical and Mental Health Ctr.) v. McMillian,* OATH Index No. 1402/06 at 8 (July 24, 2006), *adopted*, NYC HHC Dec. (Aug. 31, 2006) (saying "don't speak to me" to a supervisor was disrespectful). *See also Dep't of Correction v. Burkert,* OATH Index No. 173/93 at 6-7 (Jan. 19, 1993) (officer's non-profane but sarcastic remarks to a captain reflected disrespect); *Dep't of Correction v. Gurrieri,* OATH Index No. 1841/02 (Nov. 15, 2002), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 03-91-SA (Sept. 29, 2003) (officer who walked away from captain's routine briefing saying "I'm not listening to this shit" engaged in misconduct). I find that the Department has proved its allegations that respondent engaged in conduct prejudicial to good order and discipline on March 2, 2012. Charge II should be sustained in full.

Charge III: Incompetence

The final charge concerns respondent's uncontested, substantial absence for at least 287 of 391 work days during the 18-month period from September 22, 2010 through March 21, 2012, amounting to at least 73% of the work days alleged. In his post-trial brief, respondent's counsel wrote that respondent "does not contest the absence charge as he was out sick and hospitalized" (Resp. Br. July 2, 2012). The question presented is whether this considerable record of absenteeism constitutes excessive absence that amounts to incompetence. I find that it does.

Respondent testified that in 2010 he was diagnosed with a "MRSA" (presumably methicillin-resistant staphylococcus aureus) infection, a serious bacterial infection that is resistant to antibiotics. Respondent testified without contradiction that the infection "attacks the brain" (Tr. 58), and that his treatment required hospitalization at Beth Israel Hospital in Brooklyn. He was quarantined during the hospitalization and afterwards confined to his home for ten months because, he said, he was contagious (Tr. 58-59). After being cured of infection, he returned to work for a month, then needed emergency sinus surgery related to the MRSA. Respondent testified on direct that this surgery took place on November 25, 2011 (Tr. 59-60), but, when cross-examined, was not certain of the date. Though respondent provided no proof of these events other than his own testimony, the Department did not dispute the illness respondent described other than to question the date of the surgery (Tr. 73).

Petitioner proved respondent's absences through documents and testimony of Fayann Jacques, the Chief of Administration and Payroll for the Bureau of Wastewater Treatment (Tr. 7-8). Ms. Jacques supplied the relevant timesheets, (Pet. Exs. 1, 3), and an uncontested summary that she had prepared from the timesheets of respondent's absences (Pet. Ex. 2; Tr. 13). It is undisputed that respondent was absent for 312.5 of 391 workdays, or nearly 80% of the 18-month period charged (Pet. Ex. 2). He worked only 78.5 of these 391 workdays. Excluding the 9.5 vacation days he took, respondent was absent 303 of 391 days, or about 77% of the time. Further excluding the 16-day suspension, respondent was absent 287 days or 73% of the time. It is not clear why the petition pleads slightly different numbers, but the agency proved without opposition that respondent was absent at least 73% of the work time over the 18 months at issue. Respondent's attendance was shown as follows:

Summary of Respondent's Attendance and Leave Usage
September 22, 2010 through March 21, 2012

Days Worked	78.5 Days
Sick Charged to AL	6 Days
Undocumented Sick	1 Day
Documented Sick	1 Day
Workers Comp.	48 Days
AWOL	49 Days
Unscheduled LWOP	12 Days
Sick Charged to LWOP	170 Days
Suspension	16 Days
Annual Leave	9.5 Days
Total Days Absent Excluding Vacation	303 Days
Total Days Absent Excluding Vacation and Suspension	287 Days
Total [Work] Days	391 Days

(Pet. Ex. 2).

I find that petitioner has proved that respondent was absent at least 73% of the time in the period charged.

Respondent challenges discipline (and, particularly, termination of his employment, as discussed in the recommendation section below) based on this admittedly extensive absence on the grounds that respondent has served the agency for 23 years, that his brother and father have also served the agency, and that the absences for serious illness should not be considered excessive under principles considered by the Appellate Division in *Hunter v. New York City Board of Education*, 190 A.D.2d 851 (2d Dep't 1993) (30 absences in a year were excessive where 8 occurred on Mondays; employee provided questionable explanations for some; absence occurred after respondent was warned several times by his supervisor that his poor attendance was adversely affecting the operation of the office). *See* Resp. Br. July 2, 2012.

As noted in *Triborough Bridge and Tunnel Authority v. Lewis*, OATH Index No. 1592/03 at 8 (Feb. 10, 2004), *adopted*, Labor Relations President Dec. (Feb. 27, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 05-19-SA (Apr. 25, 2005), even in the absence of a specific agency rule defining excessive absence, as here, "[p]ast opinions of this tribunal have noted that where,

as here, an agency does not have a specific policy, an absenteeism rated exceeding 50% of the total work days in the period under review may be deemed excessive *per se*." *See also Triborough Bridge and Tunnel Auth. v. Christiano*, OATH Index No. 493/12 at 12 (Mar. 21, 2012), *adopted*, Comm'r Dec. (Apr. 11, 2012), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 12-34-SA (July 24, 2012) (same).

In *Cicero v. Triborough Bridge and Tunnel Auth.*, 264 A.D.2d 334 (1st Dep't 1999), *appeal dismissed*, 94 N.Y.2d 931 (2000), a bridge and tunnel officer worked 83 days and was absent for 304.5 days, an 80% absentee rate. The court upheld his termination for excessive absenteeism even though most of his absences were due to an on-the-job injury and were authorized for medical evaluations. The sole charge was that the excessive absenteeism constituted incompetence under Civil Service Law section 75. The same is true here as to Charge III (ALJ Ex. 1). The court in *Cicero* rejected the argument that because the term "excessive" was not defined in agency rules or elsewhere the employee should not be disciplined: "This vagueness argument might have some appeal if petitioner's absences were not so numerous or frequent that reasonable minds may differ as to whether they were excessive. However, that is clearly not the case here, where *petitioner's 80% absentee rate over a 19-month period must be considered excessive under any standard*." *Cicero*, 264 A.D.2d at 336 (emphasis supplied). The same is true here, given the notable similarity between the rate of absence found in *Cicero* and the nearly identical rate shown on this record.

Here, respondent can hardly claim he was not on notice that he had a chronic absence and AWOL record. The Code of Discipline provides in its Statement of Policy, Rule B: "It is the policy of the Department of Environmental Protection that disciplinary action shall be instituted to foster, maintain, and promote the good order, morale and efficiency of the DEP." Employees must show up for work, as is clear from DEP Code of Discipline Rule E(24), the section cited in the AWOL charges in the petition. In addition, the DEP *Employee Handbook* provides, as in *Cicero*, 264 A.D.2d at 335, that employees accrue a limited amount of sick leave, only 12 days a year. Respondent was well aware of this limit, as he testified that he knew he was entitled to 12 sick days a year at DEP and added that under a new contract he only gets 6 sick days a year (Tr. 61). Based on his own testimony, therefore, respondent could have no reasonable expectation that taking nearly 300 days off in 18 months would be acceptable. The *Handbook* also provides that poor attendance may result ultimately in "disciplinary action." (*Handbook* at 21). Thus, as

in *Cicero*, respondent here "should have been on notice from numerous sources that excessive absences would not be tolerated." *Cicero*, 264 A.D.2d at 336. With respect to the incompetence charge, the agency proved that respondent was AWOL for 49 days and out sick or injured for the remaining 238 days he missed in 18 months (Pet. Ex. 2). In addition, it is not disputed that this is respondent's sixth disciplinary case brought for his being AWOL since 2000 (Pet. Ex. 8).[3] I do not accept the notion, on this record, that respondent did not understand that he could be disciplined for missing work 73% of the time.

As noted by respondent's counsel, the Department did not elicit testimony from its own witnesses that respondent's absences were disruptive and burdensome to the agency (Tr. 87). It is true that both the plant's Chief of Administration and Payroll, Ms. Jacques, and supervisor Ali testified about respondent's absence record, but they were not asked about the effect respondent's chronic absence has had on the operation of the plant -- an omission that could in other circumstances damage an agency's case. Here, however, I do not find petitioner's failure to elicit direct testimony from its own witnesses on this point fatal to the Department's case, as there is a fair inference from respondent's own testimony that his chronic absence has adversely affected the plant's operations. Respondent testified: "Basically anything that needs to be done, I can do. I'm there so long, I know everything about the plant that there is to know about it. . . . Whatever they need me to do, I do it. . . . I know everything there is to know at a sewage plant. I've done every aspect of the plant, including store room, purchasing, everything" (Tr. 56-57).

By his own description, respondent, a sewage treatment worker with more than 20 years on the job, worked on operations, including maintaining the plant and pumps, handling samples, doing paperwork, and making repairs (Tr. 55-57). I find that respondent's chronic and lengthy absence, during which he has not performed these important tasks, places at least some burden on the employer. To find otherwise would suggest that he was not doing anything useful when he did go to work. By his own account, respondent missed 10 months of work due to his MRSA infection. Even setting aside all other forms of absence supported by the evidence, this rendered him incapable of performing his job for most of a year. "[T]he central issue [is] whether the employee's unreliable attendance render[s] him incompetent to continue his employment." *Triborough Bridge & Tunnel Auth. v. Rodriguez,* OATH Index No. 729/04 at 3-4, 11 (May 28,

[3] I have marked as Petitioner's Exhibit 8 the record of respondent's prior disciplinary history submitted via email by petitioner on notice to respondent's counsel on June 5, 2012.

2004), *aff'd*, President's Dec. (June 29, 2004) (citing the First Department's decision in *Cicero*; absent specific agency policy, absenteeism rate exceeding 50% of the total work days in the period under review deemed excessive *per se*; abysmal attendance record demonstrated that respondent was not competent to perform the duties of his job); *Dep't of Correction v. Astacio*, OATH Index No. 1715/99 at 4 (July 14, 1999), *adopted*, Comm'r Dec. (Sept. 17, 1999), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 01-36-SA (Apr. 17, 2001) (employee's absence on approximately half of all scheduled work days in a seven-month period "compels the conclusion that, during the period at issue, he could not perform the essential duties of his position.").

Respondent missed work at least 73% of the time in an 18-month period. Charge III, entitled "Incompetence" (in contradistinction to the first two charges, entitled "Misconduct"), cites the number of absences and the rate of absence. It goes on to state: "Your excessive absences render you incompetent to perform the duties of your position" (ALJ Ex. 1). While the charge does not name a rule that was violated, the Notice and Statement of Charges that was served upon respondent along with the specifications indicates that the proceeding is brought pursuant to Civil Service Law section 75, entitled "Removal and other disciplinary action." That section provides that a civil service employee may be removed from office for incompetency or misconduct after receiving written notice of stated charges and an opportunity for a hearing on the charges. Respondent has received that process here. The Department relies upon case law that holds that attendance is such a fundamental requirement of the job that absence for more than 73% of the work days in an 18-month period renders the employee incompetent to perform the work -- because he is simply not there -- and that employees are deemed to be on notice, even absent a specific rule defining excessive absence, that such a high rate of absence can lead to discipline including termination of employment (Dep't Br. June 15, 2012). The Department has proved its case.

When an employee is charged with incompetence, as respondent is here, less specificity is required than when the employee is charged with misconduct. *Fitzgerald v. Libous*, 56 A.D.2d 981, 981 (3d Dep't 1977), *aff'd*, 44 N.Y.2d 660 (1978). The key consideration in whether an incompetence charge is sufficient is "whether the person has 'a reasonable opportunity' to answer the charges and to make explanation." *Id.* Here, the Department has clearly charged respondent with incompetence, the very charge he defended at trial. I find that by stating the relevant time period and the conduct at issue, as well as the underlying statutory basis for

discipline, the charges gave sufficient notice to respondent of the nature of the allegations against him.

In contrast to misconduct under Civil Service Law section 75, incompetence may be proved under that section without any showing of intent or fault. *Dep't of Correction v. Bomani*, OATH Index No. 1383/01 at 13 (July 20, 2001), *adopted*, Comm'r Dec. (Sept. 10, 2001). Thus, a city employee's job may be terminated under section 75 for incompetence due to excessive absences caused by physical incapacity. *Considine v. Pirro*, 38 A.D.3d 773, 774-75 (2d Dep't 2007). Even assuming that respondent was a credible witness and he was legitimately ill for 10 months -- and his testimony about the emergency with his father and about whether or not he ever uses profanity was questionable -- his illness is not a defense to the charge of excessive absence. *Dep't of Correction v. Givens*, OATH Index No. 393/09 at 4 (Dec. 29, 2008), *adopted*, Comm'r Dec. (Feb. 3, 2009). The fact that the absences were authorized and the employee has a valid reason for each absence is not dispositive of whether his unavailability renders him unreliable and incompetent to continue his employment. *Cicero*, 264 A.D.2d at 336; *Dep't of Correction v. Cherry*, OATH Index No. 184/07 at 5 (Feb. 28, 2007), *adopted*, Comm'r Dec. (Mar. 22, 2007), *aff'd sub nom. Cherry v. Horn*, 66 A.D.3d 556 (1st Dep't 2009); *Triborough Bridge and Tunnel Auth. v. Lewis*, OATH Index No. 1592/03 at 9 (Feb. 10, 2004); *Matter of Wallis v. Sandy Creek Central School Dist. Bd. of Educ.*, 79 A.D.3d 1813, 1814 (4th Dep't 2010) (whether employee had legitimate reasons for missing work was irrelevant to incompetence charge); *Romano v. Town Bd. of the Town of Colonie*, 200 A.D.2d 934 (3d Dep't), *appeal dismissed*, 83 N.Y.2d 963 (1994).

Similarly, the fact that a portion of the missed time was due to on-the-job injury for which respondent received worker's compensation does not change the outcome that the absence here should be deemed excessive as a matter of law. *Wallis*, 79 A.D.3d at 1813-14 (work-related injury is no bar to a finding of excessive absence); *McQueen v. NYC Health & Hosp. Corp.*, 154 A.D.2d 789, 791 (3d Dep't 1989) (discharge resulting from poor attendance was not retaliation for filing a Worker's Compensation claim).

Petitioner has proved that respondent was excessively absent and, therefore, incompetent to perform his job. Charge III should be sustained.

FINDINGS AND CONCLUSIONS

1. The Department proved by a preponderance of the credible evidence that respondent was AWOL on October 5 and 6, 2011, and November 18, 2011, and thereby committed misconduct, in violation of Uniform Code of Discipline section E(24).

2. The Department proved by a preponderance of the credible evidence that on March 2, 2012, respondent engaged in misconduct by speaking disrespectfully and profanely to his supervisor.

3. The Department proved by a preponderance of the credible evidence that respondent was incompetent to perform his job due to excessive absences during an 18-month period from 2010 to 2012.

RECOMMENDATION

The Department seeks termination of respondent's employment. Having found liability on Charge I at the hearing, I requested and reviewed respondent's disciplinary history (Tr. 87-88). Respondent has been a sewage treatment worker for the City for nearly 24 years, since September 1988 (Pet. Ex. 1; Tr. 55). Prior to 2000, he had a clean disciplinary history. Since that time, however, he has been disciplined repeatedly for being AWOL, with no discernible effect on his conduct. This is his sixth disciplinary case brought for being AWOL in the last 12 years, and his fifth case involving AWOL since 2008.

In 2000, respondent accepted a two-day pay fine in settlement of charges that he was AWOL twice and failed to provide proper documentation for those absences. In 2008, he accepted a penalty of 12 days' suspension without pay in settlement of charges that he was AWOL 9 times in April and May 2008 and failed to file requests for leave and documentation excusing his absences. Again, in 2009, he accepted a 30-day suspension without pay in settlement of charges that he was AWOL 13 times in October and November of 2008, and that he failed to provide documentation for an "emergency vacation" leave request and for most of the other AWOL events charged. Most recently, the agency disciplined respondent in June 2011 with a 6-day suspension and a year's probation for four more instances of AWOL in December 2010 and February 2011. He failed to fulfill the terms of that settlement agreement because he was AWOL again within about three months' time. Because he violated that probationary term

of his agreement, the agency imposed an additional 10-day suspension in December 2011, as provided in the settlement agreement.

Given this very recent, highly relevant recidivism, documented with respondent's signature on all the prior penalty agreements, I find that respondent's testimony at trial, denying that he was AWOL for 49 days in the recent period 2010-11 (Pet. Ex. 2) troubling. On direct examination, respondent swore at trial that he was never AWOL: "Not that I know of. Not AWOL ever that I can ever remember without either calling or bringing in a note" (Tr. 67). This demonstrably disingenuous testimony starkly highlights his failure to appreciate the seriousness of the situation in which he finds himself and his inability or refusal over the years to learn from prior discipline or even to begin to conform his conduct to the most basic attendance rules of working for the City. Respondent ultimately, through counsel, did not contest that period of AWOL. Resp. Br. July 2, 2012.

Also troubling is respondent's history of violating time and leave rules. "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). The theory behind progressive discipline is to modify poor employee conduct by increasing penalties for repeated instances of the same or similar misconduct. *Health & Hospitals Corp. (Kings County Hospital Ctr.) v. Myers*, OATH Index No. 1487/09 at 8 (Jan. 26, 2009), *adopted*, NYC HHC Dec. (Mar. 20, 2009), *aff'd*, NYC HHC Pers. Rev. Bd. Dec. No. 1349 (July 31, 2009), *citing Police Dep't v. Schaefer & McGrath*, OATH Index Nos. 1114 and 1169/99 at 13 (July 2, 1999), *adopted*, Comm'r Dec. (Aug. 16, 1999), *aff'd sub nom. Schaefer v. Safir*, 281 A.D.2d 163 (1st Dep't 2001).

Though respondent has a long tenure, every prior incident of discipline involved one of the same types of behavior charged here -- unauthorized absence. That long tenure counts in his favor, but I find it insufficient to forestall the outcome here. Three of those disciplinary actions took place in the last four years, suggesting that respondent's behavior is getting worse, not better. Respondent has already taken a 30-day penalty in 2008 and was placed on one year of probation for unauthorized absence in June 2011. Neither penalty seems to have deterred him, given that respondent breached his probation three months after it began by going AWOL again.

Respondent's extensive, recent disciplinary history of going AWOL and failing to meet his attendance obligations is a serious aggravating factor that bears upon the choice of an appropriate penalty. Petitioner has shown based on proof that he was AWOL three more times in 2011 (Charge I) that respondent is unwilling or unable to comply with the Department's time and leave regulations by either showing up for work or providing timely and proper medical documentation. We have found in similar cases that further discipline is fruitless and termination is warranted. *See, e.g., Dep't of Environmental Protection v. Evelyn*, OATH Index No. 3343/09 at 9 (Oct. 9, 2009), *adopted*, Comm'r Dec. (Nov. 9, 2009).

Respondent has been absent from work for much of the past two years. Such incompetence due to absence may be the basis of termination, independent of any other misconduct. *McKinnon v. Bd. of Education*, 273 A.D.2d 240, 241 (2d Dep't 2000); *Dep't of Correction v. Cherry*, OATH Index No. 184/07 at 10 (Feb. 28, 2007), *adopted*, Comm'r Dec. (Mar. 22, 2007), *aff'd sub nom. Cherry v. Horn*, 66 A.D.3d 556 (1st Dep't 2009). "Excessive absenteeism, even if due to verified or work-related illnesses, may result in termination of employment under section 75 of the Civil Service Law." *Givens*, OATH 393/09 at 2. Respondent's demonstrated failure or refusal to comply with the Department's time and leave policies, as proved in Charge I, and his excessive absence, as proved in Charge III, each provide independent bases for termination of his employment. There is no question that his attendance record is abysmal. The agency can no longer rely upon his services as an employee. That respondent was also disrespectful in the workplace and used profanity to his supervisor[4] only serves to cement the conclusion that he has refused to comply with the most basic requirements of the job.

[4] Had Respondent's use of profanity and disrespectful language (Charge II) been the sole charge on an otherwise clean record, that charge might have resulted in a suspension without pay of up to 30 days. *See Wolfe*, OATH 2844/08 at 10 (2 to 10 days); *Bonafede*, OATH 2124/11 at 23 (5 to 30 days). Here, however, suspension becomes moot in light of the penalty recommendation of termination of employment for respondent's demonstrated, long history of failure or refusal to comply with basic attendance rules, the most fundamental requirement of the job.

Given the totality of the misconduct and incompetence shown here, I recommend that respondent be dismissed from the employ of the Department.

Joan R. Salzman
Administrative Law Judge

August 21, 2012

SUBMITTED TO:

CARTER H. STRICKLAND, JR.
Commissioner

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