

# ***Dep't of Sanitation v. Adkinson***

OATH Index No. 2170/14 (Jan. 25, 2016)

Evidence showed that sanitation worker failed to submit required documentation for emergency leave and sick leave, was not accessible while on sick leave, and failed to report to the Department's medical clinic when required. Termination from employment recommended. But the Department is urged to consider respondent's expressed desire to retire shortly as a viable alternative.

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## **NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS**

*In the Matter of*  
**DEPARTMENT OF SANITATION**  
*Petitioner*  
*- against -*  
**VICTOR ADKINSON**  
*Respondent*

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### **REPORT AND RECOMMENDATION**

**INGRID M. ADDISON**, *Administrative Law Judge*

The Department of Sanitation ("Department" or "petitioner") brought this proceeding under section 16-106 of the Administrative Code against sanitation worker Victor Adkinson, alleging that respondent failed to provide timely and/or proper medical documentation while on sick leave, did not remain home and accessible while on sick leave, and failed to report to the medical clinic when required, in violation of sections 7.5, 7.6, 7.8, and 7.9 of the Department's Code of Conduct. Petitioner also charged respondent with being absent without authorized leave ("AWOL") and with failing to provide documentation to support requests for emergency leave which were granted, in violations of sections 1.4 and 1.5, respectively, of the Department's Code of Conduct (ALJ Ex. 1).

A trial commenced on July 9 and was scheduled to continue on August 14, 2014. Prior to the second day of trial, respondent suffered a stroke which affected his speech. I was also informed that respondent had another serious health concern. I adjourned the matter to September 26, 2014, for the parties to decide how they wanted to proceed, as there was some

indication that respondent might have applied for disability retirement. On September 26, 2014, petitioner informed me that respondent was still out on sick leave and was not scheduled to be evaluated by the Department's health care facility until November. Pursuant to section 1-26(c) of this tribunal's Rules of Practice, the matter was removed from the trial calendar and placed on open status. *See* 48 RCNY 1-26(c) (Lexis 2015). On August 6, 2015, the Department requested that the matter be restored to the trial calendar, and a continued trial date of November 18, 2015, was set.

On the first day of trial, the parties stipulated to amendment of the charges with the withdrawal of complaint numbers 105128 and 108450, which alleged violations of the Department's sick leave policy on May 4 and October 3, 2012, and the addition of complaint numbers 120794 and 120846, alleging violations of the sick leave policy on March 28 and April 4, 2014. Petitioner relied on documentary evidence and the testimony of Supervisors Richard Ferraro and Steven Boettcher. On the second day of trial, respondent, with some difficulty, testified on his own behalf and offered documentary evidence.

For the reasons below, I find that the Department sustained the majority of its charges against respondent, and recommend that respondent be terminated from his employment. However, in light of respondent's expressed desire to retire, I urge the Department to consider his retirement in lieu of termination.

### **ANALYSIS**

#### *Absence Without Leave Authorization*

Section 1.4 of the Department's Code of Conduct prohibits employees from being AWOL. Dep't of Sanitation Code of Conduct 2010-06 § 1.4 (eff. Mar. 1, 2010). Petitioner charged that respondent was AWOL on December 13, 2011, and January 5, 2014 (complaint numbers 101142 and 118517, respectively).

Richard Ferraro started with the Department in 1999 as a sanitation worker. He was promoted first to supervisor and then superintendent in March 2011, working as a rotating superintendent in the Manhattan West 4 district, to which he was permanently assigned from June 2011 until May 2013. He has known respondent since he (Ferraro) was assigned to Manhattan West 4 district, and has had no problems with respondent's work. As superintendent, Mr. Ferraro's job includes oversight of his district including time and leave issues of district

personnel. He explained that an employee who expects to be late for a shift should notify the office at least one hour before the shift begins. For the night shift, the borough superintendent will decide whether or not to let the employee report for work (Tr. 29-31). Calls from employees are recorded in a telephone order book. Mr. Ferraro admitted that there may be occasions when the recipient of a call may neglect to note it in the telephone log book. Citytime records are used for payroll purposes and reflect an employee's time and leave with accompanying explanations. An employee's absence and lateness are also hand-recorded in an absence and lateness report for each employee (Tr. 8-14, 33-34, 36).

December 13, 2011 (Complaint No. 101142)

Superintendent Ferraro testified that on December 13, 2011, respondent was scheduled to work the midnight to 8:00 a.m. shift. The telephone order book for that day contained a notation by Supervisor Speroni at about three minutes after midnight, that respondent had neither called nor reported for work. Respondent's absence and lateness report had a similar notation. As a result, respondent was marked as AWOL in Citytime (Tr. 12-18; Pet. Exs. 1A-C).

Respondent did not challenge the charge, which I found to be supported by the evidence. Therefore, the charge that respondent was AWOL on December 13, 2011, is sustained.

January 5, 2014 (Complaint No. 118517)

According to Superintendent Ferraro, respondent was scheduled to work the midnight to 8:00 a.m. shift on January 5, 2014 (Tr. 29). The Department produced the telephone order book for January 5, 2014, which showed two entries by Supervisor Speroni. The first, at 12:15 a.m., indicated that respondent was "no call no show" (Pet. Ex. 4A). The second notation, made at 12:30 a.m., indicated that respondent had called to say that he had overslept, and was told by Supervisor Speroni that he had been marked as "no call, no show" and that the borough office had been notified. Respondent was recorded as AWOL in Citytime (Tr. 28-29, 31-32, 53-54; Pet. Exs. 4A-C). Superintendent Ferraro conceded however, that the complaint appeared to be respondent's first AWOL in a 12-month period, and that in the past, the first AWOL in a rolling 12-month period was heard at the borough and not sent for trial (Tr. 57-58).

Respondent offered no explanation for the charge, which I find to be sustained.

*Failure to Follow Emergency Leave Procedures*

Under section 1.5 of the Department's Code of Conduct, employees who cannot report to work must call and notify their work location as such, at least one hour before their assigned tour of duty. They must tender a valid reason for their inability to report to work, and must present verifiable proof of the emergency within 48 hours of the request. If unable to call at least one hour before his/her scheduled tour of duty, the employee must give a reason that is acceptable to the Department. Dep't of Sanitation Code of Conduct 2010-06 § 1.5 (eff. Mar. 1, 2010).

The Department charged that respondent was granted emergency leave for his tours of duty on March 12, 2012, and April 2, 2013, and failed to produce documentation to support the reasons he proffered for his leave.

March 12, 2012 (Complaint No. 103579)

Superintendent Ferraro testified that respondent was scheduled to work the midnight to 8:00 a.m. tour of duty on March 12, 2012. At approximately 10:51 p.m., respondent called to inform his work location that his car was down. He was granted emergency leave. The telephone log book showed that the call was taken and noted by Department worker A. Byrd. Superintendent Ferraro never received proof from respondent to support the need for emergency leave. Thus, respondent's absence was recorded in Citytime as "unscheduled leave [without] pay" (Tr. 21-24; Pet. Exs. 2A-C). The superintendent acknowledged that documentary proof could pass through the hands of multiple persons before he receives it. It is then forwarded to the borough superintendent. If approved, it is returned to the district office and no complaint would be issued (Tr. 38-39). A worker who is granted emergency leave must deposit a DS-1005 form with proof of the emergency in a tray on Superintendent Ferraro's desk, or be given to his clerk (Tr. 40-41). He stated that prior to issuing the complaint against respondent on March 22, 2012, he confirmed with his clerk that respondent had not submitted proof of the emergency. Further, respondent confirmed to the superintendent that he had submitted no proof (Tr. 47-49).

April 2, 2013 (Complaint No. 112633)

According to Superintendent Ferraro, on April 2, 2013, respondent was assigned to work the 6:00 a.m. to 2:00 p.m. shift. At around 5:00 a.m., respondent called and notified Supervisor Speroni that his car was down. Supervisor Speroni noted in the telephone order book that he instructed respondent to bring proof within two days. Respondent brought no proof, so his

request for emergency leave was recorded in Citytime as “Leave without pay” (Tr. 25-27, 50; Pet. Exs. 3A-C).

For both dates, respondent did not challenge the charges, which I find to be sustained.

#### *Violation of Multiple Rules re Medical Leave*

Sanitation workers receive unlimited sick leave, but strict conditions are attached to its usage. First, workers may not leave their homes without authorization while on paid sick leave. Dep’t of Sanitation Code of Conduct 2010-06 § 7.5 (eff. Mar. 1, 2010). Second, while on sick leave, they must take reasonable steps to ensure that they are accessible for Department phone calls or home visits. *Id.* at § 7.6. Third, if they receive authorization to leave home for a doctor’s visit or other appointment, they must provide supporting documentation to the Department. *Id.* at § 7.9. Further, category C workers who have extensive sick leave usage must report to the clinic on the first day of sick leave or document their inability to do so. *Id.* at § 7.8; Department Policy and Administrative Procedure (PAP No. 2007-04 § III (C) (Aug. 1, 2007).

Steven Boettcher, a Department employee since 1993, is a supervisor in the Department’s Supervised Sick Leave Unit (“SSLU”). His responsibilities include reviewing documentation that supports complaints of violations of the Department’s sick leave rules, and determining whether a complaint should be forwarded for hearing (Tr. 60-62). Supervisor Boettcher testified that sanitation workers on medical leave obtain an authorization code to leave their home by calling the Department’s dedicated automated system, and entering certain information. When they return home, they must log back in to the automated system (Tr. 77-78). If a Department investigator from the SSLU visits the home of a worker on medical leave and finds the worker out of residence, the investigator leaves a DS 424 form to apprise the worker of the visit. Upon receipt of the DS 424, the worker must call the automated system, provide his reference number, and leave a message (Tr. 80-81).

Within 48 hours of being out of residence, a worker on paid medical leave must provide documentary support for being out of residence.<sup>1</sup> The worker may mail the documents to a post office box at Canal Street Station, take it in-person to the clinic, or leave it at the garage of his work location when he collects his paycheck. Mr. Boettcher testified that he would wait up to 14

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<sup>1</sup>Rule 7.9 does not establish a time frame for submitting documents. But the DS 424 appraises employees that within 48 hours, they must provide documents to substantiate their whereabouts if they are out of residence when visited.

days for documents before issuing a complaint (Tr. 79, 87). Up until then, he would check a worker's file for medical notes. Even though the worker should submit an original note, if Supervisor Boettcher receives an electronic note from the doctor's office, he does not generate a complaint (Tr. 88).

Mr. Boettcher conceded that if a worker is receiving physical therapy from a chiropractor three times per week, one doctor's note will suffice for the three visits, which may be at odds with the requirement that medical notes be submitted within 48 hours (Tr. 91-92). He added that once a complaint is generated, he cannot void it (Tr. 81).

In August 2012, respondent, who has been a sanitation worker since July 1995, was involved in an automobile accident which caused him to sustain neck, back and shoulder injuries. Following the accident, he had shoulder surgery and was out of work for about one year, during which he received physical therapy almost daily. After he was reinstated to work, respondent suffered a stroke on March 11, 2014, during a visit to the clinic. Since then, he has not been cleared to return to work. Respondent noted that after Hurricane Sandy in October 2013, the Department's clinic relocated from Beaver Street to the Central Repair Station ("CRS") in Maspeth, Queens. He admitted that he is very familiar with the Department's sick leave rules, but stated that he has no recollection of what he submitted. Respondent insisted, however, that he submitted notes in person either to the clinic when he visited, or to the CRS (Tr. 177-82, 184). He also stated that the Department had granted him walking privileges, to permit him to leave his house for part of the day (Tr. 187).

The Department initiated 17 complaints alleging that respondent violated sections 7.5, 7.6, 7.8 and 7.9 of the Department's Code of Conduct. The complaints cover approximately 26 days over a period of 19 months (September 2012 through April 2014) during which respondent was on paid medical leave. To establish the charges, the Department submitted copies of home visitation and call notices (DS 424) which the SSLU visiting investigator left at respondent's residence of the days that he visited respondent, medical progress notes from the Department's clinic, and the Department's call-in logs. The following analysis of the charges and the supporting evidence is addressed by the manner in which they were grouped in the petition.

**Complaint Nos. 108279, 112188**

The Department alleged that on September 19, 24 and 26, 2012, respondent was: away from his home without authorization; was not accessible for a Department call or home visit on September 19 and 24; and failed to provide medical documentation for his absence from home on September 26, 2012. The Department further alleged that respondent failed to remain at home on February 26 and 27, 2013, was not available for a visit or telephone call on February 26, 2013, and failed to submit medical documentation for his out-of-residence doctor's visit on February 27, 2013, all in violation of sections 7.5, 7.6 and 7.9 of the Department's Code of Conduct (ALJ Ex. 1).

Complaint No. 108279

On September 19, 2012, SSLU Investigator Wai Keung Lee visited respondent's home at 2:19 p.m. and found him to be out of residence. On the DS 424, Investigator Lee documented that he rang respondent's door bell and called respondent by phone at 2:20 p.m. Respondent answered and told the investigator that he was at the doctor. Investigator Lee left a copy of the DS 424 at respondent's door. Supervisor Boettcher testified that according to the Department's automated call records which display the caller's telephone and unique reference number, respondent did not obtain an authorization code to be out of residence on September 19, 2012, and did not submit a medical note for that date (Tr. 63-68, 89; Pet. Exs. 5A, 5F).

Respondent did not dispute that he was not at home on September 19, 2012, or that he failed to provide documentation to the Department. At trial, he presented medical records from Max-Health Chiropractic of NY to establish that he received physical therapy on the date in question, thereby justifying him being out of residence (Resp. Ex. F). However, he neither called for authorization nor submitted a note to support his absence from home within 14 days, which I find to be a reasonable timeframe. Thus, respondent violated sections 7.5 and 7.9 of the Code of Conduct. The Department's charge that respondent violated section 7.6 of its Code of Conduct is not sustained because the investigator was able to reach respondent by telephone.

Supervisor Boettcher testified that on September 24, 2012, Investigator Lee called respondent. The investigator completed a DS 424 which showed that he placed two calls to respondent, at 1:27 p.m. and 2:27 p.m., and left a message for respondent to return his call. Respondent never returned the call. Later the same day, SSLU Investigator James Lightfoot visited respondent's home at 3:30 p.m. He rang respondent's door bell, and called and left

respondent a voice message. The investigator departed at 3:40 p.m. after leaving a copy of the DS 424 in respondent's mailbox. Supervisor Boettcher further testified that respondent never obtained authorization to be out of residence on that day (Tr. 69-70; Pet. Exs. 5B-C, 5F).

Respondent did not dispute that he failed to call for authorization to be out of residence on September 24, 2012. He presented proof that he was at the physical therapist (Resp. Ex. E). But, while on sick leave, sanitation workers must be accessible by telephone to the SSLU investigators. *See Dep't of Sanitation v. Cunningham*, OATH Index No. 2507/11 at 17 (Nov. 10, 2011), *modified on penalty*, Comm'r Dec. (Jan. 19, 2012); *Dep't of Sanitation v. Ayala*, OATH Index No. 1748/05 at 6 (Oct. 31, 2005). Respondent's failure to obtain authorization and his inaccessibility for a home visit or telephone call violate sections 7.5 and 7.6 of the Department's Code of Conduct.

On September 26, 2012, respondent called the Department's automated system and was issued authorization code number 45000 to leave his residence. According to Supervisor Boettcher, respondent submitted a medical note for his September 26, 2012 doctor's visit on January 9, 2013, approximately three and a half months after the visit (Tr. 70-73; Pet. Ex. 5F). The same medical note covered visits on September 24 and 28, 2012 (Tr. 93). Supervisor Boettcher maintained that the late submission of proof does not invalidate the complaint that respondent violated the Department's rule (Tr. 74). Accordingly, I find that respondent's late submission of the note to support his medical visit was a violation of section 7.9 of the Department's Code of Conduct.

In sum, the charge that respondent failed to remain home while on sick leave on September 26, 2012, should be dismissed, because he had obtained authorization to be out of residence on that day, and provided proof that he was at the physical therapist. The charge that he did not submit documentation to support his medical visit within a reasonable time should be sustained.

#### Complaint 112188

According to Supervisor Boettcher, Investigator Lee paid respondent a home visit on February 26, 2013. On a copy of the DS 424 notice which the investigator left at respondent's door, he indicated that a "lady" told him that respondent was not at home (Tr. 142; Pet. Ex. 15A). The DS 424 instructed that if respondent was not assigned an authorization code to be out of residence, he should call a particular number identified on the form. Supervisor Boettcher



testified that respondent neither obtained an authorization code to be out of residence nor called in response to the DS 424 (Tr. 142). The following day, Investigator Lee paid respondent another visit and found him to be out of residence. He called respondent and learned that respondent was at the doctor. Investigator Lee left a DS 424 at respondent's door (Tr. 142-43; Pet. Ex. 15B). Supervisor Boettcher testified that respondent had obtained authorization code number 51042 to be out of residence on February 27, 2013, but as of the date of trial, had not submitted documentation to support his doctor's visit (Tr. 141-43; Pet. Ex. 15D).

Respondent did not contest the charges, which I find to be sustained with respect to respondent's absence from his residence on February 26, 2013, and his failure to make himself available by telephone. With respect to February 27, respondent obtained authorization to be out of residence. Therefore, the charge that he failed to remain home on that date while on sick leave is unsupported. However, the charge that he failed to provide documentation in support of his doctor's visit is sustained as respondent did not prove otherwise.

#### **Complaint Nos. 108267, 109169, 109170, 109171 and 111504**

Petitioner alleged that respondent was away from his home without authorization while on sick leave on multiple days in October 2012,<sup>2</sup> and on February 4, 2013, and failed to submit medical notes for his absences from his home on the respective dates, in violation of sections 7.5 and 7.9 of the Department's Code of Conduct (ALJ Ex. 1).

##### Complaint No. 108267

Documentation submitted at trial showed that at approximately 11:27 a.m. on October 3, 2012, respondent called and obtained authorization code 45476, to be out of residence. Supervisor Boettcher testified that he wrote the complaint against respondent on October 17, 2012, two weeks after respondent's doctor's visit, when respondent failed to submit a medical note (Tr. 96-97; Pet. Ex. 6B).

The Department's evidence that it issued respondent an authorization code to leave his home is incompatible with its charge that respondent failed to remain at home during sick leave. Moreover, respondent presented proof that he was at the physical therapist on that date (Resp. Ex. F). On the other hand, respondent did not dispute that he failed to provide documentation, as

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<sup>2</sup> The complaint alleges that respondent was out of residence without authorization on October 3, 9, 10, 17, 18, 19, 22 and 25, 2012 (ALJ Ex. 1).

required, in support of his visit. Accordingly, the allegation that respondent failed to remain at home on October 3, 2012, while on sick leave, should be dismissed. But, the charge that he failed to submit a note for his visit to the doctor on that date, is sustained.

Complaint No. 109169

Supervisor Boettcher testified that on October 9, 10, and 17, 2012, respondent obtained authorization code numbers 45749, 45824 and 46245, respectively, for him to leave his residence (Tr. 100-04; Pet. Ex. 7E). On October 9, SSLU Investigator Ragusa called respondent at 12:53 p.m., and left a message for respondent to return his call by 1:53 p.m. (Pet. Ex. 7A). Meanwhile, Investigator Lee visited respondent's home at 1:50 p.m. He got no response when he rang respondent's bell, and left a DS 424 in respondent's mailbox (Pet. Ex. 7B). Investigator Lee also visited respondent at 2:16 p.m. on October 10, 2012, and was told by respondent's father that respondent had gone to the doctor. He visited respondent at 3:59 p.m. on October 17, 2012, and respondent was not at home. He called respondent and learned that respondent was authorized to leave his home. On both occasions, the investigator left DS 424 forms for respondent (Pet. Exs. 7C-D). Supervisor Boettcher issued complaint number 109169 on December 4, 2012 (Tr. 103). At trial, Supervisor Boettcher testified that respondent submitted no documentation for his October 9, 2012 doctor's visit, but did so for his October 10, 2012 visit on January 9, 2013 (Tr. 104). He conceded that that was an error because the note submitted on January 9, 2013, covered multiple visits which included October 9 and 10, 2012 (Tr. 105-07). In any event, the submission of that note in January 2013, was well beyond the time that respondent should have submitted it. Likewise, a doctor's note dated October 26, 2012, which respondent submitted on the first day of trial, in support of his visits on October 17, 18 and 19, 2012 (Resp. Ex. A), was well beyond the 48 hours that respondent had to submit it, and well beyond the extra time that Supervisor Boettcher extends.

In sum, the evidence supports that respondent was authorized to leave his home on October 9, 10 and 17, 2012. Hence, the allegation that his absence from home on those dates was unauthorized is not sustained. However, while respondent eventually submitted notes to cover his doctor's visits for the three days, his submissions were extremely delinquent. Thus, the Department's allegations that he failed to produce medical documentation in violation of section 7.9 of the Department's Code of Conduct were appropriate and should be sustained.

Complaint No. 109170

Supervisor Boettcher stated that respondent was issued authorization code numbers 46316, 46393 and 46503, to be out of residence on October 18, 19 and 22, 2012 (Tr. 111; Pet. Ex. 8F). On October 18, 2012, SSLU Investigator Lee visited respondent while he was out. The investigator called respondent and was informed that respondent had an authorization code to leave his residence. The investigator left a DS 424 at respondent's door (Pet. Ex. 8A). Supervisor Boettcher testified that respondent submitted documentary proof for his doctor's visit on October 18. On October 19, 2012, another SSLU investigator called and left a message on respondent's answering machine for him to call (Pet. Ex. 8C). Investigator Lee visited respondent on October 22, 2012. He called respondent and learned that respondent was at the doctor. The inspector left a DS 424 in respondent's mailbox (Pet. Ex. 8D). Supervisor Boettcher testified that respondent's medical note for his October 19, 2012 visit was submitted on December 11, 2012, and that he submitted no documentation for his October 22, 2012 visit (Tr. 111-12). Respondent's visits to his doctor on October 18 and 19, 2012, were covered by one note. Thus, it would appear that for both dates, respondent was delinquent by submitting the note in December (Resp. Ex. A). At the hearing, respondent belatedly submitted a doctor's note dated October 26, 2012, for his visit on October 22 (Resp. Ex. B).

Because the evidence supports that respondent had authorization to be out of residence on October 18, 19 and 22, 2012, the charge that he was out of residence on those dates without authorization should be dismissed. However, the charge that respondent failed to submit documentation for his medical visits for all three dates should be sustained, since his submissions were excessively delinquent.

Complaint No. 109171

On October 25, 2012, Investigator Lee visited respondent's residence at around 3:15 p.m. He rang respondent's doorbell and also called respondent. The investigator waited for about 10 minutes after which he left a DS 424 at respondent's door and left (Pet. Ex. 9A). Rule 7.5 requires employees who are on medical leave to remain at home during paid sick leave "unless they have received authorization to leave . . ."). Supervisor Boettcher acknowledged that respondent had obtained authorization code number 46715, to leave his home on the day in question (Tr. 118-19; Pet. Ex. 9B). In light of that, the charge that respondent failed to stay at home on October 25, 2012, should be dismissed. However, respondent did not submit a doctor's

note of his visit until the first day of trial (Tr. 119; Resp. Ex. B). Therefore, the charge that he failed to submit medical documentation as required, in violation of section 7.9 of the Department's rules, is sustained.

Complaint No. 111504

Supervisor Boettcher testified that on February 4, 2013, respondent called and obtained an authorization code to be out of residence for a doctor's visit. Investigator Lee went to respondent's home on the same day and was told by respondent's son that his father had gone to the doctor. Investigator Lee left a DS 424 in respondent's mailbox. According to Supervisor Boettcher, respondent only submitted proof of his medical visit after the charge had been initiated against him (Tr. 139-40; Pet Exs. 14A-B).

The Department acknowledged that respondent received authorization to be out of his home on February 4, 2013. Therefore, the charge that respondent violated section 7.5 of the Department's rules on February 4, 2013, by being out of his residence should be dismissed. On the other hand, by being delinquent in submitting his medical note to support his reason for being out of residence, respondent violated section 7.9 of the Department's Code of Conduct. As such, that portion of the charge should be sustained.

**Complaint Nos. 109793, 109980, 110547, 111023, 112273, 114280, 118228, 120794 & 120846**

The Department charged respondent with failing to remain home while on sick leave and failing to make himself available for a home visit or telephone call while on sick leave, on December 7, 11 and 13, 2012, on January 7 and 15, March 6, June 11 and 12, and December 17, 2013, and on March 28 and April 4, 2014, in violation of sections 7.5 and 7.6 of the Department's Code of Conduct (ALJ Ex. 1).

Complaint No. 109793

Supervisor Boettcher testified that at around 2:55 p.m. on December 7, 2012, SSLU Investigator Lee visited respondent, who was not at home. The investigator completed a home visit form which showed that he spent about 10 minutes at the home. He also called respondent's telephone number while there. He eventually left a DS 424 at respondent's home. The Department generated a report of authorizations that were granted for that date, and respondent's number was not amongst them (Tr. 125-27; Pet. Exs. 10A-C).

Respondent presented a report from Stand-Up MRI of Manhattan, P.C., which revealed that on December 7, 2012, respondent had an MRI scan of his cervical spine, thereby justifying his absence from home on that day. He did not challenge, however, that he had not obtained authorization to leave his home, or made himself available by telephone. Accordingly, I find that the charges against respondent as they relate to December 7, 2012, are sustained.

Complaint No. 109980

On December 11, 2012, Investigator Lee went to respondent's residence at around 2:30 p.m., called respondent about one minute later. He left at around 2:40 p.m., after placing a DS 424 in respondent's mailbox. On December 13, 2012, the investigator went to respondent's home at around 1:24 p.m., and called respondent about one minute later. Respondent answered and told the investigator that he was at the doctor. The investigator also left another DS 424 in respondent's mailbox on that date. Supervisor Boettcher testified that the messages report revealed that on neither day did respondent call for authorization to leave his home (Tr. 128-31; Resp. Exs. 11A-D).

Respondent made no effort to refute the charges, which I find to be sustained, with one exception. The investigator's report noted that respondent answered the investigator's telephone call on December 13, 2012. Therefore, while on both dates, respondent violated section 7.5 of the Department's Code of Conduct by being out of his residence without authorization, I find that a violation of section 7.6 of the Code occurred on December 11, but not on December 13, 2012.

Complaint No. 110547

On January 7, 2013, Investigator Lee visited respondent at around 2:07 p.m., and found him to be out of residence. The investigator noted on his DS 424 form that he called respondent at 2:08 p.m., and left the residence at around 2:17 p.m., after leaving the form in respondent's mailbox. According to Supervisor Boettcher, respondent did not answer the phone when the investigator called him. Further, respondent never obtained an authorization code for being out of residence (Tr. 133-36; Pet. Exs. 12A-C).

Respondent did not deny being out of residence or even failing to obtain an authorization code. Instead, he submitted a doctor's note to support that on January 7, 2013, he attended the doctor for treatment (Resp. Ex. D).

Even though respondent's submission supported a legitimate reason for him to be out of residence, respondent failed to obtain authorization for that purpose, and thus, was not permitted to be out. He therefore violated sections 7.5 and 7.6 of the Department's Code of Conduct.

Complaint No. 111023

Supervisor Boettcher testified that Investigator Lee visited respondent's premises at around 1:45 p.m. on January 15, 2013. When he called respondent's telephone number, respondent answered and told the investigator that he was at the doctor. The investigator left a copy of the DS 424 form at respondent's door. Supervisor Boettcher testified that respondent failed to obtain authorization to be out of residence (Tr. 137-38; Pet. Ex. 13A-C).

To justify being out of residence, respondent presented a letter from a law firm, reminding him of an appointment scheduled for January 15, 2013, at "2:30 p.m.; 3:00 p.m.," at an address in Brooklyn which appeared to be the offices of an orthopedist and a chiropractor (Resp. Ex. E). No documentation was presented to establish that respondent kept the appointment. But even if he did, he was still required to obtain authorization to leave his residence. He failed to do so. Accordingly, I find that the charge against respondent is sustained.

Complaint No. 112273

According to Supervisor Boettcher, if an investigator from the SSLU calls a worker who is on sick leave and there is no answer, the investigator must call three times in one hour. However, if the investigator's call triggers the answering machine, the investigator must leave a voice message and give the worker one hour to call back. On March 6, 2013, SSLU Investigator Ragusa called respondent's number at around 3:03 p.m., and got his answering machine. The investigator left a message and then called back at around 4:03 p.m., documenting his calls on a DS 424A call notice form. Supervisor Boettcher testified that respondent did not call for an authorization code (Tr. 144-46; Pet. Exs. 16A, B1, B2).

Respondent did not contest the charge which I find to be sustained.

Complaint No. 114280

On June 11, 2013, Investigator Lee arrived at respondent's home at around 12:24 p.m. He called respondent one minute later and also rang the bell. He left about ten minutes later after placing a DS 424 in respondent's mailbox (Pet. Ex. 17A). The following day, on June 12, 2013, another SSLU investigator called respondent at around 4:27 p.m., and got respondent's answering machine. The investigator called back at around 5:22 p.m. and still got no reply from

respondent (Pet. Ex. 17B). Again, respondent did not call for an authorization code, permitting him to be out of his residence (Tr. 147-48; Pet. Exs. 17C1, C2). Accordingly, I find the charge to be sustained.

Complaint No. 118228

On December 17, 2013, Investigator Lee called respondent's phone at 1:08 p.m., 1:38 p.m., and 2:08 p.m. Respondent did not answer, and neither was his answering machine triggered. The investigator's DS 424A indicated that he let the phone ring ten times on each occasion (Pet. Ex. 18A). Supervisor Boettcher testified that respondent had not called for an authorization code to be out of residence, and he did not call the clinic following the investigator's call (Tr. 149-50; Pet. Ex. 18B).

This charge, which was not challenged by respondent, is sustained.

Complaint No. 120794

On March 28, 2014, Investigator Lee visited respondent's home. He called from outside, got respondent's answering machine, and left respondent a message. According to Supervisor Boettcher, respondent did not return the investigator's call. In addition, respondent had not received authorization to leave his residence (Tr. 151-52; Pet. Exs. 19A, B1-B3). On April 4, 2014, Investigator Lee paid respondent another home visit. At around 2:54 p.m., the investigator called respondent who answered the phone and told the investigator that he was not at home. Supervisor Boettcher acknowledged that respondent submitted a medical note on April 24, 2014, but stated that nevertheless, respondent had not called in for authorization to be out of residence as he should have (Tr. 153-56; Pet. Exs. 20A, B1, B2).

The charge went unchallenged by respondent. While I find that respondent violated rule 7.5 by being out of residence without authorization, I found no violation of rule 7.6, since the investigator was able to communicate with respondent.

Complaint No. 120846

On April 4, 2014, Investigator Lee visited respondent's residence at around 2:53 p.m. When there was no answer to the doorbell, the investigator called respondent who informed him that he was not at home. The investigator left a DS 424 at respondent's door and left at around 3:03 p.m. Supervisor Boettcher testified that respondent never called for an authorization code that would permit him to be out of residence on that day. He noted, however, that on the day

preceding the first date of trial, he learned that respondent had submitted a doctor's note on April 24, 2014 (Tr. 153-56; Pet. Exs. 20A, B).

In spite of the proof of his doctor's visit, I find that respondent's failure to obtain authorization to be out of residence is a violation of rule 7.5. However, since the investigator was able to communicate with respondent, I find that there was no violation of rule 7.6.

### **Complaint No. 115842**

The Department charged respondent with failing to report to the Department's clinic on August 19, 2013, in accordance with the Department's Medical Leave Policy, and failing to submit medical documentation, in violation of sections 7.8 and 7.9 of the Department's Code of Conduct (ALJ Ex. 1).

Supervisor Boettcher testified that there are three categories of sick leave, Category "A," Category "B," and Category "C." He did not explain the significance of the letter assignment, but stated that an employee who falls under Category "C" must visit the doctor or report to the Department's clinic on the first day of medical leave.<sup>3</sup> A copy of the Department's Medical Leave and Evaluation Documentation Record showed that respondent is a Category C employee, and that his date of injury/illness was August 19, 2013 (Tr. 157-58; Pet. Ex. 21A). Supervisor Boettcher testified that respondent did not report to the clinic on August 19, 2013, his first day of medical leave, as he was required to. Instead, he reported to the clinic on August 21, 2013, at which time he did not present a medical note for August 19 (Tr. 158-59).

Respondent had nothing to add because he had no recollection, but he remained convinced that he always timely submitted his doctors' notes to the clinic (Tr. 185). However, he had no proof that he did, and given his admitted forgetfulness, I find that the charge is sustained.

### **FINDINGS AND CONCLUSIONS**

1. Petitioner proved that respondent was AWOL on December 13, 2011, and January 5, 2014 (complaint numbers 101142 and 118517, respectively).
2. Petitioner proved that respondent was granted emergency leave for his tours of duty on March 12, 2012, and April 2,

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<sup>3</sup> See also Department of Sanitation Policy and Administrative Procedure No. 2007-04 § III (C) (Aug. 1, 2007).



2013, and failed to produce documentation to support the emergencies (complaint numbers 103579 and 112633, respectively).

3. Petitioner proved that while on medical leave, respondent failed to remain at home, and/or remain accessible for a clinic visit or telephone call on September 19 and 24, 2012, in violation of sections 7.5 and 7.6 of the Department's Code of Conduct, as alleged in Complaint 108279. It failed to establish that respondent left his home without authorization on September 26, 2012, but proved that respondent failed to timely submit medical documentation for that date, in violation of section 7.9 of the Department's Code of Conduct, as alleged in the same complaint.
4. Petitioner failed to prove that respondent left his home without authorization on October 3, 2012, while on sick leave, but it proved that respondent failed to submit documentation to support his doctor's visit, as alleged in Complaint 108267, in violation of section 7.9 of the Department's Code of Conduct.
5. Petitioner failed to establish that while on medical leave, respondent left his home without authorization on October 9, 10 and 17, 2012, as charged in complaint 109169. But it established that respondent failed to timely submit documentation of his visits, in violation of section 7.9 of the Department's Code of Conduct, as alleged in the same complaint.
6. Petitioner failed to establish that while on medical leave, respondent left his home without authorization on October 18, 19 and 22, 2012, as charged in complaint 109170. But it established that respondent failed to timely submit documentation of his visits, in violation of section 7.9 of the Department's Code of Conduct, as alleged in the same complaint.
7. Petitioner proved that respondent failed to submit medical documentation for his doctor's visit on October 25, 2012, as charged in complaint number 109171, in violation of section 7.9 of the Department's Code of Conduct.
8. Petitioner proved that respondent left his home without authorization on December 7, 11 and 13, 2012, in violation of Rule 7.5, and failed to make himself available for a home or telephone visit on December 7 and 11, but not on December 13, 2012 (complaints 109793, 109980).
9. Petitioner proved that respondent left his home without authorization on January 7 and 15, 2013, and failed to make

himself available for a home or telephone visit on those dates, in violation of sections 7.5 and 7.6 of the Department's Code of Conduct (complaints 110547, 111023).

10. Petitioner failed to prove that respondent left his home without authorization while on sick leave on February 4, 2013, as charged in complaint 111504, but it proved that he failed to timely submit medical documentation to support his doctor's visit, in violation of section 7.9 of the Department's Code of Conduct.
11. Petitioner proved that respondent left his home without authorization and failed to make himself available for a home or telephone visit on February 26, 2013, in violation of sections 7.5 and 7.6 of the Department's Code of Conduct, and that he failed to submit documentation for his doctor's visit on February 27, 2013, in violation of section 7.9. But it failed to prove that respondent left his home without authorization on February 27, 2013 (complaint 112188).
12. Petitioner established that respondent left his home without authorization, and failed to make himself available for a home or telephone visit, on March 6, June 11 and December 17, 2013, in violation of sections 7.5 and 7.5 of the Department's Code of Conduct (complaints 112273, 114280, 118228).
13. Petitioner proved that respondent left his home without authorization on March 28 and April 4, 2014, in violation of section 7.5 of the Department's Code of Conduct, but it failed to prove that respondent was unavailable for a home or telephone visit on either day (complaints 120794, 120846).
14. Petitioner proved that respondent failed to report to the Department's clinic on August 19, 2013, the first day of his medical leave, as required by the Department's Medical Leave, and that he failed to submit medical documentation, in violation of sections 7.8 and 7.9 of the Department's Code of Conduct (complaint 115842).

### **RECOMMENDATION**

At my request, the Department provided an abstract of respondent's personnel record. Respondent has been a sanitation worker since mid-1995. His performance evaluations for: 1) January through June 2011, reflected an overall rating of "unsatisfactory," which, according to the supervisor, was due to an AWOL incident and multiple sick incidents; 2) July 2011 through

June 2012, “unsatisfactory,” because of his sick record, AWOL, and emergency leave without proof; 3) July 2012 through June 2013, “unsatisfactory,” because of his record of sick leave and AWOL; 5) July 2013 through June 2014, “unsatisfactory,” because of his failure to comply with sick leave procedures; 6) July 2014 through June 2015, “unratable,” because of his long term illness. Respondent’s personnel abstract also revealed that prior to 2012, when respondent was involved in a car accident, he already had a significant history of violating the Department’s rules governing medical leave (20 instances), and its rules governing emergency leave (32 instances). Respondent received penalties ranging from a reprimand to a fine of 25 days.

Under circumstances similar to respondent’s, involving violation of sick leave rules, this tribunal has recommended penalties ranging from three to ten days per incident, depending on the employee’s disciplinary history and the presence of mitigating evidence. *See, e.g., Dep’t of Sanitation v. Straker*, OATH Index No. 400/12 at 9 (Dec. 6, 2011) (seven days’ suspension without pay recommended for each of ten occasions of AWOL and one undocumented emergency leave, for a total penalty of 77 days’ suspension, where long-term employee had been disciplined on nine prior occasions, primarily for violation of attendance and sick leave policies); *Dep’t of Sanitation v. Cunningham*, OATH Index No. 2507/11 at 20-22 (Nov. 10, 2011) *modified on penalty*, Comm’n Dec. (Jan. 10, 2012) (suspension for 40 work days imposed for violation of emergency or sick leave rules on five occasions and one charge of AWOL, where seven-year employee had received six prior disciplinary penalties); *Dep’t of Sanitation v. Keys*, OATH Index No. 677/07 at 4 (Dec. 26, 2006) (five-day suspension requested and recommended where supervisor, with extensive sick leave usage and prior disciplinary record, was found to be out of residence while on sick leave); *Dep’t of Sanitation v. Trapani*, OATH Index No. 2012/00 at 6 (Aug. 15, 2000), *modified on penalty*, Comm’n Dec. (Sept. 12, 2000), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 01-65-SA (Aug. 1, 2001) (15-day suspension imposed on supervisor, with prior disciplinary record, found to have been out of residence while on sick leave on three occasions).

Here, while respondent’s medical leave has been protracted and there is no doubt that he is very ill, the Department cannot ignore that he failed to follow the rules on numerous occasions. There were far too many instances of him leaving his home without authorization, and failing to provide medical documentation. In fact, the Department established 31 violations of its sick leave policy by respondent. In addition, the Department also established that

respondent was AWOL, and that he violated its emergency leave rules. It is respondent's persistent and abysmal failure to comply with the rules that gave rise to the charges against him. His track record leaves me with no option than a recommendation that he be terminated from his employment with the Department, and I so recommend. In spite of this recommendation, I note that respondent had expressed a desire to retire within the next few months. I find that a viable alternative which I urge the Department to consider.

Ingrid M. Addison  
Administrative Law Judge

January 25, 2016

SUBMITTED TO:

**KATHRYN GARCIA**  
*Commissioner*

APPEARANCES:

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