Human Resources Admin. v. Cameron

OATH Index No. 2340/16 (Oct. 20, 2016), *aff'd,* NYC Civ. Serv. Comm'n Case No. 2017-0319 (June 21, 2017), **appended**

Petitioner established that respondent refused to interview clients as directed, was insubordinate and discourteous to his supervisors, and was absent without leave on multiple occasions. Petitioner also established that respondent threatened his supervisor on one occasion, but failed to establish the remaining charges. Penalty of 25 days' suspension without pay recommended.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
HUMAN RESOURCES ADMINISTRATION
Petitioner
- against -
JAMES CAMERON
Respondent

REPORT AND RECOMMENDATION

ASTRID B. GLOADE, *Administrative Law Judge*

Petitioner, the Human Resources Administration ("HRA"), brought this disciplinary proceeding pursuant to section 75 of the Civil Service Law. Petitioner alleges that respondent, a job opportunity specialist ("JOS"), was absent without leave ("AWOL"), failed to perform his duties accurately and efficiently; was insubordinate; was discourteous, intimidating and/or threatening; engaged in conduct prejudicial to good order; and engaged in conduct that was detrimental to HRA or that would undermine his effectiveness in performing his duties (ALJ Ex. 1).

During a two-day trial, petitioner presented documentary evidence and testimony from five witnesses. Respondent, who was represented by counsel, testified on his own behalf.

For the reasons below, I find that most of the specifications are sustained and recommend a penalty of 25 days' suspension without pay.

ANALYSIS

Respondent has worked as a JOS since 2011. He was assigned to HRA's Bay Ridge Job Center (the "Center") from October 2012 until February 2016, when he transferred to a new location (Tr. 240-41, 288). The charges concern incidents that occurred between May and November, 2015, while he worked at the Center.

Absences from Assigned Workstation

Petitioner alleges that on three occasions in May 2015, respondent was absent from his assigned workstation without permission, and that he was insubordinate, discourteous, and threatened or intimidated his supervisors.

May 14, 2015 (Specification I, Charges I – VII and X)

Petitioner contends that respondent was absent from his workstation without permission from 10:15 a.m. to 2:00 p.m. on May 14, 2015 and did not complete any work during that period. When questioned about his absence, respondent stated: "I do not recall and it's all in the mind" (ALJ Ex. 1).

Respondent was originally assigned to work in the applications unit on the first floor of the Center. However, because of a backlog of fair hearing compliance cases, he was reassigned to work in the fair hearing unit, which is located on the second floor. The fair hearing unit is responsible for processing cases in which applicants prevailed in an appeal of a fair hearing decision (Jadotte: Tr. 9-11, 37-38; Ferrer: Tr. 206).

On May 14, 2015, Ms. Jadotte, a long-time supervisor at HRA, was supervising the unit because its regular supervisor was absent. A staff member called her to express concern because respondent had been away from his desk for some time. Jadotte, whose office is located on the third floor of the Center, went downstairs to the fair hearing unit. She saw that respondent was not seated in his assigned location, so she checked for him on all three floors of the Center (Tr. 10-12).

Jadotte testified that she started searching for respondent at about 10:15 a.m. After she failed to locate him, Jadotte directed the employee who had expressed concern about respondent's whereabouts to contact her when he returned. At 2:00 p.m., when that worker

notified her that respondent was back at his desk, Jadotte went to the second floor to speak to him (Tr. 11-12, 13, 15).

In a memorandum written the same day, Jadotte noted that respondent had been AWOL from his workstation from 10:15 a.m. until 2:00 p.m. and that a search was conducted throughout the Center "to ensure that [respondent was] not in any kind of distress" (Pet. Ex. 1). Consistent with her testimony, Jadotte wrote in her memorandum that when she asked him to account for his absence, he told her that he did not recall and "it's all in the mind" (Tr. 16; Pet. Ex. 1). That same day, Jadotte sent an e-mail to respondent in which she directed him to complete a form to explain his absence from his workstation (Tr. 16; Pet. Ex. 2).[1]

Respondent's only response to the charge was his testimony that he was present at work the entire day on May 14. He offered no explanation for his absence from his workstation on that day, other than that he was generally confused as to whether he was supposed to work on the first or second floor after he was assigned to work on the fair hearing cases (Tr. 242-43, 273).

Respondent testified that about a week after he arrived at the Center in 2011, he was assigned to the first floor, where he worked on fair hearing compliance cases. He remained there for two years until the Center was reorganized and he was moved up to the second floor, where he continued to work on fair hearing compliance cases. He remained on the second floor working on fair hearing cases until early 2015, when he was moved to the first floor to work on applications. Respondent was moved to the applications unit because it needed additional workers and he was the most junior employee in the fair hearing unit ((Resp.: Tr. 241-43; Ferrer: Tr. 205-08).

Respondent maintained that he became confused about which floor he was to report when the Center's management moved him from working on applications on the first floor back up to the second floor to temporarily work on fair hearing cases. According to respondent, he "really wasn't too sure if [he] was supposed to be on the first floor or the second floor, or doing the fair hearing compliance or doing . . . the applications" (Tr. 242-43).

[1] Although the charges state that the special project supervisor held a meeting to discuss progress and Jadotte had temporarily assumed the supervisor's responsibilities, she could not recall whether a meeting had been scheduled (Tr. 35-36). However, she explained that the special task to which respondent had been assigned required a daily count of the number of cases completed (Tr. 38).

In making credibility determinations, this tribunal may consider such factors as witness demeanor; consistency of witness' testimony; supporting or corroborating evidence; witness motivation, bias, or prejudice; and the degree to which a witness' testimony comports with common sense and human experience. *Dep't of Sanitation v. Menzies,* OATH Index No. 678/98 at 2 (Feb. 5, 1998), *aff'd,* NYC Civ. Serv. Comm'n, Item No. CD 98-101-A (Sept. 9, 1998). I found Jadotte's testimony to be more credible than respondent's.

It is difficult to believe that respondent, who was careful and precise throughout much of his testimony, was confused about where he was to report on May 14. Even were I to credit respondent's claim, his confusion does not explain his protracted absence from his workstation. I credit Jadotte's testimony that she searched for respondent on all three floors at the Center and could not find him. Furthermore, I credit her testimony that she periodically returned to the second floor to check for respondent and asked one of his colleagues to call her when respondent returned to his workstation. Had respondent mistakenly reported to the first floor, his error should have become apparent to him well before three hours and 45 minutes had elapsed.

The evidence established that respondent was absent without permission from his second floor workstation on May 14, 2015.

Respondent's statement that he did not recall and "it's all in the mind," was essentially a challenge of his supervisor's account of his whereabouts, as he suggested that she fabricated or imagined his absence. However, this statement does not constitute misconduct.

This tribunal has held that it is permissible for an employee to disagree with a supervisor so long as the disagreement remains within the bounds of decorum and discretion. *Health & Hospital Corp. (Lincoln Medical & Mental Health Ctr.) v. Thomas*, OATH Index No. 531/04 at 5 (May 4, 2004); *see also Human Resources Admin. v. Bichai*, OATH Index No. 211/90 (Nov. 21, 1989), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 90-54 (June 15, 1990). In determining whether a disagreement rises to the level of misconduct, this tribunal considers a number of factors, including: whether threats, insolence, or profanity were used, disruption to the workplace caused by the disagreement, and whether it occurred in front of coworkers and/or members of the public. *See Transit Auth. v. Victor*, OATH Index No. 799/11 at 5 (Mar. 3, 2011), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-52-A (Aug. 9, 2011). Here, these factors are not present.

Furthermore, petitioner failed to establish that respondent was insubordinate. This tribunal has held that to establish insubordination, petitioner must prove by a preponderance of

the credible evidence that: (1) an order was communicated to the employee; (2) the contents of the order were clear and unambiguous; and (3) the employee willfully refused to obey. *See Human Resources Admin. v. Traylor*, OATH Index No. 2162/11 at 6 (July 1, 2011); *Health & Hospitals Corp. (Queens Hospital Ctr.) v. Toval*, OATH Index No. 500/11 at 11 (Dec. 23, 2010), *rejected*, Hospital's Dec. (Apr. 28, 2011), *aff'd*, HHC Personnel Review Bd. Dec. No. 1434 (Dec. 16, 2011). An order need not be made in definitive language containing the word "order," but the language used must make it clear and unambiguous that the employee is being directed to perform a task. *See Health & Hospitals Corp. (Kings Co. Hospital Ctr.) v. Hutchison*, OATH Index No. 1937/12 at 7 (Sept. 28, 2012); *Dep't of Environmental Protection v. Salinas*, OATH Index No. 1020/04 at 5 (Nov. 15, 2004), *aff'd*, N.Y.C. Civ. Serv. Comm'n Item No. CD 06-16-SA (Jan. 9, 2006) (citing *Human Resources Admin. v. Aguirre*, OATH Index No. 1734/00 (Sept. 14, 2000)). Here, there is insufficient evidence to support the charge that respondent was insubordinate on May 14, 2015, because petitioner offered no proof that respondent was ordered to report to the second floor and willfully refused to obey that order.

Accordingly, petitioner's evidence proved that respondent was absent from his workstation and did not complete any work that period of time as charged (charges I, V, VI, VIII). His proven conduct undermined his effectiveness in performing his duties (charge II), was prejudicial to good order and discipline (charge IV), and was detrimental to the agency (charge X). However, petitioner failed to prove that respondent's conduct constitutes discourtesy or insubordination (charges III and VII).

May 15, 2015 (Specification II, Charges I–X)

Petitioner alleged that on May 15, 2015, respondent was absent from his assigned workstation on the second floor of the Center without approval from 10:55 a.m. to 2:00 p.m. Petitioner further alleged that later that day, after respondent was ordered to terminate his temporary work assignment on the second floor and to report back to his first floor workstation, he sent an inappropriate e-mail to his supervisor in which he told her to "[s]tay away from my work area . . . [t]here is no need for you to touch anything of mine." It is also alleged that respondent failed to report to his first floor workstation and was unaccounted for until he clocked out at 5:26 p.m. (ALJ Ex. 1).

Ms. Gaskin, who was deputy director of the Center at the time of the incident, testified that because of the incident that occurred on May 14, 2015, respondent was relieved of his duties in the fair hearing unit on the second floor and was reassigned to the applications unit on the first floor (Tr. 43-45, 49; Pet. Ex. 3). It is unclear from this record on which date and at what time this reassignment occurred.

Petitioner charged that respondent was AWOL from the second floor between 10:55 a.m. and 2:00 p.m.; however, no evidence was adduced to establish that he was not there during that period. Therefore, that allegation should be dismissed.

According to Gaskin, on May 15, someone notified her that respondent was on the second floor. At about 2:30 or 3:00 p.m., Gaskin approached respondent on the second floor and told him to report to the first floor to interview clients. Respondent got up from his desk and left. Gaskin noticed that respondent had left documents relating to his work for the fair hearing unit on his desk so she removed them and gave them to the supervisor of that unit so it could be reassigned (Tr. 43-46, 52-53, 75).

That same day, at 3:00 p.m., respondent sent an e-mail to Mr. Melendez, his direct supervisor in the applications unit, Mr. Ferrer, the Center's director, Gaskin, and a union representative (Pet. Ex. 5; Tr. 51-52). The subject of his e-mail was "Harassment by Deputy Director Gaskin." In that e-mail, respondent stated:

> Ms. Gaskin stole documents, amongst other items, from my desk. Then she ordered me downstairs to do an "I" [interview]. I feel threatened by this behavior and will be leaving my workstation to rehabilitate my state of mind.

(Pet. Ex. 5). Respondent testified that he wrote the e-mail after he returned from lunch and found Gaskin in his cubicle going through paperwork on his desk. He found her presence intrusive and became upset, so he left his workstation (Tr. 244-46). Gaskin responded to respondent's e-mail at 3:02 p.m. In her reply, Gaskin stated that she took only City work from respondent's desk and reminded him that he had been directed to report to the first floor to work on applications (Pet. Ex. 5).

Melendez told Gaskin that respondent did not report to the applications unit on the first floor. Gaskin returned to the second floor to see if respondent had remained there, but she could not find him (Tr. 45-47). She wrote a memorandum on May 15th, noting that at approximately 3:00 p.m., respondent had been directed to report back to his workstation to interview applicants,

but failed to do so. Gaskin stated that management did not know his whereabouts and he was therefore AWOL from his workstation (Pet. Ex. 3). Respondent's timesheet for May 15 indicates that he clocked in at 9:23 a.m. and clocked out at 5:26 p.m., but was marked AWOL (Pet. Ex. 13). According to the Center's director, when respondent failed to report to the first floor to interview applicants, his work had to be reassigned (Tr. 222-23).

On May 22, in response to an e-mail from Gaskin regarding HRA's standards of conduct, respondent wrote:

> Please ma'am, I work for a living. Stay away from my work area as work is being done. There is no need for you to touch anything of mine. Please feel free to continue to collect a paycheck for speaking about the first floor, the AJOSII on the first floor, and myself, on a continuous basis from 9am to 5pm.

(Pet. Ex. 4). Respondent copied several people on the e-mail, including his direct supervisor and the Center's director. Gaskin was "dumbfounded" by respondent's e-mail. She found his behavior "irrational and erratic," and requested that he be removed from the Center in an e-mail to the agency's regional managers and the Center's director (Tr. 53-54; Pet. Ex. 4).

Respondent justified his May 22 e-mail as a "collective sum" of his experiences with several supervisors, who were accusing him of doing things wrong and moving him from floor to floor in the Center. He asserted that while he would rather not have written the e-mail, he did not regret having done so because it was appropriate in light of what he was experiencing (Tr. 245, 276-77).

Respondent's explanation for his prolonged absence, that he needed time to compose himself after Gaskin removed work from his second floor workstation, makes little sense. Gaskin removed work-related documents from respondent's desk because he was no longer assigned to those matters. This is perfectly reasonable and should have come as no surprise to him. Respondent's reaction, which he described as feeling harassed and threatened in his e-mail of May 15, is baffling. This is especially so because respondent testified that he had little interaction with Gaskin before this incident and that her conduct on May 15, while intrusive, was not threatening (Tr. 244, 283). Moreover, his absence from his workstation for over two hours was unwarranted and excessive. Even if respondent needed some time to calm down, it is odd that he would require several hours to do so. I find the more plausible explanation to be that he was displeased with being reassigned to the first floor and that he disappeared in a fit of pique.

Petitioner's evidence established that on May 15, 2015, between 2:30 and 3:00 p.m. Gaskin ordered respondent to report to the first floor of the Center to conduct interviews and he failed to comply with the order. Furthermore, the evidence established that respondent failed to report to his assignment on the first floor and was therefore AWOL from 3:00 p.m. until he clocked out at 5:26 p.m.

Respondent's statement in his e-mail that while he "work[s] for a living," Gaskin collects a paycheck for speaking about him and other workers at the Center from 9:00 a.m. to 5:00 p.m., was, viewed as a whole, disparaging and disrespectful. It is evident that respondent views himself as a diligent employee compared to Gaskin, whom he described as getting paid for gossiping about other employees. Further, respondent's statements that Gaskin should "stay away from [his] work area" and "[t]here is no need for [her] to touch anything of [his]" are rude and insolent. His e-mail fell outside the bounds of decorum and discretion and constitutes misconduct. *See Dep't of Correction v. Smith,* OATH Index No. 667/13 at 41-42 (July 19, 2013), *aff'd*, NYC Civ. Serv. Comm'n Case No. 35546 (May 6, 2014) (a statement is disrespectful if is intended to demean or belittle a supervisor or to disparage her integrity, credibility, or authority); *Dep't of Housing Preservation and Development v. Tulloch*, OATH Index No. 512/03 at 6 (May 13, 2003), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 05-45-SA (Aug. 11, 2005) (insolent behavior is sanctionable if it entails disobedience, insubordination, or disrespect directed towards another employee or supervisor).

Petitioner further charged respondent with violating Section III-24 of its Code of Conduct, which prohibits employees from striking, attempting to strike, threatening, or intimidating a participant, supervisor, fellow employee, or private citizen (ALJ Ex. 1, charge IX). However, while respondent's e-mail was discourteous, petitioner failed to prove that it was threatening or intimidating. Gaskin's concern about respondent's general behavior and e-mails, which she described as increasingly erratic (Tr. 53; Pet. Ex. 4), does not establish that she felt intimidated by the statements in his e-mail of May 22. Even were that the case, a supervisor's subjective sense of being intimidated alone is insufficient to establish intimidation. See *Admin. for Children's Services v. Hallman,* OATH Index No. 1269/05 at 3-4 (Mar. 16, 2005) (supervisor's statement that she felt intimidated by an employee's statement that her husband did not know why the supervisor was bothering the employee, did not like it, and wanted to know what the supervisor's problem was, is insufficient to show intimidation).

In sum, petitioner's evidence establishes that respondent failed to comply with orders to report to work on the first floor of the Center, was AWOL from his workstation the afternoon of May 15, 2015, and was discourteous to his supervisor in an e-mail. His conduct was prejudicial to good order, detrimental to HRA, and undermined his effectiveness in performing his duties. Therefore specification II, charges I-VIII, and X, are sustained. Petitioner failed to establish, however, that respondent was absent from his assigned second floor work location between 10:55 a.m. and 2:00 p.m. on May 15, or that he threatened or intimidated his supervisor (charge IX).

May 18, 2015 (Specification III, Charges I – VIII and X)

Petitioner alleged that on May 18, 2015, respondent did not report to his assigned work location on the first floor, despite having clocked in to work at 9:19 a.m. Respondent is alleged to have remained on the second floor of the Center, his former work location, after his supervisor directed him to report to the first floor and to have disappeared when another employee went to look for him (ALJ Ex. 1).

Mr. Gonzalez, an Administrative JOS, works on the first floor of the Center. He testified that sometime in the afternoon of Monday, May 18, 2015, he was on the first floor of the Center when he received an e-mail that respondent was sitting on the second floor. The preceding Friday, Gaskin had ordered respondent to report to the first floor. Gonzalez told Melendez, respondent's direct supervisor in the first floor applications unit, that respondent had reported to the second floor and Melendez went to the second floor to look for respondent.

Gonzalez wrote a memorandum to respondent dated May 18, in which he stated that respondent clocked in at 9:19 a.m., but disappeared until 1:44 p.m., when he was observed sitting on the second floor. Gonzalez noted that on May 15, respondent had been instructed to report back to his desk on the first floor. Gonzalez wrote that on May 18, Melendez went to the second floor and instructed respondent to report to the first floor, which he failed to do. Gonzalez later returned to the second floor to look for respondent, but he had disappeared (Pet. Ex. 6; Tr. 94).

Melendez's recollection of the incident was less than clear. On cross-examination, he appeared confused as to whether respondent was at his work location during the morning or the afternoon. However, he recalled that respondent went missing for part of the day and that

Gonzalez asked him to go look for respondent (Tr. 140-41). This testimony corroborates that respondent was missing from his work location for a portion of the day.

Respondent could not recall the specific incident, but maintained that he was generally confused as to which floor he was to work on (Tr. 247). However, his claim of confusion is unpersuasive. On Friday, May 15, Gaskin gave respondent clear verbal and written orders to report to the first floor (Pet. Ex. 5; Tr. 43-46, 52). It is disingenuous of respondent to assert that he remained confused when he reported to work the following Monday.

Petitioner established that on May 18, 2015, respondent failed to report to his assigned workstation as directed and was therefore AWOL and insubordinate. His conduct was prejudicial to good order, detrimental to HRA, and undermined his effectiveness in performing his duties. Therefore, charges I-VIII, and X of specification III are sustained.

Refusal to Perform Assigned Work

Petitioner alleges that respondent failed to interview clients assigned to him and perform other work on multiple occasions while he was assigned to the applications unit.

Melendez has been an HRA employee for 26 years, eight of them as a supervisor (Tr. 97-98). He supervised respondent from May to November 2015 in the applications unit (Tr. 97-98). According to Melendez, the applications unit, located on the first floor of the Center, accepts and processes applications for public assistance. When a client comes in to apply for benefits, he or she is given a number and a worker is assigned to interview the client. Respondent was assigned to interview applicants when he was transferred to the unit (Tr. 99-100).

The Center accepts applicants until 5:00 p.m. Therefore, staff is sometimes required to stay past 5:00 p.m. in order to process an application. The Center's management may require, or "mandate," that a worker stay past regular hours to complete an application because once an applicant arrives in the Center before 5:00 p.m., his or her application must be accepted (Tr. 101). Supervisors initially solicit volunteers to work overtime. However, if the supervisors determine that it is necessary to mandate overtime, by 3:00 p.m. on the day the overtime work is necessary, a supervisor will notify the employees who will be required to work overtime (Tr. 171).

August 13, 2015 (Specification IV, Charges II - IV, VII, VIII, and X)

Respondent is charged with refusing to complete a client interview on August 13, 2015, at approximately 4:15 p.m., although his supervisor informed him that the case was in his queue. It is alleged that respondent told his supervisor that he would not work overtime and left the work location without completing the interview (ALJ Ex. 1).

Melendez testified that on August 13, at about 4:15 p.m., a client walked into the Center seeking services. The Center's director had mandated that respondent and other workers work overtime because several clients were waiting to be interviewed. Melendez assigned the case to respondent, who stated that he was not going to stay. Respondent then left the Center and Melendez had to assign the interview to another worker, giving that worker an extra assignment (Tr. 104-05). In a memorandum memorializing the incident, Melendez noted that respondent's actions caused frustration and conflict among his colleagues, who were forced to assume his responsibilities when he left early (Pet. Ex. 7; Tr. 105).

Respondent maintained that although he did not recall the specific incident, he did not believe that he would have refused to work overtime. He denied having created a negative atmosphere and suggested that it was Melendez who caused a negative work environment, but provided no basis for his belief (Tr. 248-49).

I found Melendez to be credible. He displayed no animus or bias towards respondent and seemed genuinely puzzled by respondent's attitude, refusal to accept assignments, and disappearances during the work day. Melendez described respondent as a good worker when he first arrived at the unit. He noted, however, that respondent became disrespectful and less communicative and that his work deteriorated. Melendez stated that he reached out to respondent and tried to identify ways to help him, but respondent did not respond to his overtures (Tr. 129-30).

On the other hand, respondent's claim that he would not have refused to perform overtime is simply not believable. He appeared generally disdainful of Melendez and his supervisors at the Center, evidenced by the tenor of his statements to Gaskin, Melendez, and Ferrer. It is reasonable to conclude that respondent, who failed to comply with his supervisors' directives about where to report for work, would ignore their orders to work overtime.

In sum, I find that on August 13, 2015, respondent refused to interview an HRA client after being told by his supervisor to do so and left the Center without completing the assignment.

Accordingly, specification IV, charges II, III, IV, VII, VIII, and X (alleging that respondent engaged in conduct that compromised an employee's effectiveness in the performance of his or her duties, was discourteous, engaged in conduct prejudicial to good order and discipline, was insubordinate, failed to accurately and efficiently complete work, and engaged in conduct detrimental to HRA) are sustained.

September 8, 2015 (Specification V, Charges II - IV, VII, VIII, and X)

It is alleged that after Melendez instructed respondent to continue a client interview on paper when the Center's electronic Paperless Operating System ("POS") became inoperable, respondent told the client to return the following day. Respondent is also alleged to have replied in a sarcastic manner when his supervisor gave him a memorandum regarding his conduct (ALJ Ex. 1).

Applications for services are processed electronically using an electronic system referred to as POS. However, when the system malfunctions, the employees must process paper applications. When the system starts working again, they transfer the information from the paper applications into the electronic system and complete processing the case (Tr. 106).

On September 8, 2015, the POS system crashed while clients were waiting to be interviewed. Gaskin instructed the staff on the first floor to use paper applications (Tr. 106). Melendez testified that the following day a client returned to the Center, asked for respondent, and told the receptionist that respondent had informed him to come back the next day to be interviewed because the system was down (Tr. 106-07). After several clients who had been in the Center the previous day returned to be interviewed, Melendez realized that respondent had told clients to return for interviews because POS was not working (Tr. 107-08). Because respondent had not completed the application, another worker had to do so (Tr. 111).

Melendez explained further that respondent failed to complete his duties regarding the application because the client in question had applied for emergency food stamps ("EFS"), which required that the Center's staff collect information from him during an interview and determine whether he was eligible for benefits. In such a case, the POS system directs the worker to the EFS portion of the application, which has to be completed for the client to receive food stamps immediately. If the worker does not complete the EFS portion of the application, the supervisor

cannot sign off on the application for the client to receive the emergency benefits. Respondent failed to complete the paper application (Tr. 112-14).

Melendez wrote a memorandum dated September 11, 2015, to memorialize the incident. In his memorandum, Melendez wrote that respondent was assigned a case that required him to interview an applicant. When the POS system went down and management instructed staff to complete interviews on paper, respondent failed to follow that instruction. Instead, respondent told the applicant to return to the Center the next day when the system was operational. In addition, Melendez wrote that respondent left the building without completing his duties (Pet. Ex. 8).

In response to Melendez's memorandum, respondent wrote an e-mail stating "[p]lease subject me to these disciplinary charges. Thank you kindly" (Pet. Ex. 8). Respondent testified that he was merely stating that he accepted the disciplinary charges and was trying to be kind about it (Tr. 279).

Respondent denied telling the applicant to return because the POS was not working. According to respondent, on September 8, he processed a paper application because POS was down (Tr. 250)

Petitioner bears the burden of proving the charged misconduct by a preponderance of the credible evidence. *See Dep't of Sanitation v. Figueroa*, OATH Index No. 940/10 at 11 (Apr. 26, 2010), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-47-A (July 12, 2011) (in a disciplinary proceeding, petitioner bears the burden of proving misconduct by a fair preponderance of the credible evidence); *Dep't of Correction v. Hall,* OATH Index No. 400/08 at 2 (Oct. 18, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 08-33-SA (May 30, 2008) (same). A preponderance has been defined as "the burden of persuading the triers of fact that the existence of [a] fact is more probable than its non-existence." Prince, Richardson on Evidence § 3-206 (Lexis 2008) (citations omitted); *see also Bazemore v. Friday*, 478 U.S. 385, 400-01 (1986).

Petitioner's evidence is insufficient to satisfy its burden. First, petitioner alleges that Melendez instructed respondent to continue to interview his client on paper; however, Melendez testified that another supervisor delivered those instructions to the staff (Tr. 157). It is unclear from Melendez's testimony whether those instructions were delivered by Gaskin (Tr. 106) or the other supervisor (Tr. 157-58; Pet. Ex. 8), or both. There is, however, no evidence that Melendez issued those instructions to respondent. Second, it appears that Melendez did not have a clear

memory of this incident. He testified that he wrote his memorandum about the September 8 incident three days later, on September 11, because the incident occurred on a Friday (Tr. 166-67). However, September 8, 2015, was a Tuesday.[2]

Finally, petitioner's evidence that respondent told the client to return the next day consists of Melendez's testimony that the client told a receptionist at the Center, who told Melendez (Tr. 107). This evidence, which goes to the critical issue of whether respondent told the client to return the next day, was afforded little weight as it amounted to double hearsay. *See Business Integrity Comm'n v. Liberty Water & Sewer, LLC,* OATH Index No. 983/13 at 5 (Jan. 25, 2013) ("While hearsay is admissible in this tribunal . . . hearsay upon hearsay has been held to have diminished reliability," *citing* 48 RCNY § 1-46 (Lexis 2016)); *Matter of Rebo*, OATH Index Nos. 924/03 & 926/03 at 28 (Dec. 18, 2003), *adopted*, Loft Bd. Order No. 2840 (Jan. 15, 2003); *Health & Hospital*s *Corp. (Correctional Health Services) v. LaSane*, OATH Index No. 1165/02 at 2 (Aug. 8, 2002) ("double hearsay, when on a critical issue, has consistently been held to be unreliable" (citations omitted)).

With regards to respondent's e-mail, while it may have been sarcastic in tone, that alone does not constitute misconduct. *See Human Resources Admin. v. Rosier*, OATH Index No. 1951/04 at 5 (Mar. 31, 2005) (sarcastic comment that was not profane or argumentative does not rise to misconduct); *Dep't of Correction v. Hamlin*, OATH Index No. 110/02 at 15 (May 21, 2002) (absent some disruption in the workplace, threats, or manifest disrespect, sarcastic statements are permissible during a supervisor/subordinate confrontation).

In sum, this specification should be dismissed.

September 17, 2015 (Specification VI, Charges II - IV, VII, VIII, and X)

Respondent is charged with failing to correct a client file when directed to do so, with telling his supervisor that he did not have time to make the correction, ignoring his supervisor's request, and leaving his workstation (ALJ Ex. 1).

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[2] At respondent's unopposed request (Tr. 190-91) and pursuant to this tribunal's rules, I took official notice that September 8, 2015, was on a Tuesday. *See* 48 RCNY § 1-48(a) (Lexis 2016) ("In reaching a decision, the administrative law judge may take official notice, before or after submission of the case for decision, on request of a party or *sua sponte* on notice to the parties, of any fact which may be judicially noticed by the courts of this state"); *Dollas v. W.R. Grace & Co.,* 225 A.D.2d 319, 320 (1st Dep't 1996) (official or judicial notice may be taken of matters "of common and general knowledge, well established and authoritatively settled, not doubtful or uncertain. The test is whether sufficient notoriety attaches to the fact to make it proper to assume its existence without proof").

Melendez testified that the POS system has a management console that tracks the progress of cases. During a review of the case tracking system, Melendez discovered that respondent completed an interview but did not complete the EFS portion of a case. Melendez asked respondent to complete the case, but he refused to do so, stating that he did not have the time or was doing something else. To prevent the case from appearing in the POS management console as incomplete the following day, Melendez asked another staff member to finish the work (Tr. 114-15).

Melendez wrote a memorandum to respondent, dated September 17, 2015, which provides additional details regarding this specification. Melendez noted that although it was late, respondent completed an application interview for Chislom C. He also completed an "ineligible EFS interview" of the applicant, but the case could not be approved because respondent issued a utility payment, which prevented sign-off on the EFS application. Melendez wrote that he asked respondent to correct the case, but respondent stated that he was busy and did not have the time. Melendez repeated his request after respondent completed the interview he had been working on, but respondent ignored him, packed his bags, and left the building. Melendez noted that the case had to be reassigned to another worker (Pet. Ex 9).

Respondent testified that the client came in to the Center because her utility service had been or was in danger of being shut off. He interviewed her and processed the case to either restore or prevent shutoff of her service. He determined, based on the interview, that the client was eligible for expedited food stamps and also processed that request. Respondent maintained that Melendez claimed that he was unable to process either the utility benefits or food stamps application, which respondent described as "absolutely untrue" (Tr. 252-53). Respondent testified that he processed the utility service and the food stamps applications and sent the case to Melendez that same day for him to approve both applications. He also gave the client a job assignment, so there was no need for her to return to the Center unless it was to provide requested paperwork. He denied having ignored Melendez or having said that he was too busy to process the case (Tr. 252-54).

I credit Melendez's testimony that when he asked respondent to complete work on the case, he refused to do so. While Melendez's testimony lacked detail regarding the incident, it is supported by a contemporaneous memorandum. Furthermore, respondent's testimony that Melendez claimed to be unable to process one of the applications supports petitioner's

contention that respondent refused to do the work. I find it more likely than not that after respondent worked on the case, Melendez told respondent that he was unable to process both applications and asked respondent to correct the case, which respondent refused to do. It is evident from his testimony that respondent had no confidence in Melendez's assessment of the problem with the case and I find it more likely than not that respondent refused to do the work because he did not believe it was necessary.

Accordingly, this specification and charges are sustained.

September 25, 2015 (Specification VIII, Charges II - IV, VII, VIII, and X)

Petitioner alleges that on September 25, at about 4:06 p.m., respondent refused to accept a case and refused to follow orders to interview a client issued by his supervisor and the director of the Center (ALJ Ex. 1).

According to Melendez, when someone applies for benefits, a worker must interview the applicant and enter the case into the agency's database. In addition, the applicant must be assigned a case number. The Center's staff must adhere to this procedure even if the client withdraws the application or it is rejected. Melendez contends that respondent permitted an applicant to complete an application, but failed to make an entry in the database to reflect that the client had withdrawn the application (Tr. 118-19).

Melendez testified that respondent was assigned the case between 4:00 and 4:30 p.m. on September 25, which gave him sufficient time to complete the application, because he had clocked in at 9:26 a.m. and a full work day would have ended at 5:26 p.m. Moreover, respondent had been mandated to work overtime that day. However, respondent clocked out at 4:58 p.m. (Tr. 122-23).

Melendez memorialized this incident in a memorandum to respondent dated September 25, 2015. He wrote that respondent was assigned to interview Leysha H., having been previously told that all applicants must be registered and interviewed no matter the outcome. He noted respondent had been instructed that if an applicant requests to withdraw his or her application during an interview, he was to inform his covering supervisor, so that a notation that the applicant left the Center could be placed in the POS login queue, then reject the case (Pet. Ex. 10).

Melendez's testimony and memorandum were unclear as to the precise nature of respondent's purported misconduct. However, the Center's Director, Ferrer, persuasively testified that when he ordered respondent to work on the case, respondent refused to do so.

Ferrer testified that POS records the time that a client is registered at the Center. The supervisor then assigns the client to a worker, which is noted in POS (Tr. 177-78). The system therefore provides managers with information such as how long it takes to see a client, how many clients are waiting to be seen, and which workers are assigned to the client (Tr. 177). According to Ferrer, timeliness in processing the applications is important because delays in servicing clients reflect poorly on the Center (Tr. 177). Therefore, Ferrer or the Center's deputy director reviews the system daily at about 4:00 p.m. to determine how many clients are waiting, which staff member is assigned to work on an application, and whether that staff member has called the client (Tr. 177).

On September 25, Ferrer reviewed POS and noticed that a client had been assigned to respondent, but had not been called. Ferrer went down to the first floor and ordered respondent to see the client, but respondent calmly stated that he was not going to do so. Respondent explained that he had already done enough work for the day and would not see the client. Ferrer told respondent that he would be subject to disciplinary action. Ferrer testified that the incident was memorable because he is not typically involved in the day-to-day supervision of the Center's staff. He became involved in this instance, however, because there had been prior issues with respondent and he "didn't want anything to escalate" (Tr. 176-78).

Ferrer wrote a memorandum to respondent, dated September 28, 2015, in which he noted that on September 25, at approximately 4:06 p.m., he noticed that respondent had been assigned an application case, but had refused to interview the client. Ferrer wrote that he ordered respondent to see the client, and respondent refused to comply (Pet. Ex. 14).

Respondent had no recollection of having refused to interview the client or ever having refused an assignment. Indeed, he maintained that he was happy to accept any work that was given to him (Tr. 258).

I found Ferrer to be highly credible in his account of his interaction with respondent on September 25. Ferrer had a clear recollection of the event, which was corroborated by his contemporaneous memorandum. The evidence establishes that Ferrer ordered respondent to complete a client interview and he simply refused to do it. Accordingly I find the evidence

sufficient to establish that on September 25, 2015, respondent refused to obey Ferrer's order to work on an application, and the charges are sustained.

September 30, 2015 (Specification X, Charges 1-VIII, X)

It is alleged that on September 30, 2015, respondent refused to accept a case assignment, failed to comply with orders from Melendez and Ferrer to interview a client, left his work location without authorization at approximately 12:54 p.m., and was absent for three and-a-half hours (ALJ Ex. 1).

Petitioner's sole evidence in support of this allegation is Ferrer's vague testimony that respondent refused to work on a case to which he was assigned (Tr. 178-79) and Melendez's testimony that respondent was marked AWOL for three hours and thirty minutes (Tr. 135-36; Pet. Ex. 13). Neither witness described the circumstances surrounding assignment of the case or respondent's refusal to perform the work.

Respondent did not recall the incident, but claimed that he would not have left the work location (Tr. 260).

Petitioner's evidence is insufficient to establish that it was more likely than not that on September 30, 2015, respondent refused to work on a case to which he was assigned. Accordingly, this specification should be dismissed.

October 8, 2015 (Specification XII, Charges II-IV, VII-X)

Respondent is charged with refusing to accept a case or interview a client at 2:05 p.m. and, when asked about the case, telling the Center's director that he could only work on one case at a time. It is further alleged that respondent accused the director of harassment and threatened to call security (ALJ Ex. 1).

Melendez testified that on October 8, 2015, respondent was assigned to April T.'s case and the client was waiting to be interviewed. However, respondent stated that he would not interview April T. because he had already interviewed three clients (Tr. 163-64). Melendez made reference to respondent's refusal to interview April T. in a memorandum to respondent dated November 17, 2015. In that memorandum, Melendez noted that on several occasions respondent failed to complete work or refused to conduct interviews, including April T.'s case

(Pet. Ex. 12). However, Melendez did not write a memorandum to respondent at the time the incident occurred (Tr. 165).

Ferrer, however, memorialized his encounter with respondent in a detailed memorandum to respondent dated October 8, 2015. According to Ferrer, the POS management console showed that respondent had been assigned to a case at 10:20 a.m., for which he completed an interview at 11:13 a.m. Later that day, at about 2:05 p.m., Melendez assigned him a second case, but respondent refused to call the applicant for an interview. Ferrer asked respondent why he was not interviewing the client, to which respondent replied that he could only work on one case at a time. Thinking that respondent would be more inclined to comply with a directive from the Center's director rather than one from Melendez, Ferrer instructed respondent to work on another case. He explained to respondent that other workers were seeing clients and that he did not want the interviews to become backlogged. However, respondent refused to see the client, claimed that Ferrer was harassing him, and threatened to call security (Tr. 182-84; Pet. Ex. 15).

Respondent's testimony focused on Ferrer's conduct during the incident. He testified that while he sat in his cubicle, Ferrer stood between him and Melendez and loudly stated that respondent was being insubordinate. Respondent doubted that a client was waiting for him and thought that Ferrer was just trying to "verbally berate" him. In response, respondent told Ferrer that he would contact the Center's security (Tr. 260-61).

The evidence establishes that respondent refused to interview a client as instructed. His belief that there were no clients waiting to be interviewed is inconsistent with Ferrer and Melendez's credible testimony. Respondent's conduct was insubordinate, discourteous, prejudicial to good order, and undermined the effectiveness of the agency. In addition, respondent failed to complete assigned work.

Petitioner further charged respondent with threatening or intimidating a participant, supervisor, fellow employee, or private citizen (charge IX). However, no evidence was adduced to support this charge. Indeed, Ferrer testified that respondent was not threatening during their encounter (Tr. 185). Accordingly, that charge should be dismissed.

November 17, 2015 (Specification XIII, Charges II-IV, VII-X)

It is alleged that respondent failed to complete work assigned to him for completion by a deadline. It is further alleged that when his supervisor asked about the work on November 17,

2015, respondent answered in a threatening manner and sent disrespectful e-mails to his supervisor (ALJ Ex. 1).

A W-270 is a form used to reroute cases that need to be reviewed and processed. On November 10, 2015, Melendez assigned a W-270 to respondent for evaluation by November 16 (Tr. 123-24; Pet. Ex. 12). According to Melendez, on November 17, after respondent failed to meet the deadline, Melendez asked him about the assignment. Respondent told Melendez to leave him alone, clock out, and move away from his desk "before I get up from my chair and do something else." Melendez stepped away from respondent and reassigned the case to another worker (Tr. 124, 126; Pet. Ex. 12). Melendez summarized the incident in a memorandum to respondent dated November 17.

Respondent recalled that Melendez approached him while he was at his desk and stood within one foot of him (Tr. 264). According to respondent, Melendez asked him why he had not completed the assignment, and respondent retorted that he had already done so. Melendez addressed respondent for about ten minutes before he left the cubicle. Respondent all but conceded that he told Melendez to move away from his desk before he got out of his chair and did something, but characterized his words as a response to feeling threatened by Melendez. Respondent testified that, "[Melendez] was very menacing. . . . Regarding this in quotations, I, I don't know specifically, these are the words, but I definitely did -- at this point he was threatening, and for him to be near, very close to me . . . in my opinion at that point was to be in a threatening manner" (Tr. 265).

I credit Melendez's testimony that respondent told him to move away from his desk before he got up from his chair and did something. Respondent's suggestion that he did so out of fear defies credulity. Melendez merely stood near respondent's desk, which is not unusual given that their desks are next to each other, and asked respondent about the status of the case. Under these circumstances, respondent's statement to Melendez that he would get up from his chair and do something was a threat in response to Melendez's inquiries about work respondent had failed to complete. Respondent's warning suggested that he would take aggressive, physical action if Melendez did not move away from his desk and cease his inquiries. *See Human Resources Admin. v. Brown,* OATH Index No. 943/98 (Apr. 30, 1998), *modified on penalty,* Comm'r Dec. (June 24, 1998), a*pp. dism*., NYC Civ. Serv. Comm'n Item No. CD 99-67-D (July 9, 1999) (statement that supervisor "better be careful" was a warning derived from respondent's

displeasure with his supervisor's criticism of his performance and was intended to convey that some unstated danger or harm was likely to befall her); *Dep't of Sanitation v. Kingwood*, NYC Civ. Serv. Comm'n Item No. CD 91-115 (Sept. 16, 1991) (employee's remark to supervisor to stay away from him or "you'll get yours" held to be a threat). Moreover, it was disrespectful.

Petitioner alleged that later that day, respondent sent Melendez two disrespectful e-mails. In the first message he wrote "You need not approach me or my desk. If you need to clock out and leave this building, you need to do so" (Pet. Ex. 12). His e-mail to Melendez stated:

> I do not think that people who work for a living have to pay taxes to support your paycheck. You should be terminated I believe. I do not want your presence near me. I know how I was hired and I know about my work history. Enjoy your day.

(Pet. Ex. 12). Respondent testified that he believed Melendez should be terminated because he was not doing a good job and thought his e-mail was appropriate (Tr. 285).

Respondent's e-mails were insolent and condescending, as he told his supervisor to stay away from his desk and out of his presence. Moreover, his implication that Melendez did not merit his salary or his job was disrespectful and demeaning. *See Admin. for Children's Services v. Yu*, OATH Index No. 1924/16 at 10 (Sept. 1, 2016) (e-mail to supervisor stating "[y]ou need to sign my timesheet for this week" was rude and disrespectful). In sum, respondent was discourteous to his supervisor.

Absence Without Authorization

September 21-24, 2015 (Specification VII, Charges I, II, IV, V, VI, and X)

Respondent is charged with being absent from his work location for four days in September 2015 without prior or subsequent authorization (ALJ Ex. 1).

Respondent did not appear for work on September 21, 22, 23, and 24, 2015. Melendez, who approved respondent's time and leave, considered him AWOL because respondent failed to notify his supervisor of his absence (Pet. Ex. 13; Tr. 130-135).

Ferrer met with respondent on September 25 to discuss his absence and memorialized that meeting in a memorandum dated September 28 (Pet. Ex. 14; Tr. 174). In his memorandum, Ferrer wrote that respondent was "unable to acceptably explain and/or document" his absence. He notified respondent that he would not be paid for the dates he was absent and offered to help

him contact the Employee Assistance Program ("EAP"). Ferrer testified that he told respondent about EAP because he was concerned about respondent, who had been a good employee before his behavior deteriorated. When he contacted the agency's personnel department about how best to assist respondent, they recommended EAP. However, respondent declined to contact EAP (Tr. 175; Pet Ex. 14).

Respondent could not specifically recall being absent during September 21 through 24, but remembered that he was sick on several days in September 2015. Respondent testified that it was his regular practice to call his immediate supervisor, Melendez, or someone in the director's office, to notify them that he was ill and needed to take time off. During his illness in September, however, he called the director's secretary instead of Melendez because his relationship with Melendez had deteriorated. He believed that he might have failed to call her on one of the days that he was absent (Tr. 255-57, 280-82).

The credible testimony and corroborating memorandum, as well as petitioner's time and leave records, establish that respondent was absent without permission from September 21 through 24, 2015. Respondent's self-serving testimony that he notified the director's secretary of his illness is not supported by any evidence and is simply not credible.

Accordingly, the specification and charges are sustained.

September 29 and October 5, 2015 (Specifications IX and XI, Charges I, II, IV - VI, and X)

Petitioner alleged that respondent was absent from his work location for seven hours without approval on September 29 and October 5, 2015 (ALJ Ex. 1).

Petitioner submitted respondent's time and leave records in support of these specifications. Melendez testified that when an employee fails to notify him that he or she is going to be late or absent, he marks that employee as absent without leave (Tr. 136). The records show that Melendez entered in the City's time and leave database that respondent was absent without leave for seven hours each day on September 29 and October 5 (Pet. Ex. 13; Tr. 135-36).

Respondent did not specifically address these allegations. Consequently, the undisputed charges are sustained.

FINDINGS AND CONCLUSIONS

1. Petitioner proved that on May 14, 2015, respondent was absent from his assigned work location without permission from 10:15 a.m. until 2:00 p.m. and that he failed to complete work during that period as alleged in specification I. However, petitioner failed to prove that respondent's conduct constitutes discourtesy or insubordination, as alleged in charges III and VII.

2. Petitioner proved that on May 15, 2015, respondent failed to report to his workstation as directed by his supervisor and was AWOL, and that he was discourteous to his supervisor. Therefore, specification II, charges I-VII and X, are sustained. However, petitioner failed to prove that respondent was absent from his assigned workstation between 10:55 a.m. and 2:00 p.m. or that he threatened or intimidated his supervisor (charge IX).

3. Petitioner proved that on May 18, 2015, respondent failed to report to his assigned workstation as directed by his supervisor. Therefore, specification III, charges I-VII and X, are sustained.

4. Petitioner proved that on August 13, 2015, respondent was ordered to remain at the Center to interview an HRA client, but he refused to stay late and left without completing the assignment. Accordingly, specification IV, charges II-IV, VII, VIII, and X, are sustained.

5. Petitioner failed to establish that on September 8, 2015, respondent improperly told a client to return to the Center the following day to complete an interview when the POS system became inoperable and that respondent's e-mail to his supervisor constitutes misconduct. Specification V, charges II-IV, VII, VIII and X, should be dismissed.

6. Petitioner proved that on September 17, 2015, respondent refused to correct a case when ordered to do so by his supervisor as alleged in specification VI, charges II-IV, VII, VIII and X.

7. Petitioner proved that respondent was AWOL from September 21–24, 2015, as alleged in specification VII, charges I, II, IV, V, VI, and X.

8. Petitioner proved that on September 25, 2015, respondent refused to accept a case assignment and failed to comply with a

directive to interview a client. Therefore, specification VII, charges II-IV, VII, VIII, and X, are sustained.

9. Petitioner proved that respondent was AWOL on September 29, 2015. Therefore, specification IX, charges I, II, IV, V, VI, and X, are sustained.

10. Petitioner failed to establish that on September 30, 2015, respondent refused to accept a case assignment and left his workstation without permission. Accordingly, specification X, charges I-VIII and X should be dismissed.

11. Petitioner proved that respondent was AWOL on October 5, 2015. Therefore, specification XI, charges I, II, IV, V, VI, and X, are sustained.

12. Petitioner proved that on October 8, 2015, respondent refused to interview a client as instructed by his supervisors, and, when the Center's director instructed him to work on another case, accused the Center's director of harassment and threatened to call security. Therefore, specification XII, charges II-IV and VII, VIII, and X, are sustained. However, petitioner failed to prove that respondent threatened or intimidated his supervisor (charge IX).

13. Petitioner proved that on November 17, 2015, respondent failed to complete a work assignment, threatened his supervisor, and sent him disrespectful e-mails. Therefore, specification XII, charges II-IV, VII-X are sustained.

RECOMMENDATION

Upon making the above findings and conclusions, I obtained and reviewed respondent's personnel record. Respondent was hired in October 2011 and has had no formal disciplinary history. Respondent's sole performance evaluation during his tenure was for his work in 2014, when respondent was assigned to the fair hearing unit. He received an overall rating of "very good."

Petitioner seeks a recommended penalty of 45 days' suspension (Tr. 298). In requesting that penalty, petitioner relied on *Human Resources Admin. v. Williams*, OATH Index No. 3072/09 (Jan. 15, 2010) and *Human Resources Admin. v. Green,* OATH Index No. 1794/02

(Dec. 6, 2002), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-78-SA (Aug. 23, 2006). In *Williams*, this tribunal recommended a 45-day suspension for a captain in the agency's police force who was found to have neglected his duties, was absent without leave, and was insubordinate. During a 28-year tenure, the respondent had amassed disciplinary history that included penalties for excessive lateness and use of agency materials and employees for non-City business. In *Green*, a 30-day suspension was recommended for an eligibility specialist with an unblemished 14-year tenure who engaged in discourteous and insubordinate behavior that involved profanity and spitting at a supervisor.

These cases are distinguishable. While respondent was AWOL and shirked his responsibilities, unlike *Williams*, he has no prior formal discipline. In addition, although repeated and disruptive, respondent's insubordination and discourtesy did not involve use of profanity or egregious conduct such as spitting at a supervisor, as was the case in *Green*.

Respondent was also found to have made a threatening statement to his supervisor. Recommended penalties for employees who have made verbal threats to supervisors have depended on the severity of the misconduct. *See Health & Hospitals Corp. v. Rivera,* OATH Index No. 2063/08 (Oct. 23, 2008) (45-day suspension recommended for an employee with a prior disciplinary record who told his supervisor that "I'll wait for you outside to show you what I am made of" and was excessively late); *Dep't of Transportation v. Davis*, OATH Index No. 1042/02 (July 9, 2002) (15-day penalty recommended where respondent confronted supervisor and demanded change of AWOL codes on his time card while standing in supervisor's office and refusing to allow supervisor to leave); *Dep't of Sanitation v. Terry*, OATH Index No. 1456/01 (July 30, 2001) (10-day suspension for worker who threatened supervisor); *Human Resources Admin. v. Olafimihan*, OATH Index No. 751/98 (Mar. 19, 1998) (45-day suspension for threatening to kill supervisor); *Human Resources Admin. v. Brown*, OATH Index No. 943/98 (Apr. 30, 1998), *modified on penalty*, Comm'r Dec. (June 24, 1998) (15-day suspension increased to 30-day suspension for an employee found to have verbally threatened a supervisor); *Transit Authority v. Webb*, OATH Index No. 425/95 (Jan. 27, 1995) (20-day suspension for employee who spoke loudly, pointed his finger, and challenged supervisor's authority). Here, although respondent's words constitute a threat, they were unaccompanied by threatening gestures, profanity, a raised voice, or disruption to the workplace.

Petitioner sought a penalty of 45 days' suspension if all the charges were substantiated, which they were not. Moreover, respondent has no disciplinary history. Nonetheless, petitioner established that respondent engaged in a pattern of misconduct that interfered with the agency's core mission to provide essential benefits such as food and utilities to its clients, sometimes on an emergency basis. Moreover, respondent's conduct disrupted the agency's operations as his work had to be assigned to other employees when he refused to do it or when he disappeared from his workstation. Finally, respondent's persistent flouting of directives from several supervisors and his discourteous behavior manifests a profound lack of respect and professionalism. A substantial penalty is warranted to impress upon respondent that his conduct is unacceptable in the workplace.

Therefore, I recommend that respondent be suspended without pay for 25 days.

Astrid B. Gloade
Administrative Law Judge

October 20, 2016

SUBMITTED TO:

STEVEN BANKS
Commissioner

APPEARANCES:

GABRIELLE DESTEFANO, ESQ.
Attorney for the Petitioner

JACOB ARONAUER, ESQ.
Attorney for the Respondent

THE CITY OF NEW YORK
CITY CIVIL SERVICE COMMISS ION

In the Matter of the Appeal o{

JAMES CAMERON
Appellant

-against-
HUMAN RESOURCES ADMINISTRATION
Respondent

Pursuant to Section 76 o{ the New York
State Civil Service Law
CSC index No:2017-0319

DECISION

JAMES CAMERON (“ Appellant”) appealed from a determination of the Human Resources Administration finding Appellant guilty of incompetency and/or misconduct and imposing a penalty or suspension following disciplinary proceedings conducted pursuant to Civil Service Law Section 75.

The Civil Service Commission (""Commission”) heard arguments from the parties on May 18, 2017.

The Commission has considered the arguments presented on this appeal, and reviewed the record of the disciplinary proceeding. Based on this review, the Commission concludes that there is sufficient evidence in the record to support the findings of fact and the conclusions of law, and that the penalty is appropriate.

Therefore, the final decision and penalty imposed are affirmed.

Nancy G. Chaffetz, Commissioner
Chair

Rudy Washington, Commissioner
Vice Chair

Allen P. Cappelli, Commissioner

Larry Dais, Commissioner

Charles D. McFaul, Commissioner
Dated: June 21, 2017