

Dep't of Sanitation v. Kaplan

OATH Index No. 403/12 (Jan. 6, 2012)

Evidence showed that sanitation worker was absent without leave on one occasion, did not comply with emergency leave procedures on another occasion, failed to provide required medical documentation for six days of sick leave, and left his home without authorization three times while on sick leave. Petitioner did not prove that respondent was absent from his home without authorization on five other days. Suspension without pay for 53 days recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
- against -
KEITH KAPLAN
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

The Department of Sanitation brought this proceeding under section 16-106 of the Administrative Code against sanitation worker Keith Kaplan. In six complaints, petitioner alleged that respondent was absent without leave; failed to provide proper notice for emergency leave; did not remain home while on sick leave; failed to report to the medical clinic when required; and did not document sick leave, in violation of Rules 1.4, 1.5, 7.5, 7.6, 7.8, and 7.9 of the Department's Code of Conduct. Before the hearing, petitioner dismissed a seventh complaint (Tr. 6-7).

At a hearing on November 15, 2011, petitioner relied on documentary evidence and the testimony of Superintendent Christopher Dinapoli, Supervisor Steven Boettcher, and Supervisor Anthony Ferrino. Respondent testified in his own behalf and offered documentary evidence. Following respondent's submission of additional documents, the record was closed on December 15, 2011. For the reasons below, I find that petitioner proved most of the charges and recommend that respondent be suspended without pay for 53 days.

ANALYSIS

July 29 to 31, 2010 (Complaint 18395)

Petitioner alleged that respondent was on paid sick leave from July 29 to July 31, 2010, but he failed to remain at home as required and he did not provide medical documentation for his absences from home, in violation of Rules 7.5 and 7.9 of the Department's Code of Conduct (ALJ EX. 1).

Rule 7.5 states that sanitation workers "must remain at home during paid sick leave unless they have received authorization to leave in accordance with Department procedures." Dep't of Sanitation Code of Conduct 2010-06, Rule 7.5 (eff. Mar. 1, 2010). A sanitation worker on sick leave may receive permission to go to a doctor's office by calling the Department's automated service and receiving an authorization code (Tr. 18-19). After returning home, the sanitation worker must again call the automated service (Tr. 21).

Within 48 hours of receiving authorization to leave home for a doctor's appointment, the employee must also provide medical documentation to the Department. "Such documentation (the medical note) must be completed by a licensed medical practitioner, or must be a comparable document that is determined to be acceptable and appropriate by the Department's Medical Unit." Dep't of Sanitation Code of Conduct 2010-06, Rule 7.9. The employee medical documentation must contain a date and time of treatment and an appropriate medical diagnosis (Tr. 20). *See* Dep't Policy and Administrative Procedure on Medical Leave (PAP) 2007-04 § III (8) and Appendix (eff. Aug. 1, 2007) (employee must provide completed, original medical note (DS 398) or comparable note on treating practitioner's original letterhead, with same information as a DS 398). Faxes and copies are not acceptable (Tr. 20, 77, 89; Pet. Ex. 1 at 10). Employees who call the automated service for authorization to leave for a doctor's visit also receive a recorded reminder to mail or bring documentation to the supervised sick leave unit (Tr. 83, 85).

Here, the evidence showed that, for each of the three days at issue, respondent called the automated system before 9:30 a.m., received authorization to go to his doctor's office, and failed to call back when he returned home (Tr. 32-35, 91; Pet. Ex. 2). Supervisors or investigators made repeated attempts to call respondent or visit his home on each of the three days (Tr. 26-27, 67; Pet. Ex. 2). This evidence established that respondent was not home at 4:58 p.m. on July 29,

6:35 p.m. on July 30, or 4:55 p.m. on July 31 (Tr. 67; Pet. Ex. 2). Petitioner also proved that respondent failed to provide original medical documentation for those three days (Tr. 73).

Respondent did not dispute that he was away from his home on each of the three days, but he noted that he had authorization to go to his doctors' offices (Tr. 35-36). He also faxed the Department a medical note for one of the three days at issue (Tr. 267; Resp. Ex. A).

Based on this evidence, respondent did not violate Rule 7.5, but he violated Rule 7.9. Petitioner argued that, when respondent received an authorization code, he had "conditional" permission to leave the home and, if he failed to provide the medical documentation or call in after returning home, the authorization was invalid (Tr. 36). Respondent claimed that after he received an authorization code, he could leave home to go to a doctor's office (Tr. 39).

As this tribunal has recognized, the plain wording of the rule supports respondent's interpretation. *Dep't of Sanitation v. Valletutti*, OATH Index No. 1995/11 at 4 (July 20, 2011) (sanitation worker who called for permission to attend physical therapy session and failed to provide the Department with acceptable medical documentation violated Rule 7.9 but did not violate Rule 7.5, because he received authorization to leave his home). An employee who calls and receives an authorization code is "authorized" to leave the home. Moreover, if there is any ambiguity in the rule, that should be construed against the Department, because it drafted the rule. *Id.* (citations omitted). In any event, the underlying misconduct is the employee's failure to provide required documentation, in violation of Rule 7.9. Revocation of the authorization to leave home, due to a lack of documentation, would punish the employee twice for the same act or omission. Because respondent called and received permission to leave his home on July 29, 30, and 31, 2010, petitioner failed to prove that he violated Rule 7.5 on those days.

The evidence did prove that respondent violated Rule 7.9. Respondent faxed two DS 398 forms to the medical clinic on July 31, but those faxes were not acceptable proof because he never submitted original documents (Tr. 73, 97; 199; Resp. Exs. A, B).

Respondent's counsel argued that the Department's refusal to accept faxed medical documents is a "ridiculous" rule (Tr. 280-81). That is not a defense to the charge. Indeed, this case illustrates the logic behind the Department's insistence on original documentation. The faxes, which were not signed by respondent, are incomplete and unclear (Resp. Exs. A, B). Neither fax refers to respondent's absences on July 30 and 31. One refers to his absence on July

29 and indicates that he would be able to return to work on July 30, 2010 (Resp. Ex. A). The other fax appears to refer to an absence earlier in July (Resp. Ex. B).

Conceding that he did not always provide original medical documentation and he “very rarely” called back in when he returned from a doctor’s office, respondent claimed that he was overwhelmed with paperwork and medical issues (Tr. 265, 267-68). In 2010, testing revealed that he had an enlarged liver and spleen (Tr. 253). He saw specialists for various medical tests and worked light duty for several months (Tr. 253-54). Doctors removed respondent’s spleen in February 2011 and he developed a blood clot after a week in the hospital (Tr. 255). He received blood thinners and was on sick leave until he returned to light duty in May 2011 (Tr. 256). Respondent returned to full duty in August 2011 (Tr. 256). He also had asthma, which he attributed to working for two days at Ground Zero immediately after September 11, 2001 (Tr. 257, 263). Respondent said that the Department tried to “retire” him by referring him for a disability pension, but that application was denied (Tr. 267-68). Because he had “piles” of medical records and he filed other records with his disability application, respondent could not recall submitting original doctors’ notes to the clinic and he could not find other records (Tr. 267-68).

Although respondent suffered from illnesses in 2010 and 2011, he still had a duty to comply with the Department’s sick leave procedures. Respondent has worked for the Department for more than ten years, and he knew about his obligation to provide timely, original medical documentation. Because respondent failed to comply with that requirement for absences on July 29, 30, and 31, 2010, the charges that he violated Rule 7.9 rule should be sustained.

September 25, 2010 (Complaint 18902)

Petitioner alleged that respondent was absent without leave (AWOL), in violation of Rule 1.4, on September 25, 2010, the day after a regularly scheduled day off (ALJ Ex. 1). The evidence showed that respondent failed to call in or report to his assigned location on September 25, 2010 (Tr. 217; Pet. Ex. 6). Respondent testified that he had no recollection of that day and he did not dispute the allegations (Tr. 251-52, 272, 275). The charge should be sustained.

October 23, 2010 (Complaints 20228, 20529)

Petitioner alleged that respondent reported sick on October 23, 2010, he was not at home when a supervisor visited, and he failed to provide medical documentation for a doctor’s visit

that day. Petitioner further alleged that, as a Category C employee, with significant sick leave usage, respondent was required to go to the medical clinic that day or document his inability to do so, and he failed to fulfill either obligation (ALJ Ex. 1). The evidence supported all of these charges.

The evidence showed that respondent called in sick on October 23, 2010, but was not at home when Supervisor Serrano visited at 10:00 a.m. (Tr. 125, 128; Pet. Ex. 3). According to Serrano's report, the borough office also called respondent's phone at 10:00 a.m. and received no response (Tr. 158; Pet. Ex. 3). Shortly after 1:00 p.m., respondent called the Department, claimed he was at home, and said that, before he could get to the door, "he saw the supervisor pull away" (Tr. 127; Pet. Ex. 3). There was no record of any home visit at 1:00 p.m. (Tr. 153).

According to respondent, he happened to be looking out his second-floor apartment window on October 23 at 1:00 p.m., when he saw a supervisor's car pull up (Tr. 262). Respondent waited for the supervisor to call on the phone and tell him to come downstairs, but he did not receive any call (Tr. 263). After a few minutes, respondent went downstairs and saw that the supervisor was gone (Tr. 263). In the mailbox, respondent found a DS 424 form, signed by Serrano, falsely indicating that the visit occurred at 10:00 a.m. (Tr. 263-63; Pet. Ex. 3). Respondent claimed that Serrano had a habit of fabricating claims about visits (Tr. 263-64).

Although petitioner did not call Serrano as a witness, the evidence proved that he visited respondent's home at 10:00 a.m. on October 23. The DS 424 form is an official Department record. Serrano would be jeopardizing his career if he deliberately falsified that document and respondent offered no plausible explanation of why Serrano would do that. Instead, respondent confirmed much of the information on the form. For example, Serrano correctly described respondent's home as the second floor of a two-family house and specified the doorbell's location (Pet. Ex. 3; Kaplan: Tr. 272). Serrano also reported that the borough office called respondent at 10:00 a.m. and did not receive an answer. It is unlikely that Serrano would have fabricated claims about the borough office's actions.

In contrast, respondent's story lacked credibility. His testimony was vague and he seemed unconcerned about the Department's rules. Respondent's claim, that he happened to be by the window when the supervisor arrived, was particularly difficult to believe.

The evidence also showed that, as a Category C employee, respondent was required to report to the medical clinic on October 23 and he failed to do so (Tr. 191-93). In addition,

respondent received authorization at 1:49 p.m. for a doctor's visit that day (Tr. 127). However, he failed to provide the Department with a note for that visit (Tr. 196; Pet. Ex. 5). Instead, he reported on October 26 with a note that did not refer to October 23 (Tr. 126, 196; Pet. Ex. 3).

In a post-hearing submission, respondent produced a copy of a medical note, form DS 398, from October 23 (Resp. Ex. C). The note stated that respondent was fit to return to work the next day (Resp. Ex. C). This copy, submitted long after respondent was required to provide it to the Department, was insufficient to rebut petitioner's evidence. Notably, many spaces on the form are blank. For example, it did not indicate what time respondent arrived at or left the doctor's office or what, if any, symptoms respondent reported (Resp. Ex. C).

Unlike the earlier charges, where supervisors made home visits after respondent received authorization to go to doctors' offices, here the evidence established that respondent committed separate acts of misconduct on October 23. He was not at home when Department personnel visited and called at 10:00 a.m., and he later received authorization to leave his home but he did not report to the clinic or provide timely, original medical documentation as required. Thus, all of the charges pertaining to October 23, 2010, should be sustained.

November 6, 2010 (Complaint 20095)

Petitioner alleged that respondent failed to provide documentation for two hours emergency leave on November 6, 2010 (ALJ Ex.1). The Department requires a sanitation worker who receives emergency leave to "submit verifiable proof of the emergency within 48 hours of the request." Dep't of Sanitation Code of Conduct 2010-06, Rule 1.5.

Respondent reported for an eight-hour shift at 8 a.m. on November 6 (Tr. 222). At 9:30 a.m., he requested two hours leave without pay to take his cat for chemotherapy (Tr. 223, 229; Pet. Ex. 7). That request was denied (Tr. 223-24; Pet. Ex. 7). At 12:45 p.m. respondent reported that he was going out on emergency leave (Tr. 224, 230; Pet. Ex. 7). He had two days to provide documentation but he failed to do so (Tr. 224-25, 227, 237).

Respondent testified that his mother called him at work and told him that she could not obtain transportation to bring their cat to a veterinarian for chemotherapy (Tr. 249). After his request for leave without pay was denied, respondent told Dinapoli that he was going out on emergency leave (Tr. 250, 270-71). Respondent testified that, upon examining the cat, the veterinarian found that further treatment was futile, respondent took the cat home, and it was

euthanized a few days later (Tr. 251). Respondent, who owned the cat for 16 years, was so upset that he neglected to submit documentation for the emergency leave (Tr. 271-72).

This charge should be sustained. Respondent conceded that he took two hours emergency leave and never submitted documentation. The death of a long-time pet is upsetting, but it did not relieve respondent of his obligation to document his absence from work.

Counsel argued that it was pointless for respondent to submit documentation for the cat's treatment, because a supervisor had denied the emergency leave (Tr. 275). That argument lacks merit. Superintendent Dinapoli initially testified that respondent's request for emergency leave was denied, but Dinapoli later explained that his earlier testimony was mistaken; respondent was never told that he could not go out on emergency leave (Tr. 232, 235). That is consistent with respondent's testimony. According to respondent, when he decided to "go emergency," Dinapoli told him to "do what he had to do" (Tr. 250-51).

Because the evidence established that respondent took an emergency leave and failed to provide required documentation, this charge should be sustained.

April 15 to May 18, 2011 (Complaint 25025)

Petitioner alleged that on April 15, April 29, May 17, and May 18, 2011, respondent was out sick but was not at home when Department personnel called or visited. For two of those days, April 15 and May 18, petitioner alleged that respondent received authorization to leave his home for a doctor's appointment, but he did not submit required documentation. For the other two dates, April 29 and May 17, petitioner alleged that respondent did not seek authorization to leave home (ALJ Ex. 1).

The evidence showed that respondent was on sick leave for each of the four days (Pet. Ex. 4). He received authorization to be away from his home at 12:31 p.m. on April 15 and 8:59 a.m. on May 18, 2011, but he did not provide timely, original medical documentation to the Department for either day (Tr. 175; Pet. Ex. 4). Petitioner also proved that respondent was not at home when Department personnel called or visited at 12:18 p.m. on April 29 and 6:00 p.m. on May 17. Nor did he call for authorization to leave his home on either day (Tr. 166-67; Pet. Ex. 4).

Respondent testified that, during the period at issue, he was in and out of hospitals for asthma and he did not recall receiving any calls from the Department (Tr. 270).

On April 15, a supervisor called respondent's cell phone at 12:55 p.m. and respondent said that he was at his doctor's office (Tr. 176-77; Pet. Ex. 4). After the hearing, respondent submitted a copy of a DS 398 medical note for April 15 (Resp. Ex. C). That copy was deficient. Several spaces are blank, respondent did not sign it, and the medical condition is unclear. There are also no entries in the allotted spaces for the times that respondent arrived at or left the doctor's office (Resp. Ex. C).

After the hearing, respondent also submitted copies of a prescription dated May 16 and two fax cover sheets indicating that he sent something to the Department before 7:00 a.m. on May 17 (Resp. Ex. C). His post-hearing submission also included a copy of an emergency room report indicating that respondent received treatment for an asthma attack on May 20 (Resp. Ex. C). Although this supports respondent's claim that he suffered an asthma attack in May 2011, it does not explain his unauthorized absence from his home on May 17 or his failure to provide the Department with timely medical documentation for May 18.

In sum, petitioner proved that respondent left his home without authorization on April 29 and May 17, in violation of Rule 7.5. The evidence also proved that respondent failed to submit timely, original documentation for his authorized absences on April 15 and May 18, in violation of Rule 7.9. Those specifications should be sustained. However, because respondent received authorization to leave his home on April 15 and May 18, he did not violate Rule 7.5 or 7.6 on those days and those specifications should be dismissed.

FINDINGS AND CONCLUSIONS

1. Petitioner proved that respondent failed to provide required medical documentation for July 29, 30, and 31, 2010, in violation of section 7.9 of the Department's Code of Conduct, as alleged in Complaint 18395.
2. Petitioner proved that respondent was AWOL on September 25, 2010, in violation of section 1.4 of the Department's Code of Conduct, as alleged in Complaint 18902.
3. Petitioner proved that respondent failed to document an emergency leave on November 6, 2010, in violation of section 1.5 of the Department's Code of Conduct, as alleged in Complaint 20095.
4. Petitioner proved that respondent was absent from his home without permission while on sick leave, failed to provide

required medical documentation , and failed to report to the medical clinic as required on October 23, 2010, in violation of sections 7.5, 7.8, and 7.9 of the Department's Code of Conduct, as alleged in Complaints 20228 and 20529.

5. Petitioner proved that respondent failed to remain home while on sick leave on April 29 and May 17, 2011, in violation of sections 7.8 and 7.9 of the Department's Code of Conduct, as alleged in Complaint 25025.
6. Petitioner proved that respondent failed to provide required medical documentation for doctor's visits on April 15 and May 18, 2011, in violation of section 7.9 of the Department's Code of Conduct, as alleged in Complaint 25025.
7. Petitioner failed to prove that respondent was away from his home without authorization while on sick leave on July 29, 30, 31, April 15, 2011, and May 18, 2011, in violation of section 7.5 or 7.6 of the Department's Code of Conduct, as alleged in Complaints 18395 and 25025.

RECOMMENDATION

After making the above findings, I requested and received a summary of respondent's personnel history. Petitioner hired respondent in 2000. He has received six prior disciplinary penalties: a 2010 reprimand for failure to provide a medical note; a 30-day pay fine in 2009, in satisfaction of multiple complaints, including two AWOL charges and other violations of time and leave rules; a \$50 pay fine in 2008 for failure to provide medical documentation; a five-day suspension in 2007, following a hearing, for being off route and parking against traffic, *Dep't of Sanitation v. Kaplan*, Index Nos. 2269/09 & 2270/09 at 34 (Sept. 4, 2009); a 2007 reprimand for not providing medical documentation; and a one-day suspension in 2004 for not providing medical documentation. His performance evaluations generally rate his work as satisfactory, except for unsatisfactory ratings for poor attendance and failing to obey rules.¹

Here, petitioner proved that respondent was AWOL one day, failed to comply with emergency leave procedures on another day, and failed to comply with sick leave procedures on eight days. Petitioner requested termination of respondent's employment (Tr. 288). Conceding

¹ Petitioner provided additional documents from respondent's personnel file which were not requested. I did not consider those documents in making the penalty recommendation.

respondent committed some misconduct, respondent's counsel requested a penalty of 10 to 12 days' suspension without pay (Tr. 279).

Termination of employment would be excessive, especially because some of respondent's misconduct appears to stem from uncertainty regarding serious medical conditions in 2010 and 2011. It also appears that doctors treated respondent on some of the days at issue. Although respondent's illnesses are mitigation, they do not excuse his failure to provide documentation or otherwise comply with rules. In light of respondent's repeated violations of those rules and history of similar misconduct, a substantial penalty is appropriate.

Under similar circumstances, involving violation of emergency or sick leave rules, this tribunal has recommended penalties ranging from three to ten days per incident, depending on the employee's disciplinary history. *See, e.g., Dep't of Sanitation v. Straker*, OATH Index No. 400/12 at 9 (Dec. 6, 2011) (seven days' suspension without pay recommended for each of ten occasions of AWOL and one undocumented emergency leave, for a total penalty of 77 days' suspension, where long-term employee had been disciplined on nine prior occasions, primarily for violation of attendance and sick leave policies); *Dep't of Sanitation v. Cunningham*, OATH Index No. 2507/11 at 20-22 (Nov. 10, 2011) (40-day suspension recommended for violation of emergency or sick leave rules on five occasions and one charge of AWOL, where seven-year employee had received six prior disciplinary penalties); *Dep't of Sanitation v. Figueroa*, OATH Index Nos. 940/10 (Apr. 26, 2010) & 1914/10 (June 3, 2010), *aff'd* NYC Civ. Serv. Comm'n Item No. CD 11-47-A (July 12, 2011) (33-day suspension for two occasions of AWOL and three violations of sick leave rules upheld on consolidated appeal, where long-time employee had six prior disciplinary penalties, primarily for violating attendance and sick leave rules).

In this case, I recommend a 10-day suspension without pay for the AWOL charge, because respondent offered no defense and he has a history of similar misconduct. For the single violation of emergency leave procedure, I recommend a three-day suspension without pay because respondent was docked two hours pay for the part of the day that he missed and it does not appear that he has previously violated this rule. For the remaining eight days when respondent violated sick leave rules, a mid-range penalty is appropriate in light of respondent's prior disciplinary history and the mitigation presented. I recommend a five-day suspension for each of the eight days that respondent failed to comply with the sick leave rules.

Accordingly, I recommend a cumulative penalty of 53 days' suspension without pay. Respondent should recognize that he must comply with the Department's rules and regulations. Continued failure to do so could result in termination of his employment.

Kevin F. Casey
Administrative Law Judge

January 6, 2012

SUBMITTED TO:

JOHN J. DOHERTY
Commissioner

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