Health & Hospitals Corp. (Woodhull Medical Ctr.) v. Pena

OATH Index No. 559/13 (Mar. 25, 2013)

Housekeeping aide neglected his duties and failed to follow appropriate sanitary procedures by lying down on a previously cleaned stretcher in a patient clinic to make a telephone call. On another occasion, the aide failed to perform required cleaning duties. 45-day suspension recommended, considering prior disciplinary record.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
HEALTH & HOSPITALS CORPORATION (WOODHULL MEDICAL CENTER)
Petitioner
- against -
ARIEL PENA
Respondent

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

This disciplinary proceeding was commenced by petitioner, the Health & Hospitals Corporation ("HHC"), pursuant to section 7.5 of the its Personnel Rules. Respondent Ariel Pena, a service aide in the housekeeping department at Woodhull Medical Center ("the hospital"), is charged with abandoning his post, failing to perform his duties, and being discourteous toward his supervisor on June 8, 2011. The charges further allege that on May 28, 2012, respondent failed to comply with a directive to clean the bathrooms on medical unit 8-200, and that he also failed to complete his assignments to clean the bathroom in the intensive care unit, the lobby and the elevators (ALJ Ex. 1).

At a one-day hearing held before me, petitioner presented the testimony of respondent's supervisor, Darren Id-Deen. Respondent testified on his own behalf and called one additional witness, his co-worker Samuel Velazquez.

As set forth below, I find that the charges relating to June 8, 2011 are sustained, but only as relating to respondent's failure to perform his work. I do not find that respondent was

discourteous or left his post without permission. I find that respondent neglected to complete two of his cleaning assignments on May 28, 2012, but I do not find that he failed to comply with a directive to clean the 8-200 bathrooms.

ANALYSIS

Respondent is a service aide in Housekeeping, whose primary job is to clean and maintain various treatment areas in readiness for patients (Tr. 15; Pet. Ex. 2). Mr. Id-Deen is a Senior Housekeeper, who has been at Woodhull for about three years; in 2011 and 2012, he supervised approximately thirty employees, including respondent (Id-Deen: Tr. 12, 14-15). Mr. Id-Deen testified that he has known respondent for about two years, since respondent transferred to Housekeeping from a different department (Tr. 17). On both May 28, 2012 and June 8, 2011, respondent and Mr. Id-Deen were working Tour 1, which lasts from 12:00 a.m. until 8:00 a.m. (Id-Deen: Tr. 17).

June 8, 2011

There are four charges associated with this date. Charges I, II, and IV allege that respondent abandoned his post and lay down on a stretcher in a clinic while talking on his cell phone. Charge III alleges that respondent was discourteous to Mr. Id-Deen.

On June 8 respondent was assigned to the Dental and Gastrointestinal ("G.I.") clinics. Mr. Id-Deen testified that he made his rounds at about 4:00 a.m., and did not see respondent, who should have been taking out the trash or cleaning the clinics (Tr. 21, 22, 51). While checking to see if the stretchers had been cleaned properly, he pulled back the curtain around a bed in the G.I. clinic. "[T]hat's when I seen Mr. Pena in the bed on the phone and laying in the bed" (Tr. 22). Respondent had his cell phone to his ear, as if he was talking into it. After Mr. Id-Deen approached, respondent put down the phone and made motions with his hand as if he was texting (Tr. 54, 55, 56). Respondent had already had his break, which was from 3:00 to 3:30 a.m., and should have been taken in the staff lounge (Tr. 25, 76).

Mr. Id-Deen testified that he asked respondent why he was lying down on a stretcher with his phone. Respondent replied, "I'm laying down. I'm doing my work. What's the problem?" (Id-Deen: Tr. 23). He did not apologize (Id-Deen: Tr. 56). Mr. Id-Deen told respondent that he should not be lying down and notified his supervisor about the incident (Id-Deen: Tr. 23). That

same day, he documented his observations in a detailed memorandum to Labor Relations, which stated that respondent was lying down in a stretcher ("bed ten") with the curtain drawn, and said he had laid down to use his telephone (Pet. Ex. 4).

Respondent acknowledged that he was not working when Mr. Id-Deen saw him (Tr. 142). However, he denied that he was lying down or on the telephone; rather, he had sat down in a chair in front of the nurse's station for "maybe . . . like, one minute and a half" because he had felt pain in his knee after mopping (Tr. 119, 118; Resp. Ex. C). He questioned Mr. Id-Deen's testimony that "bed ten" was in the area, asserting that the unit had number signs hanging from overhead, and that the sign for the number "10" was positioned over the chairs in front of the nurse's station (Tr. 51; Resp. Ex. C). Moreover, respondent explained that he did not even have a telephone with him; his telephone was in his locker, in the basement (Tr. 119). He testified that although he did not see Mr. Id-Deen when the latter first entered the area, he stood up immediately once Mr. Id-Deen approached. When Mr. Id-Deen told him he should not be sitting down, he apologized. Neither he nor Mr. Id-Deen said anything else (Pena: Tr. 119, 141).

If respondent's testimony were to be credited, none of these charges would be sustained. Thus, an assessment of the relative credibility of respondent and Mr. Id-Deen is required. Factors to be considered include "witness demeanor, consistency of a witness' testimony, supporting or 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), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998); *see also Dep't of Sanitation v. Gregorio*, OATH Index Nos. 239/08 & 296/08 at 3 (Nov. 16, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 08-32-SA (May 30, 2008).

I found Mr. Id-Deen's testimony that respondent was lying in a bed more credible than respondent's testimony that he was sitting in a chair. Mr. Id-Deen was consistent and detailed throughout his testimony. When pressed if he was sure that respondent was lying in a bed, he said, "I'm certain, yes" (Tr. 55). He recalled pulling back the curtain around the stretcher to find respondent there. Moreover, when questioned over whether the number "10" really applied to the stretcher, he affirmed that it did, even when shown a photograph (Resp. Ex. C) that appeared to show chairs under the number "10" (Tr. 52). He testified that the photograph displayed a set-up similar to the set-up in the G.I. clinic, but that the stretchers were stacked with their heads

against the wall, so that the number "10" sign would have been over the foot of the stretcher, before the nurse's station (Tr. 52, 74).

I found Mr. Id-Deen credible about the bed numbers, but even if he were mistaken, it would make no difference. Respondent acknowledged that there was a stretcher behind the chairs, although he said it was stretcher "9," not "10" (Tr. 117, 118; Resp. Ex. C). Thus, by respondent's own admission, there was a stretcher in the area where Mr. Id-Deen testified he found respondent lying down.

I was convinced that Mr. Id-Deen found respondent lying in a stretcher, rather than sitting in a chair. Not only did Mr. Id-Deen document this in his memorandum to Labor Relations, but he also seemed genuinely appalled that respondent was lying in an already cleaned stretcher in a sanitary area. Indeed, Mr. Id-Deen noted that lying in the stretcher posed an "infection control issue," because respondent had been "cleaning waste, picking up trash, sweeping and mopping dirty floors [and] cleaning sinks and toilets" (Pet. Ex. 4). Likewise, he testified that respondent could have contaminated a sterile area used for surgeries (Tr. 26; Pet. Ex. 4). It is doubtful that Mr. Id-Deen would have been as concerned if respondent had simply been sitting in a chair.

Moreover, respondent acknowledged that he did not see Mr. Id-Deen immediately, when Mr. Id-Deen entered the area (Tr. 140, 141). It is unclear why respondent would not have noticed Mr. Id-Deen if respondent were sitting in the open area in front of the nurse's station, as he testified. It is more plausible that respondent did not notice Mr. Id-Deen initially because he was lying in a stretcher, with the curtains drawn, in a surreptitious attempt to make a telephone call.

I also did not credit respondent's testimony that his telephone was in his locker in the basement. Mr. Id-Deen noted in his memorandum that respondent said he had lain down to use his phone (Pet. Ex. 4). Moreover, he explained that, with the exception of the employee assigned as the "house," who carries a pager, employees are not given telephones or beepers (Tr. 62). However, "as a courtesy," workers may exchange personal cell phone numbers "just to make sure the operation and patient care is taken care of" (Tr. 52). It would be more likely than not, therefore, that respondent would have kept his cell phone with him rather than leave it in his locker, where it would be useless.

Respondent testified that Mr. Id-Deen is tyrannical (Tr. 129) and gives him an "overwhelming" amount of work (Tr. 132). Indeed, many of the housekeeping workers objected

to Mr. Id-Deen's style of management; 19 service aides signed a "letter of concern" alleging that Mr. Id-Deen abuses his power and engages in "Warden-like behavior" (Resp. Ex. B). However, there was no evidence to suggest that Mr. Id-Deen was fabricating a tale about respondent lying in a patient stretcher with a cell phone.

For these reasons, petitioner established that respondent failed to perform his assigned duties satisfactorily and to observe appropriate sanitary procedures, in that he lay down on a clean patient stretcher while using his cell phone, as alleged in charges one and two.

However, I do not find that respondent abandoned his post, as alleged in charge four, or that he was discourteous, as alleged in charge three. Respondent was assigned to the dental and G.I. clinics, and he lay down on a stretcher in the G.I. clinic. Thus, although he neglected his job duties to make a brief phone call, he did not leave his assigned post. *Cf. Health & Hospitals Corp. (Harlem Hospital Ctr.) v. Dowdell*, OATH Index No. 2124/10 at 4 (July 14, 2010), *modified on penalty*, Exec. Dir. Dec. (Sept. 20, 2010) (respondent was off post when he went to a different area of the hospital than the one he was assigned to, although he was monitoring his radio); *Health & Hospitals Corp. (Harlem Hospital Ctr.) v. Manning*, OATH Index No. 1480/10 at 13-14 (May 26, 2010) (special officer's post was the lobby but she was in a Pediatric Clinic, and therefore off post).

Regarding the discourtesy charge, I find respondent's testimony that he simply and immediately apologized to Mr. Id-Deen and that nothing else was said to be unlikely. Respondent denied having a "problem" with Mr. Id-Deen (Tr. 128). But this was contradicted by his own testimony that Mr. Id-Deen was "tyrant-like" (Tr. 129), gives him an "overwhelming" amount of work to do (Tr. 132), and changes his assignments as often as two or three times a shift (Tr. 131-32). Thus, I find it improbable that respondent merely apologized to Mr. Id-Deen. I find it more likely that he said "I just laid down to use my phone and besides, I always do my work" (Pet. Ex. 4).

However, this comment falls short of misconduct. "It is well settled that not every disagreement with a supervisor, or expression of discontent, is subject to discipline, even when voices are raised and emotions are vented." *Dep't of Environmental Protection v. DeCoursey*, OATH Index No. 666/12 at 9 (Jan. 31, 2012); *see also Transit Auth. v. Victor*, OATH Index No. 799/11 at 4 (Mar. 3, 2011), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD11-52-A (Aug. 9, 2011); *Law Dep't v. Lawrence*, OATH Index No. 1312/10 at 8 (Mar. 30, 2010), *aff'd*, NYC Civ. Serv.

Comm'n Item No. CD 11-36-A (May 11, 2011).

Factors to consider in determining whether expressions of discontent constitute misconduct include the use of threats, insolence, profanity, or a showing that the office was disrupted. *Human Resources Admin. v. Payton*, OATH Index No. 314/12 at 11(Dec. 6, 2011), *adopted*, Comm'r Dec. (Jan. 11, 2012). None of these factors exist here. Hence, charge three, alleging discourtesy, was not sustained, and should be dismissed. *See Transit Auth. v. Felix*, OATH Index No. 1206/09 at 9 (June 16, 2009) (e-mail containing a touch of annoyance does not constitute misconduct); *Health & Hospitals Corp. (Segundo Ruiz Belvis Diagnostic & Treatment Center) v. Pena*, OATH Index No. 1961/04 at 5 (Oct. 14, 2004) (work-related disagreements that are free of insult or raised voices are not misconduct).

May 28, 2012 Charges

There are three charges relating to May 28. Charge I alleges that respondent failed to follow a directive to clean the bathroom in unit 8-200, Charge II alleges that he failed to clean the Intensive Care Unit ("ICU") bathroom, and Charge III alleges that he failed to mop and sweep the lobby and elevator (ALJ Ex. 1).

It was undisputed that on May 28, 2012, which was Memorial Day, Mr. Id-Deen assigned respondent to the "house" post (Id-Deen: Tr. 28, 33-34, 60; Pena: Tr. 122). The aide with the house post carries a pager and is responsible for responding to service requests that are transmitted to him via pager (Id-Deen: Tr. 33; Velazquez: Tr. 88). The "house" aide is also responsible for cleaning three intensive care units (Id-Deen: Tr. 40, 77); the aide is required to empty trash, and "mop and sweep the rooms, if needed, and answer the calls, if needed, in that specific area" (Id-Deen: Tr. 40; Velazquez: Tr. 88).

According to Mr. Id-Deen, because a number of staffers were absent (Tr. 38, 37), he gave respondent an extra assignment at the start of his shift. That assignment was to clean the lobby, including the bathrooms outside the emergency department's administration area (Tr. 37, 61). Mr. Id-Deen testified that he told respondent that he should clean the lobby at the beginning of his shift (Tr. 37). Respondent acknowledged that Mr. Id-Deen gave him extra assignments, including the lobby area, the elevators, and the emergency department administration area (Tr. 124). He testified that Mr. Id-Deen added these assignments after his shift began, although it was unclear precisely when (Tr. 124).

Mr. Id-Deen testified that around 4:45 or 5:00 a.m., he received calls from two nurses, from two different units, complaining that respondent had failed to answer their pages for service. When respondent finally answered, he said he was busy (Tr. 34). Mr. Id-Deen began making his rounds of the area to investigate (Tr. 35). He was stopped by a doctor who said the bathrooms in the emergency department's administration area had not been cleaned (Tr. 35, 36). Becoming concerned, Mr. Id-Deen checked with the operator, who confirmed that respondent had been paged several times from units 8-100 and 8-200, which are medical and patient units, but had not received pages from any other locations (Tr. 35, 36). As he walked around, he saw that the neither the intensive care units, nor the emergency department administration bathrooms, nor units 8-100 and 8-200, had been cleaned (Tr. 43, 64). He termed the intensive care units "in a poor condition" (Tr. 77).

Mr. Id-Deen paged respondent to meet him near the emergency room to discuss the situation. When they met, near the elevators, Mr. Id-Deen told him of the complaints and asked why the ICUs and ICU bathrooms had not been cleaned. Respondent said he had been "busy," without elaborating (Tr. 39, 40, 41, 77). However, he never refused to clean the units (Tr. 81). Further, respondent said that Mr. Id-Deen "always wants to give a speech" and should just give respondent his assignment, and that he would get it done (Tr. 38, 39).

Mr. Id-Deen did not believe respondent had been too busy to get his work done. Nonetheless, he assigned another employee, Mr. McAnuf, to clean the ICU bathrooms and left the area to inform that employee and bring him supplies (Tr. 38-39, 41, 77-78, 81). He directed respondent "to continue on with his normal duties" (Tr. 78). He testified that by that, he meant cleaning the 8-100 and 8-200 units and emptying trash in the other areas (Tr. 78).

Mr. Id-Deen testified that when he returned to his office, approximately 10-15 minutes later, he saw respondent and two other employees, Mr. Velazquez and Mr. Hernandez, sitting on a bench near the x-ray machine, talking (Tr. 41, 65, 78). He was startled, because he had just given respondent a directive. He asked the group if they were on their break and they said no. At that point he told them, "I need things to get done" and walked away (Tr. 41, 42). He testified that the group ultimately completed their assignments. This included respondent, who finished all his work, with the exception of cleaning the ICUs and ICU bathrooms, which Mr. Id-Deen had re-assigned to Mr. McAnuf (Tr. 64, 66).

Mr. Id-Deen wrote a memorandum to Labor Relations that same day, documenting the

complaints about the 8-100 and 8-200 units and the emergency room administration bathrooms, and noting that he had inspected these areas and the intensive care units and found that they were not clean.[1] He noted further that when he spoke to respondent, some time after 5:00 a.m., respondent said he would finish his assignments "if I have time." Shortly after that, he saw respondent sitting on a bench with two co-workers. At that juncture he asked respondent what work he had left and re-assigned all of his unfinished assignments to Mr. McAnuf "because the ICU cleanliness was more important" (Pet. Ex. 7).

Respondent provided a different account of the night of May 28, 2012. He asserted that he cleaned the intensive care units (Tr. 140), as well as units 8-100 and 8-200 (Tr. 127, 137-38). He cleaned 8-100 and 8-200 in response to a staff member flagging him down, not because he was paged (Tr. 127, 138). He acknowledged meeting with Mr. Id-Deen after the latter paged him (Tr. 127). When they met, Mr. Id-Deen told him to clean the emergency department administration area (Tr. 125, 127). Mr. Id-Deen also told him to "forget about the elevators and lobby," which he would give to someone else to clean (Tr. 125).

Respondent also confirmed that when he took out the trash in the emergency department administration area, he saw Mr. Velazquez and Mr. Hernandez sitting on a bench. However, he did not join them or talk to them, but walked away (Tr. 141, 145).

On this record petitioner has failed to prove charge one, alleging that respondent did not follow a directive from Mr. Id-Deen to clean the bathrooms in unit 8-200. It is unlikely that respondent initially cleaned these bathrooms. Mr. Id-Deen asserted that nurses on the unit complained that respondent had ignored their service pages, that the operator had confirmed that respondent had been paged, and that he had personally inspected the area and found it dirty. He documented the nurse's complaint about 8-200 in his memorandum to Labor Relations. Respondent, on the other hand, insisted he cleaned the bathrooms, although he admitted on cross-examination that work needed to be done on units 8-100 and 8-200 (Tr. 144). Respondent's assertion that he recalled a staff member pulling him over to clean these bathrooms was not credible given his acknowledgement that he could not recall details of his work

[1] The first page of the memorandum states that Mr. Id-Deen showed respondent the "areas of concern, asked was there a reason why the ICU's bathrooms where cleaned or the unit not mopped or swept" (Pet. Ex. 7). As it would not make sense for Mr. Id-Deen to consider clean bathrooms to be "areas of concern," it is reasonable to conclude that the use of word "where" was a typographical error, and that the memorandum should have read " . . . asked was there a reason why the ICU's bathrooms were not cleaned." This would also be consistent with the latter part of the memorandum, which notes the importance of "ICU cleanliness," suggesting that on that occasion, "ICU cleanliness" had not been achieved.

assignment that night, including how many service request pages he got or whether he got all his work finished (Tr. 126).

Yet the charge against respondent is whether respondent failed to follow a directive from Mr. Id-Deen to clean the units, not whether respondent initially failed to respond to a page from the nurses to clean the bathrooms.

Mr. Id-Deen's own testimony indicated that respondent complied with the directive to clean the bathrooms in 8-200. Mr. Id-Deen testified that he met with respondent and told him to clean everything that had not been done, except for the ICU units. He said that respondent never refused any cleaning assignments and that he ultimately completed his assignments, with the exception of the work re-assigned to Mr. McAnuf. These assignments included 8-200.

Petitioner's theory of the case seems to rest upon Mr. Id-Deen's testimony that respondent was insubordinate because after having been directed to continue with his cleaning duties, he instead sat down on a bench and talked to two co-workers. Mr. Id-Deen's memorandum to Labor Relations also noted that he saw respondent and his co-workers sitting on the benches next to the back doors of the X-ray room (Pet. Ex. 7).

Respondent denied this scenario, asserting that he had been throwing out trash in the emergency department administration area, as directed. While he acknowledged seeing Mr. Velazquez and Mr. Hernandez, he denied talking with them or sitting on the bench.

Mr. Velazquez corroborated respondent's account to some degree. Mr. Velazquez testified that he had helped respondent dump some trash, because he realized that respondent had a large area to cover and the hospital emphasizes "teamwork" (Tr. 88, 102). After doing that he sat down with Mr. Hernandez. Respondent was standing nearby (Tr. 88, 102).

However, Mr. Velazquez's testimony was internally inconsistent as to the encounter with Mr. Id-Deen. He first testified that Mr. Id-Deen approached the group and asked what they were doing (Tr. 87). Subsequently he testified that he had already walked away from Mr. Hernandez when he saw Mr. Id-Deen in the hallway (Tr. 102). Thus, it was difficult to discern precisely what he recalled about his encounter with Mr. Id-Deen.

Considering all the evidence, I was more persuaded by Mr. Id-Deen's testimony that respondent was sitting on a bench with two co-workers than by respondent's testimony that he put away trash in the emergency department administration area, saw Mr. Velazquez and Mr. Hernandez sitting down on a bench, but did not join them.

However, at its best Mr. Id-Deen's testimony established that, for a moment, respondent was sitting down on a bench with two co-workers. Petitioner did not establish for how long respondent was sitting down. Mr. Id-Deen testified that he saw respondent and the other workers on a bench about ten to fifteen minutes after he directed respondent to attend to his cleaning duties. But, petitioner did not establish that respondent spent this entire time on the bench. Indeed, both respondent and Mr. Velazquez testified that respondent had removed the trash from the emergency department administration area. This was consistent with the assignment given to him by Mr. Id-Deen, as well as Mr. Id-Deen's testimony that respondent ultimately completed the work assigned to him, with the exception of the work given to Mr. McAnuf. Although Mr. Id-Deen's memorandum to Labor Relations indicated otherwise, noting that he had re-assigned all of respondent's unfinished work, I credited Mr. Id-Deen's sworn testimony to the contrary over this hearsay declaration. *See Dep't of Environmental Protection v. Cortese,* OATH Index No. 1613/06 at 6 (Sept. 12, 2006) (hearsay is generally considered less reliable than sworn testimony); *Dep't of Correction v. Tatum,* OATH Index No. 2062/04 at 13 (July 19, 2005), *modified on penalty,* Comm'r Dec. (Aug 23, 2005) (declining to sustain charges based solely on hearsay evidence, in light of contrary trial testimony); *see generally Dep't of Juvenile Justice v. James,* OATH Index No. 847/06 at 4 (July 28, 2006), *app. dismissed,* NYC Civ. Serv. Comm'n Item No. CD 07-90-D (Sept. 20, 2007) (hearsay must be sufficiently reliable and carefully evaluated before it is relied upon).

Thus, on this limited record, it would be improper to conclude that respondent did not comply with the directive to clean the 8-200 bathrooms simply because he was briefly observed sitting on a bench. *See Human Resources Admin. v. Anonymous,* OATH Index No. 212/13 at 3 (Nov. 21, 2012) (misconduct was not proven where employee did not immediately comply with a direct order to service the next client but instead began arguing with his supervisor, because petitioner failed to show "how long this disagreement took, how long the client waited, or whether there was any noticeable disruption of service").

Accordingly, charge one is not sustained.

Charge two, which alleges that respondent failed to clean the ICU bathrooms, is sustained. Mr. Id-Deen testified credibly that he saw that the intensive care units were dirty when he made his rounds at about 5:00 a.m., and he documented this in his memorandum to Labor Relations. He testified that he re-assigned the ICU bathrooms to Mr. McAnuf, which he

would not have done had they been clean. In light of this evidence, I did not credit respondent's testimony that he cleaned the ICU bathrooms. Mr. Id-Deen testified that when he asked respondent why assignments had not been completed, respondent replied only that he had been "busy," without explaining why. Mr. Id-Deen acknowledged that the any doctor or nurse in the hospital has the authority to pull a cleaner off his assigned tasks and order him to different cleaning tasks (Tr. 63). However, if that happens, the cleaner should inform Mr. Id-Deen. Respondent acknowledged that he did not tell Mr. Id-Deen that he had been asked to perform other tasks (Tr. 138). Indeed, the only tasks which he said staff had asked him to do were to clean the 8-100 and 8-200 bathrooms, which I concluded respondent did not actually clean until much later in his shift. Mr. Id-Deen emphasized that respondent, as the "house," was expected to clean the ICU. "That's a mandatory thing because it's 24 hours critical care" (Tr. 40). Here, respondent inexplicably failed to clean the ICU bathrooms from midnight, when he started his tour, to approximately 5:00 a.m., when Mr. Id-Deen confronted him. This constituted unsatisfactory performance of his duties, as alleged in charge two.

Charge three, which alleges that respondent failed to mop and sweep the elevator and lobby floors, is also sustained. Respondent did not dispute that Mr. Id-Deen assigned him these duties, and he also acknowledged that he did not complete them. However, he said that when he met with Mr. Id-Deen to discuss his assignments, Mr. Id-Deen told him not to clean the elevator and lobby and instead gave him the assignment of cleaning the emergency department administration area (Tr. 124-25). I did not credit respondent's testimony. When asked about his workload that night, respondent acknowledged, "Well, I can't recall too much" (Tr. 126). By contrast, Mr. Id-Deen was very specific in testifying that he gave respondent an extra assignment at the beginning of his shift, to clean the lobby, including the bathrooms outside the emergency department's administration area. There is thus no reason to believe that Mr. Id-Deen switched respondent's assignments at 5:00 a.m., taking away the lobby and elevator assignment and adding the emergency department administration assignment. Mr. Id-Deen noted in his memorandum to Labor Relations that he asked respondent "why assignments (lobby and elevators) given to him where [sic] not completed in a timely manner" (Pet. Ex. 7). As just noted, respondent did not explain other than to say he was busy. As respondent had been given the assignment of cleaning the lobby and elevators at the beginning of his tour, and there was no evidence, five hours later, as to why he had not completed it, charge three, alleging

unsatisfactory performance of duty, was established. *See Dep't of Sanitation v. Cardaci*, OATH Index No. 276/11 at 9 (Dec. 13, 2010), *modified on penalty*, Comm'r Dec. (Feb. 17, 2011) (supervisor was negligent in failing to carry out a directive to have the area in front of a church cleaned, because he was "on notice that his supervisor considered the location a top priority . . .").

FINDINGS AND CONCLUSIONS

1. Respondent neglected his duties and failed to follow appropriate sanitary procedures by lying down on a previously cleaned stretcher in a patient clinic to make a telephone call, during work hours on June 8, 2011, as alleged in charges one and two of the June 8 charges.

2. Petitioner failed to establish by a preponderance of the credible evidence that respondent was discourteous by telling his supervisor on June 8, 2011, "I just laid down to use my phone and besides, I always do my work," as alleged in charge three of the June 8 charges.

3. Petitioner failed to establish by a preponderance of the credible evidence that respondent abandoned his post on June 8, 2011, as alleged in charge four of the June 8 charges.

4. Petitioner failed to establish by a preponderance of the credible evidence that on May 28, 2012, respondent failed to comply with a directive to clean the bathrooms in unit 8-200, as alleged in charge one of the May 28 charges.

5. Respondent neglected his duties by failing to clean the ICU bathrooms, the lobby and the elevator floors, as alleged in charges two and three of the May 28 charges.

RECOMMENDATION

Upon making these findings, I obtained and reviewed material relating to respondent's disciplinary history. The material presented indicated the following. Respondent has been employed at the hospital since 2006 and has had three prior disciplinary cases, all resolved by stipulation. In 2007, respondent agreed to a five-day suspension in resolution of charges that he left his post without authorization, and was absent without leave. In June 2009, he agreed to a

30-day suspension in resolution of a charge that he struck another employee with a stretcher. In August 2010, he agreed to another 30-day suspension in resolution of charges that he pointed his finger at a co-worker and used coarse and insulting language. In agreeing to the 2009 and 2010 settlements, respondent pled "no contest" to the charges.

Respondent's performance evaluations have been mixed. He received a rating of "needs improvement" in the evaluation periods spanning May 24, 2009 through February 23, 2011, but his two most recent evaluations rate his work as "satisfactory."

Petitioner has requested termination, asserting that respondent's misconduct shows "a course of conduct that the facility believes cannot be corrected" (Tr. 158). I disagree. Respondent has been found to have taken an unauthorized break to make a phone call on a patient stretcher on one occasion, and to have neglected cleaning duties on another occasion. This is not the "same course of conduct" that was alleged in the prior disciplinary cases, particularly the two incidents involving aggressive or abusive behavior toward a co-worker.

As we have noted, "the theory of progressive discipline is to modify employee behavior through increasing penalties for the same or similar misconduct, and to give employees full notice that if they do not modify their conduct, they risk termination." *Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Ford*, OATH Index No. 2383/09 at 11 (July 10, 2009); *see also Health & Hospitals Corp. (Kings Co. Hospital Ctr.) v. Meyers*, OATH Index No. 1487/09 at 8 (Jan. 26, 2009), *aff'd*, NYC HHC Pers. Rev. Bd. Dec. No. 1349 (July 31, 2009). Here, because of the dissimilarity of the prior discipline, respondent has not received "full notice" that neglect of duty was likely to result in the termination of his employment. *Compare Stukes v. Housing Auth.*, NYC Civ. Serv. Comm'n Item No. CD13-06-M at 3 (Mar. 14, 2013) (finding that a prior discipline of 10 days gave insufficient notice of potential job loss resulting from similar acts 13 years later and that informal counseling and warnings did not justify termination) *with Health & Hospitals Corp. (Harlem Hospital Ctr.) v. Rhines*, OATH Index No. 1888/10 at 4 (June 4, 2010) (recommending termination for an employee who amassed 25 latenesses and absences after receiving a 10-day, 30-day, and 60-day penalty for the same conduct). And the misconduct here, while serious, was not so "particularly persistent and pervasive or egregious," as to justify termination in the absence of progressive discipline. *See Dep't of Education v. Brust*, OATH Index No. 2280/07 at 86 (Sept. 29, 2008), *adopted*, Chancellor's Dec. (Oct. 22, 2008).

However, while termination is unwarranted, a significant penalty is called for, in light of respondent's prior disciplinary record and his relatively short tenure, as well as the nature of his misconduct. On both the dates involved, respondent's behavior showed a disregard for carrying out assignments and following procedures. Most troubling was the incident where respondent lay down on an already-cleaned patient stretcher to make a telephone call, ignoring the risk of cross-contamination and infection. Taking all this into account, a 45-day suspension is appropriate. This is commensurate with prior cases which consider the nature of the misconduct, the employee's tenure on the job, and the prior disciplinary record, if any. *See, e.g., Transit Auth. v. Felix,* OATH Index No. 1206/09 (June 16, 2009) (eight day suspension recommended for a benefit examiner with 17 years of service and an unblemished record who was discourteous to claimants and supervisors and failed to carry out a supervisor's directive) *with Health and Hospitals Corp. (Elmhurst Hospital Center) v. McKenzie*, OATH Index No. 2043/06 at 7 (Nov. 3, 2006) (35-day penalty recommended for a custodial assistant who left her post on two occasions to go to the employee lounge, refused an assignment, and was disrespectful to a nurse; respondent was an 11-year employee and had two prior disciplinary penalties, the longest a 30-day suspension for threatening staff).

Accordingly, I recommend that respondent be suspended for 45 days.

Faye Lewis
Administrative Law Judge

March 25, 2013

SUBMITTED TO:

GEORGE PROCTOR
Executive Director
Woodhull Hospital Center

APPEARANCES:

RICHARD J. WASHINGTON, ESQ.
Attorney for Petitioner

CARY KANE, LLP
Attorneys for Respondent
BY: MELISSA CHAN, ESQ.