Office of Payroll Admin. v. Hassan

OATH Index No. 308/15 (Jan. 26, 2015), *adopted*, Agency Dec. (Apr. 28, 2015)

Petitioner did not establish that a computer systems manager plagiarized work which he downloaded from the internet and modified in part. The evidence showed that employee's work was not in final form, he did not attempt to conceal that he was using a template, and use of templates was not precluded by petitioner's rules. The evidence further established that employee's failure to meet the initial deadline for production was impacted by other factors not created by him. Petitioner did not establish that employee was paid for work which he did not perform. Petitioner also failed to establish that employee was excessively absent during the period January 1, 2012, through August 5, 2014. Accordingly, the charges should be dismissed in their entirety.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
OFFICE OF PAYROLL ADMINISTRATION
Petitioner
- against -
HISHAM HASSAN
Respondent

REPORT AND RECOMMENDATION

INGRID M. ADDISON, *Administrative Law Judge*

This disciplinary proceeding was referred by petitioner, the Office of Payroll Administration ("OPA" or "petitioner"), pursuant to section 75 of the Civil Service Law. Petitioner charged that respondent, a computer systems manager, plagiarized work which he downloaded from the internet and submitted it as his own, while his timesheets suggested that he devoted 196.95 hours towards working on said assignment, causing him to be paid for work that he did not actually do. Petitioner further charged that respondent failed to follow his supervisors' instructions when he did not meet the deadline for the completion of his assignment, and that his failure to meet the deadline constituted incompetence. In addition, petitioner charged respondent with being excessively absent from on or about January 1, 2012, through on

or about August 5, 2014, in that he was away from the workplace on over 20 percent of the available work days (ALJ Ex. 1).

At a hearing before me on November 24 and December 18, 2014, petitioner presented documentary evidence and the testimony of employees Diana Bicchetti and Geraldine Stepanek. Respondent presented the testimony of Farhana Lokhandwala, his former supervisor at OPA, and submitted documentary evidence. He also testified on his own behalf.

For the following reasons, I find that petitioner failed to prove its charge of plagiarism against respondent. Petitioner also did not establish that respondent was paid for work which he did not perform. Nor did petitioner establish that respondent failed to follow his supervisors' instructions. Finally, petitioner failed to prove that respondent was excessively absent from January 1, 2012, through August 5, 2014, that his absences were unauthorized, or that he was incompetent due to his absences.

I therefore recommend that the charges against respondent be dismissed in their entirety.

ANALYSIS

Plagiarism

Petitioner alleges that respondent plagiarized a document from the internet and submitted it as his own in fulfillment of an assignment, while charging 196.95 hours as time devoted to the assignment and getting paid for work that he did not do. Petitioner further alleges that respondent did not meet the target date for completion of the assignment and in so doing, failed to comply with his supervisors' instructions. Petitioner alleges that respondent's failure to meet the target deadline constitutes incompetence.

OPA is an oversight agency responsible for policies and procedures related to timekeeping and payroll, citywide (Tr. 49). Since 2012, Geraldine Stepanek has been its deputy executive director for computer systems and support. She holds a graduate degree from St. John's University, as well as certifications in professional management. Before her city employment, Ms. Stepanek worked in information technology at private corporations where at one point she spearheaded a staff of 150 persons, including project managers and technical employees ("IT") (Tr. 47-49). At OPA, she manages five different divisions: Citywide Payroll Systems Maintenance; Agency Systems Support; OPA and Citywide Systems Business Analysis; Citywide Systems Training and Communications; and Information Technology Services. The

Information Technology Services Division is subdivided into data warehousing, internal systems support and network operations.

Respondent has been a level I computer systems manager at OPA since 2006. He holds a bachelor of science degree, a diploma in computer programming, and various certificates in software development. When he started to work at OPA, respondent's job entailed reviewing technical designs, developing standards and imposing those standards upon the consultant company on the Citytime project. He was later assigned to evaluate the feasibility of updating OPA's current applications to different technology using different platforms, such as JAVA or .NET. He currently works with the internal systems support team which is comprised of three developers and one tester. Respondent's prior experience includes work at the Department of Finance as a senior software specialist, and as a software development consultant for various Wall Street firms, including Merrill Lynch and Fidelity Investments. He was also a member of the United States Marines. Before that, he worked in the hotel industry in Egypt doing technical training and software development (Stepanek: Tr. 50-52; Resp: Tr. 161-63; Pet. Ex. 7).

Ms. Stepanek testified that on or around April 30, 2014, respondent was assigned to develop the technical design for a new training application based on articulated requirements. The existing training database is an Access database that sits on a work station. Because of the volume of training that OPA does throughout the City, it wanted to have a more robust system developed that would enable the training department to better register, waitlist, communicate, and retain a history of certifications issued for various trainings. Respondent was also responsible for coding and system testing of the application that he was assigned to develop (Tr. 55-58, 90). Initially, a project charter was created, which identified the business justification for the project, its goals and objectives, and the scope of the project. It further identified the individual members of the team that were assembled for the project and their respective roles.

The project charter also established the dates by which certain milestones were to be accomplished and the parties assigned to specific tasks (Tr. 61, 64-65; Pet. Ex. 8A). Respondent's role was identified as "Design & Build." A "kick-off" team meeting was held on April 30, 2014, and the initial target date for respondent to complete his design was June 16, 2014. Assignments were distributed prior to kick-off (Tr. 89). The kick-off meeting was followed by weekly or bi-weekly status meetings up until August 13, 2014. Minutes of those meetings reflected, among other things, the attendees, what was discussed, actions to be taken

and by whom, as well as the due dates for such actions. The following chart contains data excerpted from the meeting minutes and the goals established for respondent:

Meeting Date	Topics Discussed	Action	Due Date
04/30/14	Kick-off meeting; Reviewed Charter; Reviewed roles and responsibilities; Next action.	Design and Build Process	05/07/14
		Data Dictionary	TBD
05/07/14	Design Plan – process & timeline; System requirement specifications due by 05/14/14.	Identify Design Components	05/21/14
05/14/14	Testing tools, Audit log, Administrative rights for new database.	Identify Design Components	05/21/14
05/21/14	Design components; DoITT[1] security accreditation documents; Feedback on software.	Develop Technical Design	06/16/14
05/28/14	Security accreditation documents; Path to folder with project plans indicated.	1st Draft of Technical Design – 40% should be completed	06/04/14
		Completed Development of Technical Design	06/16/14
06/04/14	Path to folder with project plans indicated.	Completed Develop of Technical Design	06/16/14
06/18/14	Technical design: Meeting on 06/20 re authentication for the registration database; completion of technical document. DoITT: Will not implement OPA's DMZ[2]; OPA to utilize DoITT's DMZ.	Technical Design – End to End	06/27/14
07/02/14	Establish Agile format.	(Respondent listed as absent)	
07/09/14	Order of business priorities; Environment Set-up; Home Screen; User ID creation.	First Set of Deliverables (Environment, Home Screen, Create User IDs) (respondent listed as part of a team of three)	07/25/14
07/23/14	Next order of business priorities; Course; Forgot password; Building home screen w/dashboard; Login-in screen	Deliverables – Add/Change/Delete – User – Course – Forgot Password	08/06/14
07/30/14	HH [respondent] will concentrate on functionality rather than look and feel; completion of installation / configuration by end of day; Issues log.	Deliverables – Add/Change/Delete – User – Course – Forgot Password	08/06/14
08/06/14	Next order of business priorities	(Nothing listed)	
08/13/14	Website progress; TFS diagrams; Bug tracking	(Nothing listed)	

(Pet. Ex. 8C).

[1] The New York City Department of Information Technology and Telecommunications.
[2] This term is later explained by respondent.

Without providing a specific date, Ms. Stepanek testified that around June 2014, respondent's director and another manager expressed their concerns to her that respondent would not meet his due date of June 16, because they had reviewed his "interim document" and "there was not much" in it. That prompted Ms. Stepanek to inquire into respondent's progress during a status meeting "at the beginning of June" (Tr. 67). Respondent informed her that he had made notes in his notebook and it would not be an issue for him to update the document. Ms. Stepanek testified that ultimately she expected respondent to produce a technical design document that would describe how the application would be written. She claimed that the requirements document contained "a lot of the functionality process flows and stuff," which would have made it easier for respondent to translate them into a technical diagram. She therefore anticipated that his document would contain screen shots or mock screen shots and pseudo codes to explain how "things" were going to interrelate and some of the databases and tables that respondent would be creating. She also expected sufficient detail from respondent to enable her to distribute the work if necessary (Tr. 67-68, 97).

On June 27, 2014, Ms. Stepanek opened respondent's document and "thought that it read a little funny" (Tr. 69, 102). Certain phrases in the document such as "construction phase" and "evolutionary prototype" were not common to OPA, and caught her attention (Tr. 77-79; Pet. Ex. 10 at 7). At the suggestion of one of her managers, she googled "technical design document" and uncovered a document produced by "Deloitte" for the Indiana Social Service Administration ("Deloitte document"). Respondent's submission seemed to replicate the Deloitte document (Tr. 69-7, 103). Petitioner submitted no information regarding the website on which the document was located or whether the website indicated that there were copyright restrictions. In a self-addressed memo dated June 27, 2014, Ms. Stepanek opined that respondent's document appeared to be a "cut and paste" with some modifications, which by her estimation had taken respondent approximately 200 hours to produce. She characterized it as "more of a theory document then [sic] a technical design for this application" (Pet. Ex. 9).

OPA submitted respondent's "Training Application Technical Design Document" and the Deloitte document (Tr. 71-72; Pet. Exs. 10, 11). As an initial matter, Ms. Stepanek pointed out that the organization structure of both documents was the same but noted that the Deloitte document, which was 32 pages long, contained more information than respondent's, which was 18 pages long. She denied that all technical design documents have the same organizational

structure (Tr. 75, 80, 95). Ms. Stepanek acknowledged that respondent's document demonstrated some attempt to customize the Deloitte document to the requirements of the Training Application project, and that some of his changes, such as the diagrams, were substantive. But, she insisted that the changes to the text of the Deloitte document were not. She identified specific pages in respondent's document which she felt had been barely modified from the Deloitte document (Tr. 76-77, 79, 113). She and another employee worked on distinguishing the two documents, and highlighted in yellow text in respondent's document that represented departures from the original Deloitte text. Items from the original text which respondent did not change but appeared to be inconsistent with his assignment were highlighted in red[3] (Tr. 72-74, 95-96). For example, page 13 of respondent's document made reference to "JAVA" instead of .NET technology (Tr. 73). Ms. Stepanek conceded that design templates are routinely used in her division (Tr. 81, 91-94, 112). She expressed that "templates are a way to go" because there was no sense in reinventing the wheel (Tr. 103). But she did not provide respondent with a template because she thought that he had a good handle on what he needed to do (Tr. 115).

Ms. Stepanek could not initially estimate the time it would have taken respondent to create the "Application Architecture Overview" diagram on page 12 of the technical design document. At first, she stated that she would need to sit down and understand what went into it. Then she claimed that it lacked content, which seemed at odds with her testimony that respondent's diagrams were substantive. She agreed that before a technical design document can be created a certain amount of preliminary work must be done. For example, the requirements of the project must be read and a decision must be made on the type of template to use, and how the data should be presented. Thus, she would normally obtain an estimate from the parties involved, which is then factored into the project plan (Tr. 104-05).

When pressed, Ms. Stepanek admitted that respondent's submission was not a final work product, and it was never completed (Tr. 96, 114). She acknowledged that she had access to his work which he saved in a shared network drive, but she neither met with respondent nor raised concerns about his document, timeliness or substance (Tr. 106-07). She maintained that for the most part, his document was not relevant to OPA's needs, which caused her to question his competence to do the assignment. She decided not to use his document because she was anxious

[3] Page 11 of respondent's document also contained a paragraph highlighted in red, which was not in the Deloitte document, but which appears to have been imported from the Microsoft website (Pet. Ex. 10 at 11).

to start coding to have a clearer vision of how the end product would appear, and was concerned that respondent's technical design might have taken another two months to complete. Her original plan followed a waterfall methodology, which involved requirements gathering, designing, building, unit testing, and system and integration testing. She switched focus to agile methodology, which involved breaking up the work into smaller components, disseminating the components, and working on them simultaneously. Respondent retained similar responsibilities under the agile methodology, but as of the date of this hearing, the work was still ongoing (Tr. 80, 83-88).

Ms. Stepanek maintained that respondent's calendar had been cleared for him to devote himself full-time to the development of the technical design document for the new training application (Tr. 80-81). He therefore had approximately three months to work on his assignment (Tr. 83, 85). She estimated that of the 248.15 hours that respondent clocked during the relevant period, he dedicated 196.15 hours to the project (Tr. 81-82; Pet. Ex. 12). She arrived at this estimate by adding the hours on respondent's timesheets from the kick-off meeting date through June 27, 2014, the date established on the project charter for respondent to submit his technical design, and subtracting two hours each day for incidentals such as computer breaks. Ms. Stepanek testified that her calculations were consistent with industry standards (Tr. 108-11). On respondent's timesheets which supplemented the exhibit, no time was apportioned for any particular work activity.

As a computer systems manager, respondent is involved in the software development life cycle (Tr. 161-63). He testified that software development involves an initiation phase, requirements gathering, business analysis, technical design, software development, testing, and software release. At the initiation phase, the prospective software user articulates a business need for the system, and decisions as to budget, staffing, the type of technology to be used, and whether an outside consultant should be hired, are explored. During the requirements gathering phase, a specialist will sit with a domain expert to discuss the needs of the project and its feasibility. At the business analysis phase (which depends on the company), the requirement may be transferred into a business-like cycle. Some companies opt for involved development where the architect gets involved in the business analysis. A functional design document is developed, where the business is broken into steps. The architect's involvement at this stage assures an understanding of the requirements. It also promotes efficiency. The technical design

is a blueprint of the system to be built. At this stage, the design analyst considers how the screen should be built, given the requirements, and what events will trigger. If using a database, the entity framework is built. This is known as the resistance phase. A presentation phase shows how the screen will be built. The technical design is then given to a software developer who will write codes and conduct unit testing in accordance with the design. After that, the software is tested for errors and sent back to the developer for correction. This is followed by release of the software (Tr. 164-69).

According to respondent, the training application for which he was assigned to develop the technical design document was intended to be used citywide, so that persons from other agencies could register for and take classes. He stated that the team assigned to the project hoped that it would be completed by the early part of 2015. Before he could initiate work on the technical design, respondent had to await the requirements document because he had not been involved in the requirements phase. The first draft of the requirements document was completed on May 14, 2014, but as of two weeks or so prior to this hearing, changes were still being made to it. Changes to the requirements document inevitably meant changes to the technical design document (Tr. 170-72). The first draft of the requirements document comprised about 200 pages. The requirements of the project required respondent to think "outside the box" in terms of how DoITT, as the technical arm of the City of New York, would react, and how the different computers would interact. Respondent testified that DoITT's network is required for projects involving multiple city agencies. Hence, DoITT must endorse every aspect of respondent's technical design (Tr. 173-74, 228-30).

After receiving the requirements document in mid-May, respondent spent his time reading it and researching what technology should be used with the proposed application. He testified that he also had other duties, including: providing support for users who did not have access to the payroll community system project, which was a citywide project; responding to multiple e-mails from senior staff at other agencies; and, attending meetings regarding proposed enhancements to the technical design of the W-4 project, which respondent described as problematic. Respondent estimated that it took him about three to four weeks to assimilate the requirements document and create a chart defining the requirements of the project (Tr. 229-30). But around the beginning of June 2014, he began to work on his technical design document (Tr. 174-76).

Respondent is a certified JAVA developer and architect. JAVA is a type of technology used in smartphones, aerospace, and various types of software (Tr. 162-63). Because of his familiarity with it, respondent proposed using JAVA technology for the new application. However, about one week after respondent received the requirements document the project manager informed him that .NET technology, which is Microsoft-based, was to be used. Because he was unfamiliar with that technology, respondent requested and was sent for training from June 9 through June 15, 2014. Following his training, respondent met with Ms. Stepanek on June 16, 2014. At the meeting, he told her that based on what he had learned during training, the project would have to be built on Model View Controller ("MVC") technology. This technology was more secure and scalable than, and differed significantly from, the Active Server Pages ("ASP") technology previously used by Microsoft. It therefore required a complete overhaul of what respondent had already done (Tr. 176-80).

The meeting minutes for June 4, 2014, displayed the network folder into which the team members were required to save working drafts of their documents (Pet. Ex. 8C). Respondent testified that he saved the working copy of his technical design document to that folder so that all team members had access to it. By the following meeting on June 18, 2014, the network managers had spoken with DoITT personnel about the training application that OPA was building. The minutes noted that DoITT rejected OPA's "DMZ" (Pet. Ex. 8C). Respondent explained that "DMZ" related to the construction of walls/firewalls/switches for OPA's protection, given that other city agencies would be accessing its training application. DoITT's rejection meant that the project could not be built as a citywide application – only local. Respondent testified that DoITT's decision caused his work to be "scrapped" since his design had contemplated a citywide application. The minutes of the same meeting further indicated that "OPA will utilize DoITT's DMZ – documents in folder." According to respondent, DoITT uploaded about 150 pages of security documents into OPA's folder on June 18, which respondent then had to review in order to figure out how to make OPA's application work given the constraints (Tr. 180-84). The project was therefore delayed (Tr. 185). The minutes for the June 18, 2014 meeting show that the deadline for submission of respondent's technical design was extended to June 27, 2014.[4]

[4] Both petitioner's and respondent's counsel made references to June 25 as the deadline (Tr. 238, 240, 243). But as the June 18 minutes indicate, June 25 was the date proposed for the follow-up meeting (Pet. Ex. 8C).

DoITT's rejection of OPA's DMZ caused further delay because the team had to decide whether or not the application would be built in-house. Respondent met with Ms. Stepanek who articulated that the application would indeed be built by OPA. He added that he is still the project's developer and is currently working on turning the functional design into codes and screens with the hope of re-presenting it to DoITT and getting their authorization for use citywide with some modification. He testified that on July 9, 2014, Ms. Stepanek announced that she was switching to agile methodology after attending a class. She never told respondent that her decision to switch was because of any delay on his part. Respondent's testimony suggested that there was no meeting of the minds between him and Ms. Stepanek regarding what needed to be done. Because OPA had never had a .NET wide application, he wanted to build a platform as a fitting foundation before inculcating other technologies into the system. Ms. Stepanek's response to him was "you're looking at things from that low down, I look for things up here" (Tr. 232-33). He informed Ms. Stepanek that even if the project was broken into smaller components, the foundation still had to be built. He explained that with the agile methodology, the technical design is bypassed. Instead, coding of the functional design document is disseminated to multiple developers. Respondent indicated that Ms. Stepanek reacted by giving him the thumbs down.

Respondent admitted that his technical design document is incomplete. In fact, he ventured that it was only about 25 percent along in terms of completion, but he stated that he is no longer permitted to work on it. However, he continues to make his own notes and is developing "in his head" a design that will support what he is currently working on (Tr. 185-88, 197-99). Respondent suggested that the timeline for completion of the project was unrealistic. He maintained that even if he had been familiar with .NET, and absent other obstacles such as DoITT's rejection of OPA's DMZ, the technical design still could not have been completed by the extended target date of June 27, 2014, because of the size of the project and the numerous requirements. He analogized that a similar project currently being undertaken by the Department of Citywide Administrative Services ("DCAS") with an outside company, is in its sixth month. Respondent stated that deadlines on projects such as the one to which he was assigned were usually flexible (Tr. 238-39).

Respondent did not deny that he obtained the Deloitte template off the internet. Respondent testified that he was not provided with a template and in cases where there is no

repository with templates the common practice in the software industry for 20 or more years is to obtain a template off the internet and customize it to the needs of the particular project. Like petitioner, he made no mention of the website from which the Deloitte document was downloaded. Nor did he indicate whether there were any restrictions as to its use. He was unaware of any OPA rule that precluded the use of outside sources for templates (Tr. 188-89, 231-32).

Respondent's insistence that he did not submit the technical design document as a final product was corroborated by Ms. Stepanek's admission that she understood it to be a work in progress. Moreover, he told petitioner's counsel as much when she called him in to a meeting to inquire whether the technical design was his work. He informed counsel that he was working on a template and followed up the meeting with an e-mail to her on July 14, 2014, in which he wrote:

> Hello Alex:
>
> This is the current status of the design document and it still due for more updates for the things I am working on. As you may see it is still in a draft status not final.
>
> This is the link to it as I continuously working on updating it then [sic] it will be refined and published.

(Resp: Tr. 185, 202-03; Stepanek: Tr. 106-07; Resp. Ex. A). The link to the design document was also included in the e-mail. Respondent acknowledged that in its current stage, his document could not be given to a coder to create a program. Nor could the Deloitte document be used by a coder to create the training application for OPA (Tr. 191).

When questioned about the similarity of the table of contents in his document (Pet. Ex. 10) to that in the Deloitte document (Pet. Ex. 11), respondent averred that the table of contents of any technical design document is almost always similarly constructed, with the exception of the "Topology Diagram," identified under item 3 of both documents. Not all systems will require a topology diagram. Only those that involve use of the internet and firewalls will require a diagram to show interaction with the web (Tr. 189-90). Respondent testified that he customized the "Revision History" on page 3 of the Deloitte document by identifying the name of his project, as displayed on page 2 of his "Revision History" (Tr. 190). Turning to the topology diagram on page 10 of his document versus that on page 9 of the Deloitte document, respondent

testified that the only change that was necessary was for him to identify "MSSQL" as the Microsoft technology being used versus "Oracle" in the Deloitte document (Tr. 192).

Respondent pointed to his "Application Architecture Overview" diagram on page 12 of his document, which he conceptualized and created after attending .NET training classes (Tr. 192). The document, which Ms. Stepanek described as lacking in content, displayed multi-directional data flow, and differed from a diagram of the same name on page 10 of the Deloitte document which demonstrated one-directional data flow. Respondent further distinguished his document by pointing to the "Logical Data" diagram on page 15. No comparable diagram was apparent in the Deloitte document. He explained that, among other things, his diagram defined the database in the back end, and the interactions that would take place. It also demonstrated the resistance layer where information will be permanently saved into the database (Tr. 193).

Respondent addressed individually the portions of his document which petitioner highlighted in red and appeared to be replicated from the Deloitte document or some other site. With respect to the text on pages 7 and 13 of his document, he maintained that his document was still a work in progress which had not yet been proofed, at which time concepts that were inconsistent with his project would be captured. He also admitted that he copied verbatim from the Microsoft website, the text highlighted on page 11 of his document, to remind himself of what he needed to write in that section (Tr. 194-97).

Even though respondent challenged the accuracy of Ms. Stepanek's estimate of the time that he devoted to the project, his testimony was consistent with her derivation. He stated that about 70 or 80 percent of his time was dedicated towards research, changes to the template, and learning the technology and the associated learning curve (Tr. 203-04, 236-37).

Farhana Lokhandwala corroborated much of respondent's testimony regarding software development and the use of templates. Since 2011, Ms. Lokhandwala, has been a level III computer systems manager at OPA, where she has worked for 11 years. Prior to 2011, she was a development oversight manager at OPA. She worked on the Citytime Timekeeping project where her responsibilities included the development of guidelines and standards for the contractor to follow, and the development of coding standards. She and her team were also responsible for reviewing technical design documents and to that end, attended requirements meetings. Before she worked for the City, Ms. Lokhandwala was employed for many years as a senior computer consultant with Goldman Sachs. That was preceded by a job in India, as an

assistant scientific researcher with a space research organization that was engaged in analyzing satellite data. Ms. Lokhandwala, who holds a Master of Physics degree, created systems to track and monitor the satellite data (Tr. 129-31).

For close to five years, from 2006 through on or around May 2011, Ms. Lokhandwala supervised respondent, who was a Citytime code application manager. She praised respondent's technical judgment and indicated that she relied greatly on it. In fact, when she was away, respondent, who was the most senior person on the team, took charge. Ms. Lokhandwala maintained that respondent's work was beyond reproach. But he did have issues with attendance because he was ill. However, she maintained that even while he was out, he would complete his work (Tr. 149-50).

Ms. Lokhandwala's description of the software development process did not deviate from respondent's. There is an initiation phase which involves the feasibility of what is being proposed, followed by a requirements phase. The requirements are translated into a functional analysis, which involves the development of flow charts showing how the end user will interact with the application to be built. Next is the technical design phase (Tr. 133-35).

In some respect, Ms. Lokhandwala provided greater details in terms of what a technical design document should reflect. She stated that it describes the systematic architecture of the software to be developed and its different components. The architect of the document will consider the technology that will best suit the requirements and the security needed. The document may be in two parts with high and low levels. The high level accounts for the system architecture, components, and context diagrams which depict data flow. The low level may contain class diagrams, sequence diagrams, and data entity relationship diagrams. Depending on the application and requirements, technical design documents may vary. Some may provide for alternate flows diagrams which are driven by use case scenarios and other may provide exceptional flow diagrams which address how errors in the system will be handled (Tr. 131-32, 136-37).

Ms. Lokhandwala corroborated respondent's testimony regarding the use of templates. According to her, templates are commonly used to develop a technical design document. Contrary to Ms. Stepanek's testimony, Ms. Lokhandwala and respondent maintained that templates for technical design documents are "pretty much standard" depending on the technology being used, because the sections are already contained in the template, such as

introduction, purpose, dependencies, and design considerations (Lockhandwala: Tr. 137; Resp: Tr. 188-89, 230-31; Stepanek: Tr. 80). Templates may be held in a repository which the technical design team may access and modify to the needs of the project. In fact, templates were used with the Citytime project. If a worker is not given a template from which to work, it is an acceptable practice to download one from the internet which may be customized (Tr. 137-39). Certain portions of the template may not be changed. For instance, across the board, best design practices are standard. Thus, even with the use of a template, the technical design architect may not deviate. However, other portions of the technical design, such as class diagrams and sequence diagrams to name a few, have to be modified to the requirements of the project and the database to be built. As a result, technical design documents for different projects cannot be the same (Tr. 139-40). She noted that DoITT is the city agency that sets network standards which must be followed (Tr. 147).

Ms. Lokhandwala acknowledged that she and respondent did not create a technical design document when they worked on the Citytime project, because the contractor was tasked with that responsibility (Tr. 152). She reviewed respondent's technical design document for the training application and found the revision history page to be standard, one that would be contained in any design document (Tr. 141; Pet. Ex. 10 at 2). The table of contents on page 3 was also standard, but it may be modified based on the technology being used and the application to be built. Ms. Lokhandwala also found the topology diagram on page 10 to be standard (Tr. 142). But she could not tell whether or not the application architecture overview on page 12 of the document represented a modification of the Deloitte template to meet the requirements of the OPA training application because she had not reviewed the requirements or the functional design documents. However, it was apparent to her that respondent was using some kind of "Model View Controller" (Tr. 144-45).

With respect to technology, Ms. Lokhandwala concurred that there are differences between JAVA and .NET. Thus, if the application called for .NET technology, respondent's document should not have contained reference to "Enterprise Java Bean" as it did on page 13. In so far as time constraints are concerned, she maintained that if an employee is charged with creating a technical design document for an application that will use technology with which he/she is unfamiliar, there must be a learning curve for the employee to understand the best design practices for the technology with which he/she is unfamiliar so that they may be

incorporated into a technical design document. This generally takes time (Tr. 148-49, 152-53). Notwithstanding, Ms. Lokhandwala could not predict what was a reasonable amount of time for respondent to produce a technical design document given the number of factors to consider, such as: his level of involvement at the requirements stage of the project; his understanding of the requirements; understanding of the use cases; and consideration of what type of technology would best suit the application (Tr. 154-55).

Ms. Lokhandwala did not know whether or not the Deloitte template was sanctioned by OPA, and expressed that she knew of no formal process of getting technical design documents sanctioned (Tr. 155).

Plagiarism is the deliberate and unauthorized appropriation or close imitation of someone else's work and representing it as one's own without crediting the work's original author. *Black's Law* Dictionary at 1267 (9th ed. 2009). *Webster's Third New International Dictionary* at 1728 (1993) specifically defines plagiarism as the commission of literary theft. While it is more commonly used to describe acts of misappropriation in the academic arena, plagiarism has also been asserted in allegations of music theft, where melody, rhythm, harmony, and structure and not song lyrics, are determinative of whether "music plagiarism" has occurred. *Velez v. Sony Discos*, 2007 U.S.Dist. LEXIS 27343 (S.D.N.Y. Apr. 5, 2007).

To prevail in this disciplinary proceeding, petitioner must prove its case by a preponderance of the credible evidence. *Foran v. Murphy*, 73 Misc. 2d 486, 489 (Sup. Ct. N.Y. Co. 1973); *Antinore v. State*, 79 Misc. 2d 8, 12 (Sup. Ct. Monroe Co. 1974), *rev'd on other grounds*, 49 A.D.2d 6 (4th Dep't 1975), *aff'd*, 40 N.Y.2d 921 (1976); *Osoba v. Bd. of Education*, NYC. Civ. Serv. Comm'n Item No. CD 92-127, at 3 (Nov. 19, 1992), *aff'g,* OATH Index No. 237/92 (Feb. 28, 1992). A preponderance has been defined as the burden of persuading the "trier of fact to believe that the existence of a fact is more probable than its non-existence." *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 622 (1993); *See also Dep't of Correction v. Tavarez*, OATH Index No. 1273/02 at 5 (Nov. 21, 2002). Petitioner has failed to convince me that respondent has committed plagiarism.

Petitioner submitted a number of cases in support of its charge. I found most to be inapposite because they dealt with the misappropriation of literary work. The only case which was remotely relevant was a District of Columbia case, *Castle v. Bensten,* 867 F. Supp 4

(D.D.C. 1994),[5] which involved a former employee of the Office of the Comptroller of the Currency ("OCC") who had prevailed in a discrimination suit filed against OCC. To limit backpay damages, OCC presented evidence that after it had fired her it discovered that Castle had committed plagiarism in the production of on-the-job training ("OTJ") materials for OCC. It argued that had it made its discovery earlier, it would have fired Castle anyway and thus, the backpay award should be limited to the date of discovery of Castle's misconduct.

The plagiarism alleged was in connection with a video and OTJ aid that Castle produced for distribution throughout the agency after it was discovered that "major portions of the video script were copied, nearly verbatim, by the Plaintiff from a published book entitled *The Coach* . . . ." 867 F.Supp. at 6. Castle gave no attribution for the video script, asserting instead that she had written it herself and accepting praise from other employees. With respect to the OTJ materials, Castle copied major portions from training materials authored by J. H. Harliss and Jeffrey Nelson, and included a bibliography, but she did not obtain permission to use the materials which, on their face, cautioned that they may not be reproduced without permission from the authors.

The court found that OCC had proven that had it known that Castle had plagiarized portions of the book "The Coach" as well as materials used in her OTJ distribution throughout the agency, it would have discharged her on the basis of that misconduct. It credited OCC's evidence that it had spent considerable time and money in the production of the video and had to pull it from use when the plagiarism was discovered. The court further found "wholly unconvincing," Castle's argument that: (1) for the video, the time to seek permission to use the copyrighted material was not until after the decision was made to use it; and (2) she had provided a bibliography for the OTJ material, and that hence, she had committed no violation. The court opined that:

> The evidence clearly shows that the Plaintiff prepared a video script containing copied portions of the book *The Coach*, placed her name on the script, received accolades for the script from other OCC employees, but failed to make any attribution whatsoever to the script's true authors. The misconduct thus occurred when Ms. Castle copied the book without permission and took full credit for its contents. Moreover, there is no evidence indicating that she ever had any intention of making proper attribution; rather, the Plaintiff testified that she perceived her virtual word-for-word use of the book *The Coach* as a mere

[5] *Castle* was affirmed by the United States Court of Appeals for the District of Columbia Circuit in *Castle v. Rubin*, 78 F.3d 654 (D.C. Cir. 1996).

> adaptation, while the evidence showed that in fact nothing but the names of the relevant characters were "adapted."

867 F.Supp. at 9. The court therefore limited its award of backpay to the date of OCC's discovery of Castle's plagiarism.

I find *Castle* relevant only to the extent that it occurred in a government employment context and the materials that the employee was assigned to create were training materials. Otherwise, both the video script and OTJ materials were literary in nature and not analogous to a technological design. Even if they were, it was indisputable that Castle's work was submitted in final form and was widely disseminated throughout the agency. She readily accepted credit for it and never once acknowledged the authors from whom she had plagiarized. That is not the case here. Respondent's testimony that his work was far from being in final form was uncontroverted. In fact, Ms. Stepanek suggested that that was the reason why she switched to agile technology. Besides that, there was nothing to suggest that respondent was attempting to conceal that he was using a template. Both he and Ms. Lokhandwala credibly testified that obtaining a template from the internet is an acceptable practice in the software industry and neither knew of any OPA rule that prohibited such a practice. Even Ms. Stepanek endorsed the use of templates because she did not see the need to reinvent the wheel. Neither she nor OPA's counsel pointed to any OPA rule to the contrary.

While it was clear that certain portions of respondent's document resembled parts of the Deloitte document, I am not prepared to characterize this as plagiarism, given Ms. Lokhandwala's and respondent's credible testimony that certain topical areas would not deviate from one another, document to document. That is because regardless of the software that is being developed, if a particular type of technology is being used, in this case, .NET technology, there would be close similarities across the board (Lockhandwala: Tr. 137; Resp: Tr. 188-89, 230-31). But it was also apparent that respondent had embarked on modifying the Deloitte template to OPA's needs. Some of his diagrams were distinguishable from those in the Deloitte document and Ms. Stepanek conceded that his diagrams were substantive (Tr. 113). Ms. Lokhandwala, who was not familiar with his assignment, was also able to identify that respondent was using some kind of Model View Controller, which he learned during his .NET training and which he discussed with Ms. Stepanek.

Notably, Ms. Stepanek, who had access to the network folder and respondent's work, did not express any anxiety about his document or the likelihood of him meeting the deadline for completion until it was brought to her attention by respondent's director and another manager, neither of whom testified. Ms. Stepanek's testimony that she inquired into the status of respondent's document "at the beginning of June," seemed oddly timed. At that time, only two weeks had elapsed since respondent had received the requirements document. Moreover, it was within those two weeks that respondent was informed that OPA had opted for .NET technology. Given the variables at play, it was not clear to me that the target date for completion of respondent's technical design document was inflexible or that it should have been. First, there was the delay in the production of the requirements document. Then, there was respondent's unfamiliarity with .NET technology, requiring him to attend a one-week training session. Next, there was DoITT's rejection of OPA's DMZ. These were factors that appeared to significantly impact delivery, but yet were not factored into the equation by OPA. For his part, respondent had just learned the .NET technology and according to Ms. Lokhandwala, there needs to be a learning curve. What is remarkable is that for such a significant application that was contemplated to be used citywide, respondent's time to deliver was only extended by 11 days, to June 27, 2014. The meeting minutes show that Ms. Stepanek decided to establish the agile methodology on or around July 2, 2014, when respondent was not present, and not July 9, as he testified. In any event, Ms. Stepanek's decision to switch to agile methodology seemed to be predicated upon the aggregate of factors that were not initially contemplated by her, and not on any perceived tardiness on respondent's part.

In sum, petitioner presented no authority to suggest that respondent's failure to amend text from a template which he used to create a document that was not in any way a final submission, and where the document demonstrated distinct signs of individualism, should be deemed plagiarism. In addition, petitioner's charge that respondent received payment for work that he did not perform discounts the time that he invested in reading the requirements documents and understanding it, given that he was not involved at the requirements phase. It also discounts the "substantive" work demonstrated by his diagrams, as Ms. Stepanek testified.

Thus, petitioner's charge that respondent plagiarized work, plus the associated charges that he was paid for work that he did not perform, and did not comply with his supervisor's

instructions when he failed to meet the deadline for production of his technical design document, should be dismissed.

Likewise, the charge of incompetence for respondent's failure to meet the deadline should be dismissed. Incompetence is defined as either the "inability to perform one's job as well as the persistent unwillingness or failure to do the work." *Law Dep't v. Stanley*, OATH Index No. 1540/05 at 4 (June 15, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-08-SA (Jan. 9, 2006). As distinct from misconduct, fault on the part of the employee is not necessarily required to establish incompetence. Petitioner need only prove that respondent is unable to meet the minimally acceptable threshold requirements of the duties of his title. *Employers Retirement System v. Myrick*, OATH Index No. 505/95 at 26 (Apr. 11, 1995); *see also* OPA Code of Conduct Chap. 4, Rule 4 (rev. Dec. 2013) (Pet. Ex. 1).[6] Petitioner has not done so here. To hold otherwise would mean that any time a professional failed to meet a deadline or fell behind schedule, he/she could be punished for misconduct.

Excessive Absenteeism

The charges allege that from on or about January 1, 2012, to on or about the date that he was served with these charges, respondent has been away from the workplace for more than 20 percent of the work days during that period, and that some of his absences were without adequate notice, in violation of Chapter 4, Rules 4A-D, 6D and 7B of petitioner's Code of Conduct. OPA Code of Conduct Chap. Rules 4A-D, 6D and 7B (rev. Dec. 2013) (Pet. Ex.1).

Diana Bichetti is OPA's director of administrative services. Her responsibilities include human resources, payroll, timekeeping and support services (Tr. 8-9). Ms. Bichetti testified that respondent has worked for OPA for eight years and for the City for 15 years (Tr. 18-19; Pet. Ex. 3). City workers generally work a 35-hour work week or the equivalent of 1820 hours per year. As a management employee, respondent accrues 15 hours and 45 minutes of annual leave and seven hours of sick leave per month, pursuant to Personnel Order No. 88/5 (Tr. 15, 17; Pet. Ex. 2). This is an aggregate of 273 hours per year, which approximates 15 percent of an employee's

[6] Petitioner's Code of Conduct defines incompetence as:
A. The inability to qualify or continue to qualify for a skill or standard of performance;
B. The inability to perform or maintain a standard of performance as required by one's job or tasks and standards;
C. The failure to completely perform a legally assigned duty or task or to maintain a level of productivity consistent with agency policy;
D. The failure to completely perform one's legal duties and assignments with evidence of declining productivity.

annual hours, assuming a 35-hour work week (Tr. 17). This translates to approximately 682 hours of leave accruals over a 30-month period.

OPA's timekeeping system, Citytime, records an employee's time and calculates whether or not an employee has worked his required number of hours. If there is a shortfall in the number of hours an employee is required to work versus what was actually worked, it must be satisfied with a deduction from annual leave. An employee may request an advance of annual leave where his/her annual leave has been exhausted. The hours advanced are recouped when the employee returns to work and annual leave accruals resume (Tr. 23, 27-28). According to Ms. Bichetti, the City's Payroll Management System ("PMS") is interlinked with Citytime, from which it derives data in order for employees to be paid. The City Human Resource Management System ("CHRMS") generates time and leave reports out of PMS (Tr. 18, 23-24).

OPA submitted a ten-page CHRMS report showing respondent's leave usage from January 13, 2012 through June 19, 2014 ("covered period") (Pet. Ex. 5). The report, which appears to have been generated in chronological order by "Earned Date," showed various other headings, including: "Event Type," which was coded; "Event Description," which described the type of leave taken; "Process Date"; "Detail Hours"; and, "Extended Hours." The report totaled the "Detail Hours" and "Extended Hours" as 1,204.15 and 1,084.45, respectively (Pet. Ex. 5 at 10). Because the report reflected leave taken pursuant to the Family Leave Act ("FMLA") as both sick leave and FMLA, Ms. Bichetti highlighted only the days that should be counted, in an effort to avoid duplication when tallying respondent's leave usage (Tr. 25-26, 32-33). She testified that respondent's absences during the covered period totaled 815 hours, which meant that he used 30 percent[7] of his time as leave (Tr. 26).

At my request, petitioner provided a breakdown of those 815 hours in a supplemental document to petitioner's exhibit 5. The breakdown showed that of the 815 hours of respondent's absences, more than 90 percent comprised of approved annual leave, sick leave or leave pursuant to the Family Medical Leave Act ("FMLA").[8]

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[7] Petitioner actually charged respondent with being "away from the workplace on over 20% of the available work days" (ALJ Ex. 1).

[8] The FMLA provides for up to 12 weeks of unpaid leave, which may be taken intermittently, for a serious health condition that prevents the employee from performing job functions. 29 U.S.C. §§ 2612(a)(1)(D); 2612(b)(1) (Lexis 2014). A serious health condition is defined as "an illness, injury, impairment, or physical or mental condition" requiring either inpatient care or continuing treatment by a health care provider. 29 U.S.C. § 2611(11).

SUMMARY OF LEAVE TAKEN BY RESPONDENT FROM JANUARY 2012 THROUGH MAY 2014

(IN TERMS OF HOURS)

A/L[9]	A/L used for S/L[10]	Comp.[11] time	S/L	FMLA S/L	FMLA Sick charged to A/L	FMLA LWOP[12]	LWOP for Sick	LWOP	TTL
(01/13/12 - 05/14/14)	(05/22/12 - 02/05/14)	(10/18/13)	(01/17/12 – 05/23/14)	(05/07/12 – 07/31/12)	(05/08/12 – 08/02/12)	(08/02/12 – 08/10/12)	(02/18/14 – 02/21/14)	(01/03/14 – 05/14/14)	
289.30	112.30	3	202.45	14	92	48	28	26	815.45

(Supplement to Pet. Ex. 5).

Ms. Bichetti conceded that respondent's absences were excused and that the leave regulations for managerial employees do not dictate how much time an employee in a managerial title may take. But she stated that an employee needs to be present to work in order for the agency to function (Tr. 18, 35). She was not sure whether anyone had spoken with respondent about what OPA considered excessive absences. Further, Ms. Bichetti maintained that OPA's absence control policy and procedure which provides for a "Stepping Process" through which employees are put on notice of potentially disciplinable absenteeism, was inapplicable to respondent because of his managerial title (Tr. 37).

Petitioner submitted a copy of pages excerpted from the leave regulations for the City's managerial employees. Personnel Order No. 88/5, eff. date Apr. 28, 1988 (Pet. Ex. 2). The document explained the manner in which managers accrue annual leave and sick leave, but it provided no guidance on what is considered excessive absenteeism.

Petitioner also presented respondent's performance evaluations for the calendar years 2012 and 2013, during which the majority of his absences were amassed (Pet. Ex. 4). For both years, respondent received an overall rating of "3," which, according to his performance evaluation plan included in the exhibit, means that he fully met requirements.

Finally, although uncharged, Ms. Bichetti asserted during the hearing that due to a timekeeping error, OPA advanced respondent 40 hours of time and failed to recoup it. But she did not provide any specifics as to dates and hours that comprise the 40 hours. She appeared to blame respondent for OPA's failure to recoup the time that it had advanced him because

[9] Annual leave.
[10] Sick leave.
[11] Compensatory time.
[12] Leave without pay.

according to her, employees are responsible for knowing how much leave they have available (Tr. 28-30, 36).

Respondent testified that he has had the same supervisor since 2012. From February to approximately July 2012, his supervisor, Ms. Cicero, was out on medical leave. Other than during that period of time, he always personally requested leave from her. Respondent emphatically denied failing to give appropriate notice to his supervisor when he anticipated being absent. With respect to annual leave, he always informed her ahead of time. If he had a doctor's appointment scheduled, he would give his supervisor advance notice. Only for unanticipated events such as having to be taken to the hospital by ambulance would a member of his family contact Ms. Cicero. He testified that in 2012, he was out for approximately one month after he was involved in a motor vehicle accident (Tr. 213-17).

Respondent insisted that he was never put on notice that his absenteeism during the past two years was a problem. Nor was he ever reprimanded by his supervisor for being absent. In fact, the first time that his attendance was addressed was in November 2013, when Ms. Bichetti told him that he owed the agency time dating back to 2009, and she was in the process of adjusting his leave balances. In 2009, he had been diagnosed with a heart condition and had to be outfitted with a stent at the Veteran's Administration hospital where he is classified as a silent heart attack patient (Tr. 220-23). In June 2014, Ms. Bichetti e-mailed respondent that the actual number of hours advanced that was not recouped was 58.5 hours. She initially wanted to deduct the hours as LWOP, but respondent protested because of the effect that such action would have upon his retirement. Accordingly, Ms. Bichetti proposed deducting the time from respondent's annual leave and sick leave, which she did (Tr. 223-24). Respondent was adamant that his duties were never neglected nor were assignments left incomplete because he was absent (Tr. 220).

As an initial matter, for the first time at the hearing, petitioner raised the allegation that it had advanced respondent sick time which it admittedly failed to recoup after respondent returned to work. Petitioner did not request that I amend the charges and I decline to do so *sua sponte.* This tribunal has amended charges in the past where doing so would not prejudice the respondent. *Edenwald Contracting Co., Inc. v. City of New York,* 60 N.Y.2d 957 (1983); *NLRB v. Coca-Cola Bottling Co. of Buffalo, Inc.,* 811 F.2d 82, 87 (2d Cir. 1987) (amendment of complaint did not deprive party of due process where issues are fully litigated at trial). Given respondent's testimony that the issue had been brought to his attention prior to the hearing,

amendment of the charges is unlikely to prejudice him. However, the courts have held that "No person may lose substantial rights because of wrongdoing shown by the evidence, but not charged." *Murray v. Murphy*, 24 N.Y.2d 150, 157 (1969). I am not convinced that there was any wrongdoing by respondent that led to petitioner's failure to recoup time. Rather, the allegation appears to be driven by petitioner's quest to cloud its own culpability and bolster its charges against respondent.

Under section 75 of the Civil Service Law, conduct is disciplinable if the employee's violation of a rule, policy or procedure constitutes misconduct or incompetence. By itself, excessive absenteeism may constitute incompetence. However, petitioner has failed to establish that respondent's absences, which it conceded were not unauthorized, rose to the level of incompetence as a matter of law.

Rule 6D of Chapter 4 of OPA's Code of Conduct provides that an employee may be disciplined for failure to comply with time and leave procedures promulgated by the City of New York and/or OPA. Rule 7B provides that managers/supervisors are required to comply with all relevant provisions of the rules and regulations of discipline. But, petitioner's Code of Conduct does not articulate a numeric definition of excessive absenteeism by which managerial employees may be guided.

Where it has not been specifically defined by agency rules, this tribunal has considered whether the employee's absences are so numerous that they are excessive *per se*. *See Triborough Bridge & Tunnel Auth. v. Christiano*, OATH Index No. 493/12 at 12 (Mar. 21, 2012), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 12-34-SA (July 24, 2012); *Admin. for Children's Services v. Hoffman,* OATH Index No. 1616/02 at 9 (Dec. 20, 2002). Absences that approximate 50 percent of the work days in the period under review have been found to be excessive *per se*. *Christiano*, OATH 493/12 at 12; *Triborough Bridge & Tunnel Auth. v. Lewis*, OATH Index No. 1592/03 at 8 (Feb, 10, 2004), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 05-19-SA (Apr. 25, 2005); *Triborough Bridge & Tunnel Auth. v. Davi*, OATH Index No. 339/01 at 7 (June 18, 2001); *Dep't of Parks and Recreation v. Guerin*, OATH Index No. 1711/99 (Aug. 3, 1999), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 00-97-SA (Nov. 14, 2000); *Dep't of Parks & Recreation v. Lenoble*, OATH Index No. 823/91 (Apr. 30, 1991), *aff'd*, NYC Civ. Serv. Comm'n Item No. 92-43 (Apr. 9, 1992) (69 unauthorized absences in a 15-month period excessive); *Hoffman*, OATH 1616/02 at 10 (25 unauthorized absences in a year not found to be

excessive *per se*); *Dep't of Parks and Recreation v. Hubbard*, OATH Index No. 1153/97 (Feb. 24, 1998) (21 absences in one year not found to be excessive). This formula was affirmed by the First Department in *Cicero v. Triborough Bridge & Tunnel Auth.*, 264 A.D.2d 334 (1st Dep't 1999), *leave to appeal denied*, 94 N.Y.2d 931 (2000).

Petitioner's evidence supported that respondent was out for 815.45 hours over a two and a half-year period. Petitioner claimed that this equated to 30 percent of respondent's work hours. That is insufficient for me to find respondent's absences to be *per se* excessive. Moreover, it is not clear to me how petitioner's 30 percent calculation was made. If the presumptive number of hours that respondent works per annum is based on a 35-hour work week, his work hours for the period charged (January 1, 2012, to on or around August 5, 2014) would be approximately 4600 hours, 30 percent of which would be 1380 hours. Besides that, the evidence indicated that 154 hours of respondent's absences were attributable to leave pursuant to approved FMLA which petitioner may not factor into its calculation of excessive absences. *See Christiano,* OATH 493/12 at 15-17. Even assuming the remaining 601.45 hours were unauthorized absences, this works out to approximately 240 hours per year, well beneath the aggregate of respondent's accruals. Moreover, respondent's absenteeism rate would be significantly lower than the 30 percent calculated by petitioner and would therefore not be deemed excessive *per se*.

The fact that an employee's absences are not so numerous that they may be deemed excessive *per se* does not end the inquiry however. This tribunal has also noted that the following circumstances may give rise to sanctions: (1) absences that have an adverse impact on the employee's workplace efficiency and operations; and (2) absences that are excessive based on the circumstances surrounding the missed days of work. *See Bd. of Education v. Hunter*, OATH Index No. 384/90 (Mar. 5, 1990), *adopted in part, rejected in part*, Dec. of the Bd. (Apr. 4, 1990), *aff'd sub nom. Hunter v. NYC Bd. of Education*, 190 A.D.2d 851 (2d Dep't 1993) (30 absences over 12 ½ months, though not excessive *per se*, were excessive where the respondent had prior attendance problems and unapproved absences, several of which followed weekends); *Health & Hospitals Corp. (Kings County Hospital Ctr.) v. Dedier*, OATH Index No. 1203/07 (Mar. 22, 2007) (respondent's 27 unscheduled absences over a nine-month period, even though approved as sick leave, were excessive); *Health & Hospitals Corp. (Harlem Hospital Ctr.) v. Pabon*, OATH Index No. 270/04 (Oct. 29, 2003) (respondent's 57 unscheduled absences over 13-month period were excessive without aggravating factors); *Health & Hospitals Corp.*

(Metropolitan Hospital) v. Coley, OATH Index No. 2044/96 (Sept. 11, 1996) (in default proceeding where respondent did not appear to provide justification, 21 absences over 9 months, including 12 approved, deemed excessive).

The factors that are generally considered towards a determination of excessive absenteeism include the availability of leave accruals, the lack of advance notice, the timing of such absences in relation to weekends and holidays, the legitimacy of the need for the absences, and whether respondent was ever warned that the absences were deemed excessive. *See Health & Hospitals Corp. (Lincoln Medical & Mental Ctr.) v. Davis*, OATH Index No. 1573/08 (May 8, 2008) (employee who was absent on 11 occasions in five months, four of which occurred before or after a weekend or holiday found to be excessively absent); *Health & Hospitals Corp. (Bellevue Hospital Ctr.) v. Cruz*, OATH Index No. 1162/03 (May 30, 2003) (18 absences over seven months found to be excessive, given the impact to the facility, the failure to submit documentation, and the fact that five of the absences were considered instances of AWOL and eight occasions of sick leave occurred either before or after a scheduled pass day).

As previously stated, respondent accrues two and a quarter days of annual leave per month or 27 days per year, and one day of sick leave per month or 12 days per year (Tr. 15; Pet. Ex. 2). But petitioner presented no comparative analysis of respondent's accruals versus his absences by month or year. Thus, it is not clear to me whether or not respondent exceeded his accruals. Petitioner presented only a summary of respondent's absences based on the type of leave. It offered no testimony in terms of the existence of aggravating factors such as whether or not respondent's absences were regularly taken on the days before or after a scheduled day off, a holiday, or a weekend. Further, respondent's testimony that he was out for a significant period in 2012 because of his involvement in a motor vehicle accident, as well as his ongoing heart condition went unchallenged.

Petitioner's claim that in some instances respondent failed to provide adequate notice to his supervisor for his absences was unsupported. His supervisor was not present to testify and there was nothing in writing from her noting any days on which respondent failed to give adequate notice of his absences. On the other hand, respondent's testimony that he was never put on notice that petitioner considered his absences to be excessive was unrebutted.

Here, there was no proof that respondent was unable to do his job, or that his absences placed a burden on OPA or respondent's co-workers. *Cicero*, 264 A.D.2d at 336 (calling the

"disruptive and burdensome effect" of respondent's absences the "ultimate issue" in an incompetence case). Moreover, in spite of the fact that the majority of respondent's absences occurred during 2012 and 2013, his performance evaluations reveal that he managed to meet requirements for those calendar years. That is not surprising given the testimony of Ms. Lokhandwala, that respondent performed even when he was out of the office.

Petitioner has therefore failed to establish that respondent as excessively absent, his absences were unauthorized, or that he was incompetent due to his absences. Accordingly, this charge should be dismissed.

FINDINGS AND CONCLUSIONS

1. Petitioner failed to establish that respondent plagiarized work which was based on a template that he downloaded from the internet, did not submit in final form, and to which he had begun to make substantive changes.

2. Petitioner did not establish that respondent was excessively absent during the period January 1, 2012, through August 5, 2014, that his absences were unauthorized, or that he was incompetent due to his absences.

RECOMMENDATION

Having failed to establish its charges against respondent by a preponderance of the credible evidence, the charges should be dismissed in their entirety.

Ingrid M. Addison
Administrative Law Judge

January 26, 2015

SUBMITTED TO:

MOHAMED H. HAFEEZ
Acting Executive Director

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