Dep't of Sanitation v. Harris

OATH Index No. 760/12 (Sept. 24, 2012)

Over the course of two years, supervisor failed to document emergency leave, provided inadequate documentation to the Department's clinic, was absent without leave, slept on duty, failed to remain accessible while on sick leave, and misused Department property. 48-day suspension recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
- against -
EUGENE HARRIS
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 supervisor Eugene Harris. In twenty-one complaints, petitioner alleged that, from November 2009 to November 2011, respondent failed to document emergency leave, provided inadequate documentation to the Department's clinic, was absent without leave, slept on duty, failed to remain at home or accessible while on sick leave, failed to supervise sanitation workers, and misused Department property, in violation of sections 1.4, 1.5, 3.1, 3.19, 5.1, 7.1, 7.5, 7.6, 7.8, 7.9, and 8.1 of the Department's Code of Conduct and Policy and Administrative Procedure (PAAP) 2007-04 (ALJ Ex. 1). At the hearing, petitioner withdrew another charge without prejudice (Tr. 116).

At a seven-day hearing, which ended on August 6, 2012, petitioner relied on documentary evidence and the testimony of Deputy Chief Chi Dong; Superintendents Ryan Dempsey, Patrick Shannon, and James Quinn; and Supervisors Steven Boettcher and Anthony Ferrino. Respondent testified in his own behalf and offered documentary evidence. For the reasons below, I find that petitioner proved most of the charges and recommend a cumulative penalty of 48 days' suspension without pay.

ANALYSIS

Undocumented emergency leave (Complaint 11442)

Petitioner alleged that respondent failed to document emergency leave on November 30, 2009, in violation of section 1.5 of the Department's Code of Conduct (ALJ EX. 1). Uniformed employees may receive emergency leave, but they "must give a valid reason for the emergency leave and must submit verifiable proof of the emergency within 48 hours of the request." Dep't of Sanitation Code of Conduct 2010-06, § 1.5 (eff. Mar. 1, 2010).

Deputy Chief Dong testified that respondent was supposed to work from midnight to 8:00 a.m. on November 30, 2009, but he called before the shift began and said that he was "going emergency" because his dog was ill (Tr. 555; Pet. Ex. 16). When he returned to work on December 1, respondent submitted an authorization request for the emergency leave (Tr. 556; Pet. Ex. 16). Respondent wrote that his dog was very ill, but he did not submit supporting documentation, such as a veterinarian's note (Pet. Ex. 16). Because respondent failed to provide verifiable proof of an emergency, Chief Dong denied the request for approval (Tr. 557).

Respondent testified that he requested emergency leave because his dog was only a few weeks old and was vomiting (Tr. 946, 948). Eventually, respondent took the dog to a veterinary hospital and paid $400 for diagnosis and treatment (Tr. 951). However, respondent offered no documentation to support his claim.

This charge should be sustained. The Department requires verifiable documentation for emergency leave and petitioner proved that respondent failed to submit any independent proof of an emergency. *See Dep't of Sanitation v. Kaplan*, OATH Index No. 403/12 at 7 (Jan. 6, 2012), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 12-30-SA (June 6, 2012) (sustaining charge of failure to document emergency leave where sanitation worker offered no proof to confirm that he took cat for medical treatment).

Inadequate documentation (Complaints 12783, 12786, 21310, 23012, 23434, 100220)

Department employees are required to obey rules, regulations, and direct orders. Code of Conduct § 3.1. Under the Department's sick leave rules, Category C employees, who have significant sick leave usage, must report to the Department's clinic on the first day of sick leave and when required by the Department's clinic. PAAP 2007-04 § III(C)(1). All employees who

claim that they are unable to travel to the Department's clinic, "must submit documentation which *clearly substantiates* the employee's inability to travel." PAAP 2007-04 § V (emphasis added). Petitioner alleged that respondent violated those rules and procedures on six occasions: December 5 and 17, 2009; December 8, 2010; February 16, 2011; March 11, 2011; and November 2, 2011 (ALJ Ex. 1). The evidence supported five of those six charges.

Medical division supervisor Ferrino testified that respondent was a Category C employee on the cited dates and on each day he went on sick leave without reporting to the Department's clinic as required (Tr. 21, 63, 87, 98, 112, 128). Respondent testified that he suffers from a number of medical conditions (Tr. 1062, 1088; Resp. Ex. N). He stated that he supervised sanitation workers assigned to assist in the cleanup at Ground Zero after the attack on September 11, 2001, and he was exposed to toxins because he did not receive proper equipment (Tr. 1087). Respondent has been diagnosed with asthma, pulmonary problems, diarrhea, depression and post-traumatic stress disorder, and he has received compensation from a 9/11 Victims' Compensation Fund (Tr. 1062, 1088-89).

Respondent, who served in the United States Marine Corps in Vietnam, receives medical care from the United States Department of Veterans Affairs (VA) (Tr. 939, 1079). For the past ten years, respondent has been treated at the VA clinic on 23rd Street in Manhattan (Resp. Ex. J). VA doctors confirmed that respondent has been treated for a number of illnesses that are a consequence of his work at Ground Zero (Resp. Ex. J).

Respondent claimed that on each of the dates at issue he was too ill to travel from his home in Brooklyn and unable to get to the Department's clinic or his own doctors (1158, 1167, 1169-70). He often had episodes of bloody diarrhea that made it impossible for him to travel to the Department's clinic or the VA clinic by bus or subway (Tr. 1062).

Petitioner did not dispute that respondent suffers from a variety of illnesses (Tr. 1237). However, petitioner contends that respondent has repeatedly failed to follow sick leave rules (Tr. 1237). The specific charges are addressed below.

Respondent called in sick on December 5, 2009, but he did not go to the Department's clinic or his own doctor that day. On December 7, respondent went to the VA clinic and obtained medical documentation that he brought to the Department's clinic (Tr. 33, 35; Pet. Ex. 1c). According to that documentation, respondent has a history of Achilles bursitis and tendinitis, he reportedly had heel pain since December 4, and his dog had eaten the plastic inserts

for respondent's shoes (Resp. Ex. N). Respondent testified that he could not travel on December 5 due to pain in his left heel (Tr. 1100).

This charge should be sustained. Respondent did not go to the clinic on December 5 as required and the documentation he later provided did not clearly establish his inability to travel that day. The documentation makes no mention of respondent's ability to travel.

Respondent went to the Department's clinic again on December 15, 2009 (Tr. 159). According to Department records, respondent complained of recurring diarrhea and said that he was awaiting an appointment for a colonoscopy (Tr. 159; Pet. Ex. 2c). Department personnel examined respondent, confirmed his symptoms, and scheduled him to return to regular duty on December 17 (Tr. 160; Pet. Ex. 2c).

On December 17, respondent called in sick and he did not go to the Department's clinic (Tr. 63; Pet. Ex. 2a). Respondent went on vacation from December 21 to 26 (Pet. Ex. 2a). When he returned to the Department's clinic on December 30, he provided notes dated December 28 and 29 (Tr. 65; Pet. Exs. 2e, 2n). The December 28 note stated that respondent "was sick with the flu from December 17 through today" and the December 29 note referred to lower back pain (Tr. 67; Pet. Exs. 2e, 2n). Neither note indicated that respondent went to a doctor on December 17 or that he was unable to travel that day (Tr. 163; Pet. Exs. 2e, 2n).

Respondent testified that he was unable to travel on December 17 due to diarrhea and gastrointestinal problems (Tr. 1103-04, 1164-65). When he went to his doctor on December 28, respondent was no longer suffering from diarrhea but he had lower back pain (Tr. 1105-07).

This charge should be sustained. Respondent failed to report to the Department's clinic on December 17, 2009, and the documentation that he later submitted did not clearly substantiate his inability to travel that day.

On December 8, 2010, respondent called in sick and did not report to the Department's clinic (Tr. 87). He was ordered to report the next day with medical documentation (Tr. 87, 89; Pet. Ex. 3a). Respondent reported on December 10 and submitted a note, dated December 9, stating that he was evaluated for diarrhea and an upper respiratory condition (Tr. 91-92; Pet. Ex. 3A; Resp. Ex. A). According to the December 9 note, respondent "was unable to travel to the clinic yesterday" (Tr. 1113; Resp. Ex. A).

This charge should be dismissed. Respondent's medical documentation included a note from his doctor specifically stating that respondent was unable to travel on December 8 (Resp.

Ex. A). The note also indicated that the treating doctor made that assessment after evaluating respondent for diarrhea and an upper respiratory condition (Resp. Ex. A).

Petitioner argued that there was no proof that the doctor's statement was based on objectively verifiable tests (Tr. 1238). There was, however, no evidence that anyone at the Department's clinic mentioned this deficiency to respondent. Moreover, Supervisor Ferrino conceded that, on occasion, the Department would accept a note from an employee's doctor stating that the employee was unable to travel the preceding day (Tr. 201). It was unclear how that determination would be made. Ferrino explained that he administered rules and the Department's medical staff evaluated illnesses (Tr. 202). According to Ferrino, respondent's December 9 note was not reviewed by a Department doctor; instead, it appears that Ferrino simply disagreed with the treating physician's assessment (Tr. 201-02).

Because a treating physician evaluated respondent and concluded that he was unable to travel on December 8, and there was no medical evidence to the contrary, petitioner failed to prove that respondent provided inadequate documentation. *See Dep't of Sanitation v. McCaffery*, OATH Index No. 2518/10 at 5-6 (Aug. 16, 2010) (treating physician's note that employee was previously unable to travel to Department clinic deemed sufficient).

Respondent was out sick on February 16, 2011 (Tr. 97). He did not report to the Department's clinic until February 19, when he submitted medical documentation (Tr. 98; Pet. Exs. 5c, 5d). The documentation stated that when respondent went to the VA clinic on February 18 and he reported that he had an asthma attack the night of February 16, before developing diarrhea and a sore throat the next day (Pet. Ex. 5d). Respondent's doctor saw him on February 18 and advised him to stay home from work until February 22 (Pet. Ex. 5c). Respondent testified that he called in sick on February 16 with asthma, diarrhea, and vomiting (Tr. 1114).

This charge should be sustained. Respondent did not report to the Department's clinic on February 16 and he did not provide the required medical documentation to substantiate that he could not travel that day (Pet. Ex. 5c, 5d). Instead, respondent offered an unverified claim that he suffered an asthma attack on February 16. There was no indication of the severity of the attack, how it was treated, or whether it prevented respondent from travelling.

On March 11, 2011, respondent called in sick (Tr. 112). He did not go to the Department's clinic until March 15 and he did not bring any medical documentation with him (Tr. 113; Pet. Ex. 5a). Later that day, the VA clinic faxed documents to the Department

indicating that respondent had been suffering from painful diarrhea since March 10 (Tr. 114; Pet. Exs. 5c, 5d). Respondent testified that he was unable to travel and he had to wait for his medication to be effective, but his doctor's note made no reference to respondent's ability to travel (Tr. 1068; Pet. Exs. 5c, 5d).

This charge should be sustained. Respondent did not report to the Department's clinic on March 11 and subsequent medical documentation did not clearly establish that he was unable to travel that day.

Respondent went on sick leave for gastroenteritis and related issues on October 22, 2011 (Tr. 126; Pet. Ex. 6a). On October 26, he reported to the Department's clinic, he was continued on sick leave, ordered to report back on November 2 (Tr. 127, 135; Pet. Exs. 6b, 6d). Respondent did not report to the Department's clinic on November 2 (Tr. 128). Instead, he reported on November 3 (Tr. 137).

According to respondent, he had a dental emergency on November 2 (Tr. 1096; Resp. Exs. L, M). His gums were bleeding, he was missing a "few crowns," and it was impossible for him to eat (Tr. 1096; Resp. Ex. M). On November 3, respondent obtained a note from his dentist and delivered it to the Department's clinic (Resp. Ex. L). That note was rejected as insufficient and respondent later produced a more detailed note; yet neither note stated that respondent was unable to travel on November 2 (Tr. 1098-99; Resp. Exs. L, M).

This charge should be sustained. Respondent failed to report to the Department's clinic on November 2 and his documentation did not clearly establish that he was unable to travel that day. Although respondent may have been in pain due to a dental condition, he was required to document that he was incapable of travel and he failed to do so.

Absence without leave (Complaints 12452, 13544, 22740, and 99366)

Petitioner alleged that respondent was absent without leave on January 22, 2010, March 2, 2010, March 2, 2011, and September 29, 2011**,** in violation of Rule 1.4 ("employees may not be absent without authorization") (ALJ Ex. 1). The charges should be sustained.

Deputy Chief Dong testified that an employee who misses roll call is deemed absent without leave and docked a day's pay (Tr. 569). If that employee calls in and requests permission to come in late, the Department has discretion to grant or deny that request depending on the employee's attendance record (Tr. 530, 551, 599, 608). *See Dep't of Sanitation v. Alves*,

OATH Index No. 402/12 at 2 (Dec. 5, 2011) (employees who miss roll call are deemed absent without leave). Petitioner's evidence showed that respondent failed to appear for roll call on the four cited dates and did not receive permission to arrive late (Tr. 530, 551-52, 584).

On January 22, 2010, respondent was scheduled to report for work at 11:45 p.m. for a midnight to 8:00 a.m. shift (Vol. II Tr. 30). He did not show up for work or call in, and another supervisor had to work overtime (Vol. II Tr. 31-32; Pet. Ex. 18). For the other three dates cited, respondent did not show up for work 15 minutes before his shift as required, he phoned in claiming that he had overslept, and he did not receive permission to come to work late. On March 2, 2010, he was scheduled to work a 4:00 p.m. to midnight shift and he phoned in at 3:45 p.m. (Tr. 527, 571, 584; Pet. Ex. 19). On March 2, 2011, respondent was scheduled to work from midnight to 8:00 a.m. and he called at some unspecified time stating that his alarm did not go off (Pet. Ex. 20). On September 29, 2011, respondent was scheduled to work from 6:00 a.m. to 2:00 p.m. (Tr. 547, 549; Pet. Ex. 21). He called in at 6:10 a.m. (Tr. 550; Pet. Ex. 21).

Respondent did not dispute that he failed to report to work on time for each of the four specified dates (Tr. 1051, 1153). Claiming that he could get to work in lower Manhattan within 15 to 20 minutes from his home in Brooklyn, respondent complained that the Department could have made an exception for him to arrive late and it failed to do so (Tr. 1152-53). He also noted that on March 2, 2010 and 2011, he was tired after working 12-hour snow removal shifts and in late 2011 he had been taking medication that put him in a deep sleep (Tr. 1053-54, 1060, 1151).

Petitioner proved each of the four charges because respondent failed to appear at the beginning of each shift. Although the Department had discretion to allow some employees to arrive late, there was no obligation to grant such extensions to respondent, especially in light of his frequent absences. Moreover, as a supervisor it was particularly important for him to be present at the beginning of the shift when work is assigned. Fatigue from snow removal is not a defense. Respondent's fellow employees also worked long hours and they, too, had to show up on time. Similarly, if medication made respondent drowsy, he needed to make sure that alarms went off to wake him in time for work.

Sleeping on duty (Complaint 13215)

Petitioner alleged that, from 5.15 to 5:25 a.m. on February 19, 2010, respondent slept on duty, in violation of section 3.19 of the Department's Code of Conduct.

The material facts are undisputed. Respondent worked from midnight to 8:00 a.m. on February 19, 2010, and his lunch hour was from 4:30 to 5:00 a.m. (Tr. 643, 647). At 5:15 a.m., Superintendent Dempsey saw respondent sleeping in a Department car parked in the garage (Tr. 643-44, 752). Dempsey took care of other matters and, ten minutes later, knocked on the car window to wake respondent up (Tr. 644). Respondent rolled down the window and Dempsey asked him to meet in the garage office (Tr. 646). In the office, Dempsey asked respondent if he was feeling well (Tr. 647). Respondent said that he was "okay" and he explained that he had fallen asleep during his lunch break (Tr. 647).

Respondent admitted that he slept on duty that day (Tr. 1137). He testified that he was fatigued due to recent snow removal work, he took a nap at his lunch hour, and by sleeping in a car in the middle of the garage he was not trying to hide (Tr. 1136-39).

This charge should be sustained. It is not a defense to the charge that respondent had been working long hours or that he slept in plain view. As a supervisor, respondent should not have been setting such a poor example by sleeping in the midst of the garage.

Failure to remain at home and accessible while on sick leave (Complaints 16881, 17349, 19234, and 24791)

The Department closely monitors sick leave usage. Under sections 7.5 and 7.6 of the Department's Code of Conduct, uniformed employees may not leave their homes without authorization while on paid sick leave and they must take reasonable steps to ensure that they are accessible for Department phone calls or home visits. The Department alleged that respondent violated these rules on May 8, 2010, June 5, 2010, September 24, 2010, and April 27, 2011.

Supervisor Boettcher from the supervised sick leave unit testified that, according to contemporaneous records respondent was on paid sick leave, and he had not received authorization to leave his home on cited dates (Tr. 262, 275, 285-86, 304). On each date, a Department investigator called respondent's phone between 10:00 a.m. and 4:00 p.m., respondent did not answer, the investigator left a message for respondent to call back within an hour, and respondent failed to call back in time (Tr. 261-62, 273, 284, 300; Pet. Exs. 7, 8, 9, 10).

Respondent testified that he was sleeping at home on each of the cited dates and he did not hear the investigators' phone calls (Tr. 1120, 1124, 1129, 1130, 1132). In May and June 2010, respondent was recovering from foot surgery, under medication, and incapable of leaving

his home without assistance (Tr. 1119-1120, 1132). On September 24, 2010, he was on medication for depression and emotional stress (Tr. 1122-23; Pet. Ex. 9b and 9c). And in April 2011, respondent was again on sick leave in connection with foot surgery (Tr. 1129). Respondent noted that he normally works midnight to 8:00 a.m. and sleeps during the day (Tr. 1119). He also testified that he has been out sick more than 100 days from 2009 to 2011, the supervised sick leave unit called approximately once every day, and there were "only" four occasions when he did not answer the phone (Tr. 1119, 1128-29).

These charges should be sustained in part. Petitioner showed that respondent failed to remain accessible for phone calls from the supervised sick leave unit, in violation of section 7.6 of the Code of Conduct. Respondent's explanation that he was sleeping when the investigators called, is not a defense. However, petitioner failed to prove that respondent was not at home on the four cited dates. The evidence supported respondent's claim that he was at his home due to various medical conditions. Thus, the charges that respondent violated section 7.5 of the Code of Conduct should be dismissed. *See Dep't of Sanitation v. Rodriguez*, OATH Index No. 1638/12 at 5 (July 18, 2012) (failure to respond to sick leave unit investigators proved that employee did not remain accessible, but did not prove that employee was away from home).

Failure to supervise and misuse of Department property (Complaints 13090, 20440, 22606, and 22627).

The remaining charges pertain to respondent's conduct as a supervisor. Petitioner alleged that respondent violated section 8.1 of the Code of Conduct (supervisors must carry out assigned tasks) by: failing to supervise sanitation workers assigned to clean up near Canal Street after Chinese New Year celebrations on February 13, 2010; failing to notify his supervisors that a basket crew had not finished its route on December 3, 2010; and sending less-than-full trucks to be dumped on February 23, 2011 (ALJ Ex. 1). Petitioner also charged respondent with failing to return keys for a Department vehicle on February 26, 2011, in violation of Rule 5.1 (Department vehicles must be properly used and maintained) (ALJ Ex. 1).

Not every error or omission by an employee is misconduct. To prove misconduct, petitioner must show that respondent willfully, intentionally, or negligently violated Department rules. *See Reisig v. Kirby*, 62 Misc.2d 632 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008

(2d Dep't 1969); *McGinigle v. Town of Greenburg*, 48 N.Y.2d 949, 951 (1979). Here, petitioner proved one of the four charges.

Failure to supervise clean-up crew

Petitioner alleged that respondent failed to supervise ten sanitation workers assigned to clean up after a Chinese New Year celebration on February 13, 2010. Night borough superintendent Quinn assigned respondent to supervise a special event crew of 10 to 15 sanitation workers to clean the Chinatown area that night (Tr. 796-97). At about 3:50 a.m., night city superintendent Calderon reported to Quinn that there were 10 unsupervised workers in the Chinatown area, near the Bowery (Tr. 798, 800, 815-16). Quinn radioed respondent who stated that he was driving sanitation workers that had been temporarily assigned to his district back to their district in upper Manhattan (Tr. 804, 840).

Quinn testified that respondent should have called for permission before driving the workers back to their district (Tr. 805). Had respondent called, Quinn would have directed a garage utility worker to transport the workers (Tr. 806). According to Quinn, he would not have allowed a supervisor to leave other workers unsupervised (Tr. 807). Superintendent Dempsey confirmed that garage utility workers normally drive temporarily assigned workers (Tr. 728).

Respondent denied leaving workers unsupervised (Tr. 964). He testified that his immediate supervisor that evening was night district supervisor Santiago (Tr. 959). Respondent and Santiago shared responsibility for cleaning the Chinatown area that night (Tr. 963). Shortly after 3:00 a.m., respondent told Santiago that his crew had finished cleaning their area and he noted that the temporarily assigned workers had to go back to their district (Tr. 963). Santiago told respondent to drive the workers and refuel the van (Tr. 963). The remaining workers from Manhattan District 3 were supervised by Santiago (Tr. 963).

Department records confirmed that Santiago was the night district supervisor on February 13, 2010 (Tr. 816, 823-24; Resp. Ex. D). Quinn and Dempsey conceded that if Santiago gave respondent an order to drive workers back to their district, respondent had to obey that order (Tr. 734, 847). Quinn and Dempsey later spoke to Santiago (Tr. 865-66). According to Quinn, he told Santiago that respondent would be receiving a complaint and Santiago did not say whether he gave any order to drive the temporarily assigned workers (Tr. 865-66). Dempsey did not recall what Santiago said about the incident (Tr. 787-88). Santiago is retired and neither party called him as a witness (Tr. 811).

This charge should be dismissed. Petitioner did not dispute that Santiago was respondent's immediate supervisor on February 13 and petitioner failed to rebut respondent's credible claim that Santiago told him to drive the workers back to their district. As respondent's supervisor, Santiago most likely knew what respondent was doing and approved it. There was insufficient evidence to show otherwise. It was uncertain what was said when Quinn and Dempsey later spoke to Santiago. Although Santiago may not have mentioned the order to drive the workers, it is unclear whether he was ever asked about such an order. Also, Santiago had good reason not to mention that subject. If he ordered respondent to drive the temporarily assigned workers back to their district, that meant that Santiago may have failed to supervise the remaining workers. Under these circumstances, petitioner failed to prove that respondent neglected his duties or disobeyed an order. On the contrary, it appears that respondent obeyed his immediate supervisor's order.

Failure to supervise basket crew

Petitioner alleged that respondent failed to notify his superiors that a basket crew "was in jeopardy" of not finishing its route on December 3, 2010. Night borough superintendent Shannon testified that respondent was the supervisor for Manhattan District 3 that night and his duties included supervising a garage utility worker, a relay driver, two sanitation workers who were training with snow removal equipment, and two sanitation workers on a basket collection route (Tr. 364-66). Prior to 5:30 a.m., respondent made a routine report to the borough office and did not note anything unusual and Shannon assigned two sanitation workers to surplus cleaning in respondent's district (Tr. 378).

At 7:30 a.m., Shannon went to Manhattan District 3 before going home and he learned that there was a problem (Tr. 382). District superintendent Dempsey, who worked the 6:00 a.m. to 2:00 p.m. shift, told Shannon that the midnight to 8:00 a.m. basket route was unfinished (Tr. 383). Of the 33 lines on the route, only 18 were complete (Tr. 385).

Shannon ordered Dempsey to issue a complaint to respondent (Tr. 387). According to Shannon, the basket route had priority and respondent should have anticipated problems and reported them to the borough office in a timely fashion (Tr. 390). If respondent had notified the borough office that the basket route would not be completed, Shannon could have reassigned other workers or prioritized the remaining unfinished lines (Tr. 380).

Superintendent Dempsey recalled that he arrived in Manhattan District 3 at 5:30 a.m. for his 6:00 a.m. to 2:00 p.m. shift (Tr. 451-52, 620-21). He checked the "material out" book and there was no indication that there was any unfinished work from the midnight to 8:00 a.m. shift (Tr. 463). More than an hour later, Dempsey learned that the basket route would not be completed (Tr. 464). Dempsey asked respondent whether the borough office had been notified and respondent replied, "I'm telling you" (Tr. 465). Dempsey said that he wished he would have been told about this before the 6:00 a.m. roll call, so he could have re-assigned workers (Tr. 466, 471-72). After talking to respondent, Dempsey reported the unfinished route to the borough office and told Shannon about it when he arrived at the district at 7:30 a.m. (Tr. 466-68). Dempsey said that the basket route is normally completed during the midnight to 8:00 a.m. shift and respondent should have known in advance that the route would not be finished (Tr. 476).

Respondent testified that there were no problems during the first half of his midnight to 8:00 a.m. shift (Tr. 979-80). He saw the basket crew at 1:00 a.m. and 2:15 a.m. and they were on schedule (Tr. 991). At 5:00 a.m. respondent called the borough office as required and reported that there was nothing unusual (Tr. 983-84). However, at 5:15 a.m. respondent caught the basket crew taking an unauthorized break (Tr. 980). For the remainder of the shift, until the 7:20 a.m. cutoff time when the crew had to return to the garage, respondent followed the crew as they serviced the baskets (Tr. 981, 986-97). According to respondent, the crew engaged in a "rule book slow down," by parking the truck at corners, dragging baskets to the back of the truck, cleaning up the surrounding area, and dragging baskets back to the sidewalks (Tr. 990, 996). Respondent issued the crew complaints for the unauthorized break (Tr. 987).

According to respondent, he called Dempsey and reported that the crew took an unauthorized break and was "messing around" (Tr. 982). It was standard practice for respondent to pass such information along to Dempsey (Tr. 983).

Petitioner claimed that respondent should have realized that there was a problem earlier and he waited too long to notify Dempsey. In contrast, respondent claimed that he notified Dempsey shortly after the problem became apparent.

Dempsey conceded that if respondent had reported the problem at 5:45 or 6:00 a.m. it would have been Dempsey's responsibility to notify the borough office and take corrective action (Tr. 472-74). Thus, it was important to know when respondent spoke to Dempsey. Respondent's recollection was that he called Dempsey before 6:00 a.m. (Tr. 982). Dempsey

testified that the conversation took place at 6:30 a.m. or later (Tr. 464, 621, 738, 741). However, his recollection was vague. He could not recall what respondent said, where the conversation took place, or when it occurred. When first asked about the conversation, Dempsey testified, "I'm not sure exactly how he phrased it. But it (the basket route) wasn't completed" (Tr. 464). Asked whether respondent mentioned a problem with the basket crew, Dempsey recalled that respondent said that the crew was "working slow" (Tr. 465). In his initial descriptions of the conversation, Dempsey omitted any reference to an unauthorized break or respondent's issuance of complaints to the workers. Though Dempsey later added those details, he could not recall whether the conversation took place over the phone or in the garage (Tr. 464, 470, 488, Pet. Ex. 14b).

Dempsey also offered conflicting estimates of when the conversation took place. He first testified that they discussed the problem between 6:30 and 7:30 a.m. (Tr. 464, 621, 738). Later, he testified that they discussed the problem between 6:30 and 7:00 a.m. (Tr. 741).

Because it is unclear what respondent told Dempsey, when the conversation occurred, or where it occurred, petitioner's evidence fell short of proving that respondent neglected his duties. When he caught the basket crew taking an unauthorized break at about 5:15 a.m., respondent did not have any reason to believe that the route would be unfinished in the next two hours. He took immediate action and personally supervised the workers as they continued their route. In response, the crew slowed down. Thus, it may not have been until 6:00 a.m. when respondent knew, or should have known, that the route would not be finished. Petitioner did not prove that respondent should have recognized the problem any sooner.

It is also likely that respondent and Dempsey spoke near the outset of Dempsey's shift. Respondent and the basket crew had not yet returned to the garage by 6:00 a.m.; it would be natural for Dempsey to find out what was happening at the beginning of his shift. Whether respondent and Dempsey spoke at 6:00 a.m. or 6:30 a.m., it appears that respondent personally supervised his recalcitrant workers, issued complaints, and notified his immediate supervisor shortly after realizing that there was a problem. Even if respondent could have been more vigilant, petitioner failed to prove that he was negligent. The charge should be dismissed.

Failure to ensure that collection trucks were filled to capacity

Petitioner alleged that respondent failed to supervise sanitation workers because he did not ensure that three collection trucks were filled to capacity before they were sent to the dump

on February 23, 2011, the Wednesday after a three-day holiday weekend (ALJ Ex. 1). Respondent worked from midnight to 8:00 a.m. that day and supervised seven collection crews (Tr. 658, 661, 695; Pet. Ex. 23). Superintendent Dempsey testified that he wrote "13 tons, plus" in the material out book and directed respondent to "get capacity loads" (Tr. 661, 899).[1] Because it was a Wednesday after a three-day holiday weekend, there was a backlog of material (Tr. 660, 670). On a normal Monday and Wednesday a total of 24 collection trucks are used in respondent's district (Tr. 688, 690). Since there was no collection that Monday, there should have been more than enough material for seven trucks to collect (Tr. 698).

The amount of material collected by each truck is weighed at the dump. After reviewing reports based on dump receipts, Dempsey testified that three trucks from respondent's shift had less than capacity loads (Tr. 670-71; Pet. Ex. 23). The crew for truck DC 615 finished their route at 5:55 a.m. and returned to the garage with 11.83 tons of material at 6:15 a.m., an hour before the 7:20 a.m. cutoff time when all crews must return to the garage (Tr. 686, 696, 700; Pet. Ex. 24). Truck DF 043's crew returned to the garage at 6:20 a.m. with 11.39 tons of material (Tr. 700; Pet. Ex. 25). Both of those trucks were sent to the dump during the next shift. The crew for truck DC 110 finished their route at 4:17 a.m., dumped 11.93 tons of material at 5:06 a.m., and returned to the garage at 6:15 a.m. (Tr. 711, 716-18; Pet. Ex. 26). All of the trucks finished their assigned routes and the DS 350 cards for each truck indicated that it was full (Tr. 723).

Supervisors are expected to meet with crews and check the trucks before they return to the garage (Tr. 780). Dempsey testified that, although the exact weight cannot be determined without a scale, an experienced supervisor can tell by "cycling" the truck, making sure that the blade cannot go further forward, and banging the side of the truck (Tr. 708-09).

Respondent testified that he told his crews at the beginning of the shift to collect capacity loads of 13 tons or more (Tr. 998). When a crew finished their route, respondent met them in the field, asked whether the truck was full, and confirmed that the truck was full by cycling the truck, checking the blade, and banging the side of the truck (Tr. 998-99, 1035-36). He was also concerned about over-loading the trucks because drivers cannot allow garbage to fall out of the

[1] Dempsey was permitted to refresh his recollection with the material out book and testify about what orders he wrote. However, petitioner was precluded from introducing the document into evidence due to untimely disclosure and undue prejudice (Tr. 886). The document was not produced until midway through the hearing -- after respondent's counsel had made specific discovery requests and had extensively cross-examined Dempsey based on the absence of a written order (Tr. 881, 886). In addition, it was unclear from the document whether Dempsey wrote "12" or "13" next to the word "tons" (Tr. 880-81).

truck en route to the dump in New Jersey (Tr. 998, 1035). Noting that two of the trucks at issue were not sent to the dump until the next shift, respondent suggested that the garage supervisor bore some responsibility for checking whether the trucks had capacity loads (Tr. 1003-04, 1038).

The parties offered conflicting evidence regarding the typical amount of material collected in respondent's district. For example, petitioner offered evidence that one year later, on February 22, 2012, three out of five trucks collected more than 13 tons of material (Tr. 923; Pet. Ex. 29). But the other two trucks collected less than 13 tons that day and one of those trucks only collected 11.49 tons (Tr. 924; Pet. Ex. 29). For one of the trucks at issue, DC-110, respondent presented evidence that it never contained more than 13 tons of material on any of the 13 shifts after February 23, 2011, and on only two of those shifts were more than 12 tons collected (Resp. Ex. F).

This charge should be dismissed. Preliminarily, I found no merit to respondent's claim that garage supervisors have some obligation to check truck capacities. However, I did credit respondent's claim that one could not tell the precise weight of material collected by checking a blade or banging the side of a truck. Indeed, when asked whether there was a noticeable difference between a truck with 11.39 tons and 13 tons, Dempsey repeatedly testified that "it depends" (Tr. 708-10). By all accounts, it is a judgment call. At best, supervisors can only estimate how much material is in a truck. Underestimating the weight of a truck is not misconduct. *See Dep't of Sanitation v. Pabon*, OATH Index No. 110/12 at 9 (Nov. 23, 2011), *modified on penalty*, Comm'r Dec. (Jan. 19, 2012); *Dep't of Sanitation v. Richards*, OATH Index No. 1579/01 at 13 (Nov. 16, 2001), *adopted*, Comm'r Dec. (Nov. 28, 2001).

For the three trucks at issue, subsequent weighing at the dump revealed that they contained 88 to 92 per cent of the expected goal of 13 tons (Pet. Ex. 23). That is not so far below capacity that it should have been apparent to respondent in the field. Moreover, it is undisputed that, during his shift, respondent sent two other trucks back out to collect additional material because they had below-capacity weight (Dempsey: Tr. 768-771; Respondent: Tr. 1034; Pet. Ex. 23). This evidence showed that respondent was exercising his professional judgment and it undercut the notion that he neglected his duties.

Dempsey also faulted respondent for not sending one of the trucks back out into the field when it returned from the dump at 6:15 a.m. (Tr. 724). According to Dempsey, the crews should have been working until the "last minute" before the 7:20 a.m. cutoff time (Tr. 724). That might

be a better way to collect refuse, but it was not the charge against respondent. The narrative portion of the charge specifically accused respondent of sending trucks with less-than-capacity loads to the dump. To amend the charge at this point, to include Dempsey's alternative theory of misconduct, would be improper. *See Murray v. Murphy*, 24 N.Y.2d 150, 157 (1969) (public employee has a due process right to notice of the charges and "may assume that the hearing will be limited to the charges as made … any other course is a violation of the employee's right to be treated with elemental fairness.").

Misuse of Department vehicle

Petitioner charged respondent with misuse of Department property because, at the end of his shift on February 26, 2001, he failed to return keys for a car that had been assigned to him and, as a result, the car could not be moved for several days (ALJ Ex. 1).

This charge should be sustained. It is undisputed that respondent failed to return the car keys and went home after his midnight to 8:00 a.m. shift on Saturday, February 26, 2011 (Dempsey: Tr. 649, 654; Respondent: Tr. 1139). Shortly afterwards, respondent spoke to Dempsey on the phone and said that he would return the car keys either later that day or the next day (Dempsey: Tr. 654, 756, 782; Respondent: Tr. 1140-42). However, respondent called in sick on Monday and did not return the car keys until Wednesday, March 2 (Dempsey: Tr. 655, 758; Respondent: Tr. 1140-41, 1144). As a result, the car was unavailable for use (Tr. 657). Dempsey testified that the cars are normally washed on Sundays, but this car was not washed because the keys were unavailable (Tr. 783).

By failing to return the keys at the end of his shift, respondent neglected to take proper care of Department property. Respondent compounded the error by making no effort to get the keys back to the Department for four days. Because of respondent's negligence, the car could not be used. The Department was under no obligation to send someone to respondent's home in Brooklyn to retrieve the keys. Respondent failed to return the keys at the end of his shift; it was his obligation to return them promptly. His failure to do so was misconduct.

FINDINGS AND CONCLUSIONS

1. Petitioner proved that respondent failed to provide required documentation for emergency leave on November 30, 2009, in violation of section 1.5 of the Department's Code of Conduct, as alleged in Complaint 11442.

2. Petitioner proved that respondent provided inadequate medical documentation for his sick leave on December 5, 2009, December 17, 2009, February 16, 2011, March 11, 2011, and November 21, 2011, in violation of sections 3.1, 7.8, and 7.9 of the Department's Code of Conduct, as alleged in Complaints 12783, 12786, 23012, 23434, and 100220 .

3. Petitioner failed to prove that respondent provided inadequate medical documentation for his sick leave on December 8, 2010, in violation of sections 3.1, 7.8, and 7.9 of the Department's Code of Conduct, as alleged in Complaint 21310.

4. Petitioner proved that respondent was absent without leave on January 22, 2010, March 2, 2010, March 2, 2011, and September 29, 2011, in violation of section 1.4 of the Department's Code of Conduct, as alleged in Complaints 12453, 13544, 22740, and 99366.

5. Petitioner proved that respondent slept on duty on February 19, 2010, in violation of section 3.19 of the Department's Code of Conduct, as alleged in Complaint 13215.

6. Petitioner proved that respondent failed to remain accessible for visits or phone calls from the supervised sick leave unit on May 8, 2010, June 5, 2010, September 24, 2010, and April 27, 2011, in violation of section 7.6 of the Department's Code of Conduct, as alleged in Complaints 16881, 17349, 19234, 24791.

7. Petitioner failed to prove that respondent left his residence without authorization on May 8, 2010, June 5, 2010, September 24, 2010, and April 27, 2011, in violation of section 7.5 of the Department's Code of Conduct, as alleged in Complaints 16881, 17349, 19234, and 24791.

8. Petitioner did not prove that respondent failed to supervise subordinates on February 13, 2010, December 3, 2010, and February 23, 2011, in violation of section 8.1 of the Department's Code of Conduct, as alleged in Complaints 13090, 20440, and 22606

9. Petitioner proved that respondent misused Department property on February 26, 2011, in violation of section 5.1 of the Department's Code of Conduct, as alleged in Complaint 22627.

RECOMMENDATION

After making the above findings, I requested and received a summary of respondent's personnel history. Petitioner hired respondent in 1995 and promoted him to supervisor in 2001.

He has been a night district supervisor in Manhattan District 3 since 2006 (Tr. 942). Respondent has received seven prior disciplinary penalties: the loss of ten vacation days in 2010 for one charge of failing to remain at home or accessible while on sick leave and eight charges of failing to provide adequate medical documentation; a six-day pay fine in 2008 for three charges of failing to provide adequate medical documentation; a four-day pay fine in 2007 for assorted misconduct, including failure to obey sick and emergency leave rules; a one-day pay fine in 2006 for permitting unauthorized use of Department property; a three-day suspension without pay in 2005 for failing to provide medical documentation and failure to maintain Department records; a three-day suspension in 2004 for failing to provide medical documentation; and the loss of one vacation day in 2003 for failing to provide medical documentation.

Respondent's recent performance evaluations are mixed. In 2011 he received satisfactory evaluations for achieving department goals, giving clear directions to subordinates, and following EEO rules, but he received unsatisfactory ratings for entering Department data and ensuring proper operation of Department vehicles. From 2008 to 2010, he received mostly satisfactory ratings and a few unsatisfactory ratings. He has a poor attendance record. In recent years he has repeatedly been out more than 70 days per year.

Here, petitioner proved that respondent violated Department rules 16 times from November 2009 to November 2011. Respondent failed to document emergency leave, provided inadequate documentation to the Department's clinic five times, was absent without leave four times, slept on duty, failed to remain accessible for phone calls from the supervised sick leave unit four times, and misused Department property. Petitioner now seeks termination of respondent's employment (Tr. 1246). That would be excessive.

Petitioner's penalty request was premised on the assumption that it had proved all of the charges. Because not all of the charges were proved, a lesser penalty would be appropriate. Although respondent has a significant disciplinary history, the most serious penalty previously imposed against him was the loss of 10 vacation days. To terminate respondent's employment at this point would be inconsistent with principles of progressive discipline.

The bulk of respondent's misconduct stems from his failure to comply with the Department's sick leave procedures. He repeatedly failed to report to the Department's clinic on the first day of an illness and he did not always answer investigators' phone calls while on sick leave. But there is mitigation. Petitioner does not contest that respondent suffers from several

serious medical conditions that prevented him from working. Moreover, respondent presented undisputed evidence that some of his absences are due to illnesses that resulted from his on-duty activities at Ground Zero in the aftermath of attacks on September 11, 2001. That does not excuse respondent's failure to comply with the Department's sick leave procedures, but it suggests that termination of his employment would be unduly harsh.

A substantial penalty short of termination would penalize respondent for his misconduct while giving due consideration to the mitigation presented, and would be consistent with penalties imposed under similar circumstances. *See, e.g., Dep't of Sanitation v. Speroni*, OATH Index No. 1613/12 at 15-16 (July 19, 2012), *adopted*, Comm'r Dec. (Aug. 23, 2012) (30-day suspension imposed on supervisor with a lengthy disciplinary record who was absent without leave on three occasions, failed to follow direct orders on three occasions, and was out of uniform on one occasion; penalty recommendation noted that demotion is not an available penalty under the Administrative Code); *Dep't of Sanitation v. Alves*, OATH Index No. 402/12 at 10 (Dec. 5, 2011) (47-day suspension recommended for 15 absences without leave where long-term employee had lengthy disciplinary history); *Dep't of Sanitation v. Cunningham*, OATH Index No. 2507/11 at 22 (Nov. 10, 2011), *modified on penalty*, Comm'r Dec. (Jan. 19, 2012) (40 work-day suspension imposed on a sanitation worker for violating emergency or sick leave rules on five occasions and was absent without leave on another occasion, where seven-year employee had received six prior disciplinary penalties); *Dep't of Sanitation v. Figueroa*, OATH Index Nos. 940/10 (Apr. 26, 2010) & 1914/10 (June 3, 2010), *aff'd* NYC Civ. Serv. Comm'n Item No. CD 11-47-A (July 12, 2011) (33-day suspension for two occasions of AWOL and three violations of sick leave rules, where long-term employee had six prior disciplinary penalties, primarily for violating attendance and sick leave rules).

Accordingly, I recommend a penalty of three days' suspension without pay for each of the proven charges, for a cumulative penalty of 48 days' suspension. Respondent should be aware that he must follow the Department's rules. Continued failure to do so may result in termination of his employment.

Kevin F. Casey
Administrative Law Judge

September 24, 2012

SUBMITTED TO:

JOHN J. DOHERTY
Commissioner

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