Dep't of Environmental Protection v. Berlyavsky

OATH Index No. 181/14 (Nov. 26, 2013), *rejected in part*, Comm'r Dec. (Dec. 26, 2013)*, **appended**, *modified*, NYC Civ. Serv. Comm'n Case No. 2014-0060 (Sept. 25, 2014), **appended**

Project manager charged with disobeying orders to leave work location at end of work day and to report to storehouse and with falsely stating that he made a vehicle damage report. Administrative law judge sustained two specifications that employee worked longer than seven hours and recommended penalty of one day suspension.

*Commissioner rejected ALJ's findings in part and ALJ penalty recommendation, and imposed 30-day suspension without pay. On appeal, Civil Service Commission adopts the findings of Judge Spooner and imposes a 15-day suspension.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Petitioner
- against –
VIKTOR BERLYAVSKY
Respondent

REPORT AND RECOMMENDATION

JOHN B. SPOONER, *Administrative Law Judge*

This disciplinary proceeding was referred to me in accordance with section 75 of the Civil Service Law. Petitioner, the Department of Environmental Protection, filed two sets of charges against respondent Viktor Berlyavsky, a project manager. The first set of charges alleged that respondent disobeyed orders to leave his work location at the end of the work day; the second set alleged that he failed to report to a storehouse and then falsely stated that he had made a vehicle damage report.

A hearing on the charges was conducted before me on August 21 and October 10, 2013. Petitioner presented the testimony of four supervisors. Respondent testified on his own behalf, denying any misconduct, and presented the testimony of his union president.

For the reasons provided below, I find that the evidence was sufficient to sustain two of the specifications and recommend that respondent be suspended for one day.

ANALYSIS

Respondent has been an employee of the Department for 12 years. He was hired as an associate engineering technician and currently is a project manager. His current job responsibilities include coordinating projects in the Department Job Order Contracting and Task Order Contracting Group, a unit which manages contracts for maintenance and services needed to support the City's water system.

Failure to Leave and Returning to Work Location

The first set of charges (No. 0091/13D) alleges that respondent was insubordinate on six days, March 25, 26, and 28; April 12 and 26; and May 28, 2013. On all of these dates, respondent allegedly remained at his work location after his work day should have ended, in violation of instructions from his supervisor. A second specification alleges that, on April 26, 2013, he initially left the work location but returned without permission. Respondent's departures on these dates (with the exception of April 26) were recorded in respondent's computerized time records and were not disputed. At the hearing, respondent insisted that his extended work hours were due to his efforts to meet deadlines set by his supervisor, that the restriction that he could never work longer than seven hours was humiliating and unfair, and that he did not understand until receiving an e-mail instruction that working late might be misconduct. Petitioner characterized respondent's late hours as insubordination. The evidence provided some support for both interpretations of respondent's actions.

Petitioner provided no explanation as to why or how it developed its unusual policy of disciplining employees for working longer than their scheduled seven work hours. It was undisputed that managers, who included staff just above respondent, typically worked longer than seven hours in order to complete their assignments (Farnan: Tr. 228). Non-managers, such as respondent, generally worked a seven-hour work day. There was no evidence that respondent was paid or sought to be paid overtime (which needed to be approved in advance by a supervisor) or sought or was awarded compensatory time for any of the extra hours he worked

(Tr. 105, 171). Although respondent's supervisor warned two other employees about late departures, respondent was the only employee ever brought up on disciplinary charges for working more than seven hours (Tr. 90, 105).

There was evidence that the seven-hour work rule which respondent was charged with violating was controversial and only recently considered to be grounds for discipline. Respondent testified that, prior to 2012, there were no restrictions on any Department employees for working longer than seven hours. This changed in February 2012, when the new administrator of his unit distributed a memo (Resp. Ex. A) to the staff indicating that no non-managerial employee "is to be at the premises before or after their work hours." Respondent stated that this directive was strongly objected to by the union. In August 2012, the memo was replaced by a second memo (Resp. Ex. B) in which the language about non-managers being present beyond their required work hours was removed.

Some seven months after the seven-hour provision in the memo was retracted, respondent's supervisor began issuing ever more emphatic orders to respondent to leave the work place after seven hours. Ms. Gziki, respondent's supervisor, testified that, in March 2013, she noticed that respondent was remaining at work after his seven-hour work day ended (Tr. 68-70). According to respondent's timesheet for the week of March 25-28 (Pet. Ex. 8), he worked 8 hours and 15 minutes on March 25, 9 hours on March 26, and 8 hours on March 28, with a one-hour allowance for lunch (Tr. 73).

On April 1, Ms. Gziki called respondent and told him that he should not "do" uncompensated time unless he was requested to do so by a supervisor (Tr. 76). Ms. Gziki told respondent it was all right to stay 15 minutes to "wrap up." Respondent told Ms. Gziki he needed to stay longer "to do his own" stuff, including union work. Ms. Gziki told respondent he should do that on his own time and needed to leave work once his work for the day was done (Pet. Ex. 9). Ms. Gziki recorded this conversation in an e-mail (Pet. Ex. 9) sent to her supervisor later that day (Tr. 76-77).

After Ms. Gziki's discussion with respondent on April 1, he wrote her an e-mail (Pet. Ex. 10) at around 9:20 p.m. In the e-mail, respondent acknowledged that, during their phone conversation that day, Ms. Gziki had "instructed me that my voluntary two hours' work without pay on March 26, 2013 was a violation and should not happen anymore." He drew Ms. Gziki's

attention to a March 25 instruction from her that respondent should finish a survey for CCTV cameras and make a list of all equipment he observed during his field visit. Respondent stated that he devoted "personal time" to completing this assignment. Respondent also stated that he needed "that additional time" to discuss a salary issue with the union.

Respondent indicated that, in the weeks that followed, he tried unsuccessfully to discuss the issue of whether he could work longer than seven hours with Ms. Gziki. Ultimately, he sent e-mails to an assistant commissioner and to the Commissioner to protest this and other policies (Tr. 127; Resp. Ex. C).

Respondent's timesheet (Pet. Ex. 11) for the week of April 8 through 12, 2013, shows that he worked no more than 30 minutes late on April 8, 9, 10, and 11, but worked for 8 hours and 30 minutes on April 12. Ms. Gziki testified that, upon seeing this timesheet on the morning of April 15, she wrote respondent another e-mail (Pet. Ex. 12) requesting an explanation for the late departure. Ms. Gziki testified that respondent replied to this e-mail (Tr. 80-81), although no e-mail on this issue was offered into evidence by either party.

Ms. Gziki testified that, late in the day on April 15, she had a conversation with respondent about working late and again told him to leave after he had been at work for seven hours (Tr. 82). She summarized this conversation in another e-mail to her own supervisors (Pet. Ex. 13). In the e-mail Ms. Gziki recounted a conversation with respondent at just after 4:00 p.m. on April 15 in which she told him to go home after working his seven hours and he told her to leave him alone.

On April 25, Ms. Gziki sent respondent an e-mail (Pet. Ex. 15) stating that his work hours were to begin between 8:15 and 9:00 a.m. He had an hour for lunch. She wrote, "As soon as you complete your 7 working hours, according to schedule, you are to go home."

It was not disputed that, on the following day, April 26, respondent left and returned to the workplace. Ms. DeLillo recalled that, at around 4:45 p.m., she saw respondent working on his computer and asked him why he was still there. Respondent told her he had already clocked out and was trying to finish some work. Ms. DeLillo told respondent it was time for him to leave, whereupon respondent logged off his computer and left at around 5:10 p.m. Ms. DeLillo later saw respondent walking back into the office. She asked him, "What's up?" He gave Ms.

DeLillo "a look" and walked by her. Several minutes later Ms. DeLillo went by respondent's desk and he was gone (Tr. 110).

Ms. DeLillo sent an e-mail (Pet. Ex. 17) on Friday, April 26, at 5:41 p.m. summarizing the encounter with respondent. In the e-mail, she wrote that respondent told her that he was working late to complete a task assigned to him by Ms. Gziki via e-mail after he had clocked out. Ms. DeLillo indicated that, in Ms. Gziki's e-mail, Ms. Gziki directed respondent to attend an asbestos sampling event on the following Monday. Ms. DeLillo told respondent he should turn off his computer and leave. Several minutes later Ms. DeLillo was speaking with Ms. Gziki when she saw respondent come back into the office. Ms. DeLillo asked him, "What's up?," and he gave her an "unpleasant look," did not reply, and returned to his desk. Several minutes later Ms. DeLillo noticed respondent was not in the office any longer.

On rebuttal, petitioner called Mr. Farnan, another Department manager, who testified that at around 5:00 p.m. he overheard the conversation between Ms. DeLillo and respondent. He heard Ms. DeLillo ask respondent what he was doing in the building. Respondent indicated he had some work to complete. Ms. DeLillo, in a "polite" and "professional" tone, told respondent he had to leave and noted that he had been spoken to before about remaining at work late (Tr. 219-21).

Respondent's time records (Pet. Ex. 16) show that on May 28 he worked 9 hours and 30 minutes.

In his testimony, respondent admitted having discussions with Ms. Gziki beginning in early April about working more than seven hours, but stated that he did not understand until the end of April that his late hours would be subject to formal discipline. Respondent testified that Ms. Gziki spoke with him twice about staying at work more than seven hours (Tr. 123). He testified that he had assignments to complete and found her order "humiliating" (Tr. 124). At the end of the day on April 15, Ms. Gziki came to respondent's cubicle and directed him to leave. He left as she asked him to do (Tr. 124-25). Respondent insisted that it was only after receiving Ms. Gziki's e-mail of April 25 (Pet. Ex. 15) that he understood that he might "get in trouble" for staying more than seven hours at work (Tr. 126-27).

Respondent offered no explanation for working late on the March dates or on April 12. As to his late departures on April 26 and May 28, however, respondent offered detailed excuses.

Respondent testified that on April 26 he clocked out at around 4:23 p.m. (Tr. 128-29) and was just about to leave when he encountered Ms. DeLillo, who ordered him to leave. He left as directed but returned to his cubicle because he forgot his cell phone (Tr. 131). He found Ms. DeLillo's direction to leave and her question about his subsequent presence there "terribly humiliating" (Tr. 131).

Respondent's union representative, Dr. Moriates, testified that she attended a meeting in May 2013 with respondent, Ms. Gziki, and Ms. DeLillo. The supervisors told respondent not to work late (Tr. 169-70). According to Dr. Moriates, prior to the time Ms. Gziki was assigned to the unit in February 2013, there had been no prohibition on working beyond seven hours (Tr. 170). Dr. Moriartes was not aware of any other worker brought up on disciplinary charges for working late (Tr. 171).

Respondent stated that, on May 28, he was served at the end of the day with a letter (Resp. Ex. D) from an assistant commissioner ordering him to attend a meeting two days later concerning "three separate incidents which were reported to my office and occurred on or about April 15, 2013." Respondent immediately tried to remember what had happened on April 15 and sent an electronic copy of the letter to his union representatives. He indicated that he "lost track of time" and ended up staying some two hours and 30 minutes late (Tr. 130).

An employer must prove three elements to establish a charge of insubordination: (1) that an order was communicated to the employee and the employee heard and understood the order; (2) the contents of the order were clear and unambiguous; and (3) the employee willfully refused to obey the order. *Dep't of Homeless Services v. Chappelle*, OATH Index No. 1918/07 at 3 (Aug. 30, 2007). No evidence was offered to prove that, prior to March 25, 26, and 28, 2013, respondent was given a direct order by Ms. Gziki or any other supervisor to leave his work location after seven hours. The allegations concerning these charges must be dismissed.

Respondent's late departures on April 12 and 26 and May 28 all occurred after respondent admitted that, on April 1, he was given a verbal order by Ms. Gziki to leave work after seven hours. Respondent's e-mail of April 2 (Pet. Ex. 10) states that, after the discussion of April 1 with Ms. Gziki, he understood that staying at work after hours was a "violation."

It is true that these three late departures occurred while Ms. Gziki was complaining about respondent missing deadlines, providing him with an incentive to work late. In an e-mail dated

April 15 (Pet. Ex. 13), Ms. Gziki complained to Ms. DeLillo that respondent "has to work on a schedule with deadlines" and respondent "was missing them or he was just doing unprofessional reports just to meet them by copy [sic] pasting emails." Nonetheless, for his late departure on April 12 of one hour and 30 minutes beyond his seven-hour schedule, respondent offered no justification or explanation. Respondent's testimony that he did not believe at this time that staying after hours would result in formal disciplinary charges does not excuse disobeying his supervisor's express order to leave after working seven hours. I find that respondent's late departure on April 12 was therefore insubordinate, in violation from verbal instructions from Ms. Gziki, and therefore misconduct, in violation of the Department rules requiring that employees obey their supervisors. *See* Code of Discipline rule E(5).

Respondent's delayed departure of "an indeterminate amount of time" on April 26 occurred after respondent signed out on CityTime at 4:23 p.m. According to the credible testimony of Ms. DeLillo and respondent's own admissions, after signing out, he remained at his desk at least 25 more minutes, left when directed to do so by Ms. DeLillo, and then returned and left again. This more than 25-minute delay in leaving would be in apparent violation of the seven-hour work day order (with a grace period of 15 minutes to finish up) imposed on respondent by Ms. Gziki.

However, I credited the statement made by respondent to Ms. DeLillo, and recounted in Ms. DeLillo's e-mail, that, after respondent clocked out at 4:23 p.m., he received an e-mail from Ms. Gziki and was attempting to read and reply to it. The e-mail concerned attendance at an off-site work event the following work day. Under these circumstances, where respondent had been criticized by Ms. Gziki for failing to complete assignments on time, it was not misconduct for respondent to spend a few minutes reading and completing a reply to Ms. Gziki's e-mail.

I also credited respondent's plausible and unrebutted testimony that he obeyed Ms. DeLillo's instruction to leave but was distracted and forgot his cell phone. He went back to his desk, collected the phone, and left. This brief return to his desk cannot reasonably be seen as insubordination, since respondent's delay in leaving was prompted by legitimate needs to reply to Ms. Gziki's e-mail and then to retrieve his cell phone. The allegations concerning respondent's late departure and return to his desk on April 26 must be dismissed.

For the final date of May 28, it was undisputed that, at the end of the day, respondent was served with a letter ordering him to attend a meeting three days later to discuss three "incidents." Respondent testified that, after reading this letter, he felt he needed to stay later in order to review his files and e-mails and try to discover what the incidents referred to consisted of. He indicated that he had only two days to prepare and wanted to speak with his union representative as soon as possible (Tr. 129). He admitted that, in an effort to complete these tasks, he made a "mistake" and "lost track" of time (Tr. 130).

Respondent was justified in being anxious that the letter and the scheduled meeting concerned allegations of misconduct and that, as a result, his job might be threatened. Ms. Gziki's testimony demonstrated that, at this time, respondent was also being criticized by her for missing deadlines and completing assignments in an "unprofessional" manner. Nonetheless, respondent's decision to work two hours and 30 minutes beyond the time Ms. Gziki had told him he must leave, without seeking permission to do so, was misconduct. *See Ferrari v. NYS Thruway Auth.*, 62 N.Y.2d 855, 856 (1984); *Dep't of Environmental Protection v. Schnell*, OATH Index No. 2262/00 at 8 (Oct. 25, 2000)..

In sum, the allegations in charge I that respondent worked an hour and 30 minutes late on April 12 and two hours and 30 minutes late on May 28, in violation of Ms. Gziki's orders, should be sustained as misconduct. The other specifications in the first set of charges should be dismissed.

Failure to Report to Storeroom

The second set of charges (No. 0080/13D) alleges that, on May 1, 2013, respondent disobeyed an order to report to the general storehouse, failed to report any delays in arriving at the storehouse, and, two days later, falsely stated that he had reported that his vehicle was damaged.

Ms. DeLillo testified that, on May 2, 2013, respondent's immediate supervisor, Ms. Gziki, was on vacation. Ms. DeLillo, Ms. Gziki's supervisor, was managing the staff in Ms. Gziki's absence. Ms. DeLillo noticed that, on an assignment roster from Ms. Gziki (Pet. Ex. 1), Ms. Gziki wrote that, under respondent's assignments for May 1, "AM: With David at General Storehouse." When Ms. DeLillo checked the storehouse sign-in log (Pet. Ex. 2), she saw that

respondent signed in at 11:05 a.m. According to respondent's CityTime records, he arrived at work at around 8:30 a.m. (Tr. 14-19). Google mapping website (Pet. Ex. 7) indicates that the storehouse is 4.4 miles away from respondent's work location (Tr. 63-65).

On May 3, Ms. DeLillo met with respondent and his union representative to discuss the delay in respondent's arrival at the storehouse. Respondent said that he had had issues with a vehicle and could not "get in touch with" the proper individuals to whom he needed to report the vehicle problem. Ms. DeLillo asked respondent to prepare a written report on the matter (Tr. 21-23).

After the meeting, Ms. DeLillo contacted Mr. Anderson, who was in charge of the Department vehicles. Mr. Anderson told her that respondent had checked out a vehicle on April 29 for three days. There was no indication in the vehicle database that respondent had reported any problem with the vehicle (Tr. 23-24).

Mr. Anderson testified that, in March 2013, he assisted respondent in activating his computerized vehicle reservation account (Tr. 41-42). He recalled later receiving a visit on May 1 from respondent, who said that he wanted to report vehicle damage (Tr. 44). Mr. Anderson believed he was at meetings at the Municipal Building in Manhattan on May 1 from around 9:00 a.m. until 12:00 p.m., as reflected in his calendar (Pet. Ex. 4). He surmised that respondent's visit on May 1 must have occurred in the afternoon (Tr. 45-46). No damage to the vehicle was recorded in the computer system as of that date (Tr. 46-47).

Respondent testified that, on May 1, he arrived at work at 8:40 a.m. and immediately went to his assigned vehicle. There he noticed a "scar" on the vehicle and went about reporting it by calling the fleet telephone assistance number. He went back to his office and tried to call the appropriate phone number but could not find the PIN number he needed in order to access the automated system. He was unable to locate Ms. Gziki (Tr. 137). He ultimately visited the fleet share office on another floor to discover his PIN number and to report the problem (Tr. 132-33). He indicated that he called in the vehicle damage at around 9:55 a.m. (Tr. 137). Respondent provided photos (Resp. Exs. E and F) of his cell phone showing a display indicating he called the fleet share telephone number on May 1 at 8:58 a.m. and again 9:55 a.m. (Tr. 136).

Respondent did not recall speaking with Mr. Anderson in the afternoon about the vehicle (Tr. 163).

The undisputed facts here show that respondent reported for work at his usual time of 8:30 a.m. He was assigned by Ms. Gziki to report to the storehouse in the "AM," but did not arrive at the warehouse around 11:05 a.m. Respondent's explanation that his late arrival was due to his efforts to report damage to his assigned fleet vehicle is supported by the evidence of respondent's cell phone display, showing that he made phone calls to the fleet share support line at 8:58 a.m. and at 9:55 a.m. It is further supported by the testimony of Mr. Anderson, who recalled seeing and speaking with respondent that day.

All three of the allegations of misconduct concerning respondent's actions on May 1 must be dismissed. There was no proof that respondent was ordered to be at the storehouse at a specific time, other than a general direction that he must report in the "AM." There was no indication of what duties respondent was required to perform at the warehouse or that his arrival at 11:00 a.m. prevented him from completing his assignment or had any other adverse consequences. Nor was there any evidence as to when the other employee, also ordered to go to the storehouse, arrived. While it would probably have been prudent for respondent to communicate the reason for his delay to his acting supervisor, Ms. DeLillo, it was not shown to be insubordinate or otherwise misconduct that respondent failed to do so. In particular, no proof was offered to show that respondent was generally required to report a delay occasioned by administrative tasks to a supervisor, that respondent had ever been warned or criticized in the past for failing to report a delay to his supervisor, or that there was any adverse consequence occasioned by respondent's reporting to the warehouse at 11:00 a.m. instead of 9:00 a.m.

The discrepancy between Mr. Anderson's testimony and respondent's was never fully explained. Mr. Anderson recalled respondent reporting the vehicle problem to him in the afternoon, while respondent did not recall speaking with Mr. Anderson at all, stating instead that he spoke in the morning with a woman at the fleet office about his PIN number. However, whichever account is credited, it makes little difference to the outcome. Given the cell phone photos as well as the testimony of Mr. Anderson, the evidence demonstrates that respondent did, in fact, call the fleet share support line or contact the fleet share office to report the vehicle damage.

The fact that the fleet database did not record a call having been placed by respondent did not establish that respondent was lying. It was undisputed that, as of May 1, the new

computerized system had been in place for only one and one-half months (Tr. 52). It seemed more likely that, after respondent called the fleet number, he failed to navigate the automated telephone system with his PIN successfully and perhaps failed to realize that he had not logged in a damage complaint. The evidence therefore did not support the allegation that respondent's statements that he reported the vehicle damage were false.

In sum, the evidence does not support a finding of misconduct for any of respondent's actions on May 1 and these charges must be dismissed.

FINDINGS AND CONCLUSIONS

1. Charge I of case no. 0091/13D should be dismissed in part in that petitioner failed to prove that respondent was insubordinate on March 25, 26, 28, or April 26, 2013.

2. Charge I of case no. 0091/13D should be sustained in part in that, on April 12, respondent worked for one hour and 30 minutes beyond his scheduled work time of seven hours, and, on May 28, 2013, respondent worked for two hours and 30 minutes beyond his scheduled work time of seven hours, in violation of an order from his supervisor and Department Code of Discipline rule E(5).

3. Charge II of case no. 0091/13D should be dismissed in that petitioner failed to prove that respondent was insubordinate on April 26, 2013.

4. Charge I of case no. 0080/13D should be dismissed in that petitioner failed to prove that respondent committed misconduct in failing to report for a work assignment on May 1, 2013.

5. Charge II of case no. 0080/13D should be dismissed in that petitioner failed to prove that respondent neglected his duties on May 1, 2013.

6. Charge III of case no. 0080/13D should be dismissed in that petitioner failed to prove that respondent made a false statement on May 3, 2013.

RECOMMENDATION

Upon making the above findings, I was provided with personnel information by petitioner in order to make an appropriate penalty recommendation. Respondent was appointed to the Department as an assistant mechanical engineer in 2001, became a project manager in 2009, and has been disciplined twice. In 2006, following an OATH hearing, he was suspended for five days for insubordination in shouting at a supervisor. *See Dep't of Environmental Protection v. Berlyavsky*, OATH Index No. 1011/06 (Apr. 19, 2006). In 2010, he was served with misconduct charges and suspended for 30 days for insubordination and various refusals to cooperate with co-workers; in 2012, an arbitration determination upheld a portion of the misconduct charged, including much of the insubordination, and reduced the suspension to 21 days.

Petitioner submitted three evaluations of respondent from 2008, when he was an assistant mechanical engineer, and three evaluations from 2009, when he was a project manager. The 2008 evaluations range from "good" to "outstanding." Two of the 2009 evaluations are "very good." The third is "conditional," with the reviewer noting that other staff complained about respondent's "impatient," "critical," and uncooperative behavior. The five good to outstanding evaluations provide grounds for mitigation of the penalty. The "conditional" evaluation seems to repeat the misconduct charges from 2010. These evaluations mirror the portrait of respondent described by the agency witnesses: a generally capable employee who can be difficult to work with.

The facts found here show that respondent was insubordinate in twice disobeying an order to leave work after seven hours. At the same time, the facts show several additional mitigating circumstances, all of which must be weighed in determining a penalty. First, there was no evidence offered that the order that non-managerial workers leave work after seven hours served any specific agency policy. The evidence showed that co-workers with managerial titles frequently worked longer than seven hours in order to complete assignments and, presumably, to avoid the sort of criticism for missing deadlines that Ms. Gziki leveled at respondent. Respondent plausibly testified that he did not understand the rationale of forcing professionals to leave work at a certain time (Tr. 148) and that he felt humiliated by Ms. Gziki's orders.

As noted above, on May 28, respondent was ordered in writing late in the day to attend a meeting with an assistant commissioner with the ambiguous and ominous language of having to explain "three separate incidents" on April 15. Faced with an order to account for unspecified misconduct with no information except that it had occurred on a date some ten days earlier, it was reasonable for respondent to need to search his work records, including his e-mail, to try to discern what the basis for the complaints might be. Such a search could only be done in the work place. Furthermore, because respondent had been told by Ms. Gziki that he should do "union work" on his own time, it was reasonable for respondent to believe that doing research on this issue during the work day might be grounds for further criticism or even discipline.

It was notable that no employees other than respondent were disciplined for staying beyond seven hours. Ms. Gziki stated that she had spoken to two other workers about working longer than seven hours (Tr. 90). After being warned, these employees did not again stay longer than seven hours (Tr. 105). The past history concerning the imposition and later retraction of the seven-hour rule for non-managerial staff and the discipline of only respondent for violating the rule further suggested that respondent may have been singled out for discipline more because he was disliked than out of an office-wide concern for preventing workers from remaining for longer than seven hours.

Despite these numerous mitigating factors, petitioner sought exceptionally harsh penalties. At the hearing petitioner's attorney requested that respondent be suspended for 30 days for the first set of charges and an additional 44 days for the second set of charges (Tr. 264-65). Such high penalty requests seemed grossly disproportionate to the nature of the misconduct charged, which consisted of remaining in the office more than seven hours on several occasions and being two hours late for an assignment. Indeed, if imposed, such harsh penalties could run afoul of legal authority requiring that disciplinary penalties be appropriate to the misconduct. *See Pell v. Bd. of Education*, 34 N.Y.2d 222, 233 (1974) (disciplinary penalty imposed by an agency on a public employee can not be sustained "if the measure of punishment or discipline imposed is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness").

Petitioner's penalty requests were indicative of other aggressive arguments made during the hearing, arguments that seemed animated more by rancor toward respondent than by reason.

Even though both sets of charges in this case were created on the same date and involved the same issues and witnesses, petitioner's attorney insisted on scheduling them for two separate trial dates. When counsel for respondent sought to have the hearings consolidated because the same witnesses would be called in both cases, counsel for petitioner opposed this request on the grounds that the agency was entitled to separate trials so that any penalty for charges heard in a later hearing could be increased (Tr. 5-6). Counsel's interpretation of progressive discipline runs contrary to prior cases, which authorized increased penalties only where additional misconduct follows punishment for previous misconduct. *Dep't of Correction v. Ford,* OATH Index Nos. 734/13, 735/13, 736/13, 737/13, & 738/13 at 27 (May 23, 2013), *citing Human Resources Admin. v. Green*, OATH Index No. 3347/09 at 19-20 (Nov. 18, 2009) (progressive discipline requires that prior penalty must precede acts being sustained as misconduct).

In her cross-examination of respondent, counsel for petitioner asked if respondent had "no respect for women supervisors" (Tr. 152) and whether he had sent letters to the Commissioner complaining about issues at the workplace (Tr. 153). She offered an e-mail (Pet. Ex. 18) to show that respondent complains to the Commissioner about "daily petty management" issues (Tr. 156-57). In her closing, she argued a number of facts which she suggested warranted an increased penalty. She noted that respondent was "constantly questioning and challenging authority" (Tr. 260), that "there's something really wrong with his attitude towards work and how he interacts with his supervisors" (Tr. 262), and that "he jumps over seven levels of supervision to write the Commissioner e-mails" (Tr. 262). She noted that respondent falsely testified that he told Ms. DeLillo on April 26 that he forgot his cell phone (Tr. 263), and that respondent "altered the time records" to reflect a sign-out time on April 26 of 4:23 p.m. (Tr. 263), although no evidence to support these accusations was ever offered. To the extent that petitioner's severe penalty request is based on unproven allegations not included in the petition, the request must be rejected.

Another incident bearing on counsel for petitioner's animus toward respondent and his efforts to offer proof in contradiction of the charges bears noting. On the hearing date following the testimony of most of the witnesses, counsel for respondent complained that, following the hearing of August 21, respondent's witness, Dr. Moriates, had been charged with being AWOL from work on that date. The AWOL charge was based upon her appearance at OATH at 10:00

a.m., after allegedly being ordered to report at 2:00 p.m. Counsel sought a negative inference of retaliatory intent and bad faith against the Department, insisting that the charges against Dr. Moriates were intended to punish and discourage employees from testifying on behalf of other employees charged with misconduct (Tr. 190-91). Indeed, without reaching any fact-findings on the issue, it must be observed that AWOL charges against an agency employee for appearing early at a scheduled disciplinary hearing seem extraordinary. Given the tenor of the subjective assertions about respondent, there was some basis for respondent's concern that the actions against Dr. Moriates may have been aimed in part to punish her for testifying on behalf of respondent and to discourage her from doing so again.

Even given respondent's disciplinary history which includes a 21-day suspension for insubordination, the minor nature of the misconduct sustained, along with the substantial mitigation, indicates only a minimal penalty is warranted.

Accordingly, for the two instances of insubordination sustained here, I recommend that respondent be suspended for one day.

John B. Spooner
Administrative Law Judge

November 26, 2013

SUBMITTED TO:

CARTER STRICKLAND
Commissioner

APPEARANCES:

CARLA LOWENHEIM, ESQ.
Attorney for Petitioner

FAUSTO ZAPATA, ESQ.
Attorney for Respondent

December 26, 2013

I have been made aware of the circumstances which gave rise to the recent disciplinary proceedings brought against you. Administrative Law Judge John B. Spooner, having heard all the evidence, recommended that the charges be sustained in part and dismissed in part.

I hereby approve the findings of the Administrative Law Judge sustaining Charge I in # 0091/13D, for the dates April 12, 2013 and May 26, 2013, and I adopt those findings as my own.

For the reasons set forth below, I reject the findings of the Administrative Law Judge regarding the dismissal of Charges I & II for the date April 26, 2013.

For the reasons set forth below, I reject the findings of the Administrative Law Judge regarding the dismissal of all the charges in #0080/13D.

0091/13D

The findings of fact made by the ALJ regarding April 26, 2013, overlook relevant facts in the record. While respondent's CityTime records show that he clocked out on that date at 4:23 pm (Pet Ex. 17), he was still sitting at his desk with his computer on at 5:00 pm when his supervisor, Angela Delillo, accompanied by Mike Farnan, approached him (Pet. Ex. 17, Tr. 109, 219, 232-34). Ms. Delillo told him that he should not be there so late. Respondent's testimony was that he packed up and left a couple minutes after 4:23 pm (Tr. 149-50); clearly this was untrue if both Ms. Delillo and Mr. Farnan observed him still at his desk at 5:00 pm.

Respondent's contention, which was credited by the ALJ, was that he had received an email from his supervisor, Ms. Gziki, which "concerned attendance at an off-site work event the following work day." The ALJ concluded that "it was not misconduct for respondent to spend a few minutes reading and completing a reply to Ms. Gziki's e-mail."

However, the record is devoid of any proof that respondent actually did respond to an email from his supervisor after 4:00 pm on April 26. Respondent failed to provide a copy of the alleged email and/or his answer thereto.

Even if, *arguendo*, he was responding to an email, by his own testimony, respondent packed up his things and departed within a couple of minutes of clocking out at 4:23 pm (Tr. 129, 131, 149-50). While there is no evidence in the record supporting respondent's contention, there is eye witness testimony from two supervisors to support the fact that, on April 26, respondent was still at his desk at 5:00 pm. Clearly, respondent had not packed up his things and departed within a couple minutes of clocking out at 4:23 pm.

Additionally, while respondent did depart the work place at or shortly after 5:00 pm, he thereafter was observed returning through a different set of doors (Tr.11O). Ms. Delillo, who saw him come back, questioned respondent about his return. Other than giving her "a look," respondent ignored his supervisor's direct question (Tr. 110). No mention was made by respondent about why he was returning, providing further evidence of his violation of the directive to leave. While his testimony at the hearing was that he forgot his cell phone and was

only returning to get it (Tr. 131), he failed to provide any evidence to verify this. His failure to be responsive to his supervisor when questioned about his return should be construed against him. Had he actually answered the supervisor's question, she arguably could have granted him permission for him to be at the work place at that time. Without such permission, he was engaging in conduct prejudicial to good order, which violates rule E. 6 of the agency's Uniform Code of Discipline.

I specifically reject the ALJ's characterization of this set of charges as disciplining respondent "for working more than seven hours." These charges are for insubordination—respondent was repeatedly given a direct order by his supervisor to leave the work place after he had completed his seven hours (Tr. 73, 77, 81, Pet. Ex. 13, 14). Respondent, who disagreed and questioned this directive, failed to take the appropriate action to challenge it; i.e., by filing a grievance. Therefore, respondent had to obey the directive. By his own admissions, he did fail to obey the directive of his supervisor on at least two occasions, never asking her permission to remain at the work place after hours. I find that he also disobeyed it on April 26 and that there were no mitigating circumstances.

Therefore, I sustain Charge I, specification 5 and Charge II.

0080/l3D

Respondent was given an assignment for May 1, 2013 by his supervisor, prior to her departure on vacation, to be at the General Storehouse in the morning (Pet. Ex. 1). Based on respondent's arrival time at work (8:39 am) and the time it would take to drive to the General Storehouse (30 minutes or so), respondent should have been at his assigned work location for that day by 9:30 am (Tr. 19). When Ms. Delillo, who was acting as respondent's supervisor for that week, checked the sign-in sheet for that day at the General Storehouse, it showed that respondent had not arrived there until 11:05 am (Tr. 18, Pet. Ex. 2). Ms. Delillo then questioned where respondent was during that time since he was not at his assigned location (Tr. 21-22).

The respondent contended that he found damage on his agency-assigned vehicle that he then attempted to report to a centralized telephone number (Tr. 22). While he was allegedly doing this, he never contacted his supervisor—either to ask for assistance or to advise her of his whereabouts and/or his reason for his delay and absence from his assignment (Tr. 17, 137). That he allegedly looked for Ms. Delillo and she was not in her office was not confirmed by any proof. Respondent did not send her an email or telephone her to inform her of his delayed arrival. Doing either of these things would have provided documentation and lent support for his assertion that he did try to locate her.

Respondent is charged with violating rule E. 12 which states, "Employees shall not neglect their assigned duty or duties." "Neglect of duty" is defined by the Code as "the willful failure to properly perform any duty, an interference with the operations of the Agency, malingering, inefficiency, unalertness, lateness, unauthorized absence from a post of duty, . . ."

Respondent did not timely depart for nor did he arrive in a timely fashion to his assigned location on that morning. That he had not kept his supervisor informed of the reasons for the delay results in his being absent from his assigned area without authorization. Thus, respondent did violate rule E.12. It is not necessary, as the ALJ suggests, that the agency demonstrate what tasks

respondent had NOT performed at his assigned work location. The rule speaks just to be being present at the "post of duty." Failure to be present, under the circumstances herein, is a violation of the rule.

Furthermore, in that his assignment at that location for that day was a directive from his immediate supervisor which he failed to follow, respondent also violated rule E. 5 (failing to obey all lawful orders of their superiors).

On May 3, 2013, when Ms. Delillo questioned respondent about the events of May 1, 2013, respondent could not prove that he did report the vehicle damage he allegedly discovered on May 1. Even though he ultimately did produce screen shots of his office telephone's records which indicated that he dialed the car share program's number (Resp. Ex. E, F), there was no confirmatory evidence that he successfully made a report. No ticket was generated within the system reporting the damage (Tr.46). Furthermore, respondent had been assigned that car for the previous two days (Tr. 51). That on the third day of his use of the car he first discovered a "scar" puts his credibility at issue. Respondent was also unable to name the person who allegedly helped him retrieve his PIN number on May 1 and failed to produce that person to testify to those series of events. Given respondent's unsatisfactory explanations, without any verification through documentation or a witness, there was sufficient evidence to conclude that he made false reports on May 3, 2013, when questioned about the events on May 1.

Therefore, I sustain Charges I, II, & III.

I have considered the penalty recommended by the Administrative Law Judge for the charges he sustained and reject that penalty.

Respondent has previously been the subject of disciplinary proceedings and has received disciplinary penalties for similar misconduct consisting of a five-day suspension (2006) and a twenty-one day suspension (2010).

Therefore, IT IS HEREBY DETERMINED AND ORDERED that, in accordance with progressive discipline, the penalty to be imposed for the sustained charges brought under these two case numbers is a thirty (30) work day suspension without pay.

Carter H. Strickland, Jr.

THE CITY OF NEW YORK
CITY CIVIL SERVICE COMMISSION
----------X
IN THE MATTER OF THE APPEAL OF:
BERLYAVSKY, VIKTOR **DATE: 09/25/14**
Appellant:
-against
NYC DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent:
Pursuant to Section 76 of the New York
State Civil Service Law
----------x
PRESENT:

NANCY G. CHAFFETZ, COMMISSIONER
CHAIR

RUDY WASHINGTON, COMMISSIONER
VICE CHAIR

CHARLES D. MCFAUL, COMMISSIONER

FAUSTO E. ZAPATA, ESQ.
REPRESENTIVE FOR APPELLANT

CARLA LOWENHEIM, ESQ.
REPRESENTATIVE FOR RESPONDENT

APPELLANT PRESENT

STATEMENT

On Thursday, June 19, 2014, the City Civil Service Commission heard oral argument in the appeal of **VIKTOR BERLYAVASKY,** Project Manager, NYC Department of Environmental Protection ("DEP"), from a determination by the DEP, finding him guilty of charges of incompetency or misconduct and imposing a penalty of **Suspension** following an administrative hearing conducted pursuant to Civil Service Law Section 75.

THE CITY OF NEW YORK
CITY CIVIL SERVICE COMMISSION

In the Matter of the Appeal of

VIKTOR BERLYAVSKY
Appellant
-against-
NYCDEPARTMENT OF ENVIRONMENTAL PROTECTION
Respondent
Pursuant to Section 76 of the New York
State Civil Service Law
CSC INDEX NO.: 2014-0060

DECISION

PRESENT:

NANCY G. CHAFFETZ, COMMISSIONER
CHAIR

RUDY WASHINGTON, COMMISSIONER
VICE CHAIR

CHARLES D. MCFAUL
COMMISSIONER

VIKTOR BERLYAVSKY ("Appellant'") appeals from a determination of the New York Department of Environmental Protection ("DEP") finding him guilty of incompetency and misconduct and imposing a penalty of a 30-work day suspension following disciplinary proceedings conducted pursuant to Civil Service Law ("CSL'") Section 75. The Civil Service Commission ("CSC" or "Commission") conducted a hearing on June 19, 2014.

DEP charged Appellant, a Project Manager, with five charges involving insubordination, failure to perform/neglect of duties, and making false statements. DEP alleged several instances of Appellant violating DEP's policy for non-managerial employees to leave the workplace after seven hours of work and one instance of failure to report to a work assignment. The Office of Administrative Trials and Hearings ("OATH") Administrative Law Judge ("ALJ"), John B. Spooner, found Appellant guilty of one partial charge, and not guilty of the remaining charges,

and recommended a penalty of a l-day suspension. The DEP Commissioner rejected the ALJ's findings and penalty recommendation, and instead found Appellant guilty of all charges, and imposed a 30-work day suspension.

Appellant's Position

Appellant was represented by counsel who argued that the record did not contain substantial evidence to demonstrate that Appellant engaged in misconduct. Counsel also argued that, if the CSC were to sustain the findings of guilt the penalty should be modified to a reprimand.

Counsel argued that there were numerous indications in the record that Appellant had been unfairly targeted for discipline. Counsel stated that he had objected during the OATH hearing because Appellant was apparently the only employee who had been singled out for violating the policy of not leaving the work place after seven hours of work. Further, counsel stated that DEP had subsequently disciplined one of Appellant's witnesses, Stacy Moriates, for being absent without leave on the day she gave testimony at OATH, which he argued was retaliatory.

Counsel argued that the facts in the record did not show that Appellant intended to disobey a direct order. Counsel pointed out that the union had been actively negotiating with DEP regarding its policy that non-managerial employees must vacate the premises after seven hours. Thus, prior to receiving a written copy of the policy after the negotiations had concluded,

Appellant did not believe it was an effective order. When questioned by the Commission about Appellant's supervisor's having given him a direct verbal order on April 1, 2013 to leave the premises after seven hours, counsel argued that Appellant was still confused about the rule because of the union negotiations. Therefore, Appellant did not have an intent to disobey a direct order, and DEP had not demonstrated insubordination.

Counsel further argued that, if the Commission sustains the DEP Commissioner's findings of guilt, the penalty should be modified to a reprimand. Counsel pointed out that DEP had not demonstrated any injury caused by Appellant's actions, and that DEP derived a benefit from Appellant because he stayed late at work without pay.

DEP's Position

Counsel for DEP argued that ALJ Spooner's findings and penalty recommendation were inappropriate, based on the record. Counsel further maintained that the DEP Commissioner properly found that DEP had established the charges by a preponderance of the credible evidence, and the penalty imposed was not shocking to the conscience.

Counsel explained that DEP had requested large penalties for the five charges against Appellant, based on his previous disciplinary history and the principals of progressive discipline, yet ALJ Spooner had allowed his animus toward counsel to influence his findings and penalty recommendation. Counsel stated that ALJ Spooner had raised issues in his Report and Recommendation ("R&R") that were not within the subject matter of the hearing, and that he came to conclusions that were not supported by the record. Counsel pointed to page 12 of the R&R, where the ALJ took issue with DEP's failure to explain its goal in imposing the requirement for non-managerial employees to vacate the premises after seven hours. Counsel argued that the policy should not have been considered, because it was irrelevant to the ALJ's

analysis, and, instead, the ALJ should have considered whether Appellant was given a valid order that he should have obeyed. Counsel also pointed out ALJ Spooner's statement on page 14 of the R&R that counsel for DEP demonstrated ··animus" toward Appellant during cross-examination, but argued that she had a good faith basis for each question she presented during the OATH hearing. Finally, counsel argued that it had been inappropriate for ALJ Spooner to mention in his R&R the disciplinary charges against Ms. Moriates as evidence of DEP's animus toward Appellant. That disciplinary case was not before ALJ Spooner at the time, and the charges had not yet been filed at the time that he wrote his R&R.

Counsel for DEP further argued that the DEP Commissioner's review of the case had been appropriate. Counsel stated that the 30-day suspension is not shocking to the conscience and is consistent with progressive discipline, where Appellant has already been subjected to two suspensions (five days for the first and 21 days for the second).

Analysis

The Commission has carefully reviewed the record adduced below and considered the arguments on appeal. We find that ALJ Spooner's findings were well-reasoned and supported by the record. Accordingly, we reverse the findings of the DEP Commissioner, and adopt the

findings of ALJ Spooner.

However, we find that the ALJ erred in his analysis of the mitigation for Appellant's misconduct. The ALJ addressed several aspects of the case that he characterized as revealing animosity toward Appellant. The discussion of these factors suggests that they were accorded

greater weight than they deserved. Ultimately, the penalty recommended by the ALJ did not properly account for the principle of progressive discipline.

Unless misconduct is serious enough to warrant immediate dismissal, the principle of progressive discipline requires that long-term employees be given adequate warning that a pattern of similar misconduct may result in termination of employment. We note that Appellant was appointed in 2001, and has been suspended without pay twice (once for five days and once for 21 days). Therefore, we find that a 15-day suspension is more appropriately aligned with the findings adopted herein, and with the principles of progressive discipline.

Decision

Accordingly, the Commission hereby reverses the DEP Commissioner's findings of guilt, and affirms the OATH ALJ's findings. In addition, the Commission hereby modifies the penalty to a 15-day suspension. Appellant is to be reimbursed within 30 days of this decision.

NANCY G. CHAFFETZ, COMMISSIONER
CHAIR

RUDY WASHINGTON, COMMISSIONER
VICE CHAIR

CHARLES D. MCFAUL
COMMISSIONER

Dated: September 25, 2014