# *Dep't of Sanitation v. J. S.*

OATH Index No. 1454/19 (Aug. 5, 2019), *rejected*, Comm'r Dec. (Sept. 26, 2019), **appended**

Evidence established that due to legitimate medical reasons, sanitation worker did not appear at the Department's clinic or submit medical documentation by the Department's deadline. Charge that sanitation worker disobeyed an order and refused to submit to drug testing should be dismissed.

Commissioner sustained the drug test refusal charge but mitigated the penalty to time-served for the pre-trial suspension.

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

*In the Matter of*
**DEPARTMENT OF SANITATION**
*Petitioner*
*- against -*
**J. S.**[1]
*Respondent*

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## REPORT AND RECOMMENDATION

**NOEL R. GARCIA,** *Administrative Law Judge*

Petitioner, the Department of Sanitation ("Department"), commenced this disciplinary proceeding against respondent, a sanitation worker, pursuant to section 16-106 of the Administrative Code. Petitioner alleges that on August 29, 2018, respondent failed to appear at the Department's Health Care Facility ("clinic") for drug testing when ordered to do so, and failed to submit proper medical documentation justifying his inability to travel to the clinic, in violation of section 2.5 of the Department's Code of Conduct, and section 4.13 of the Department's Policy and Administrative Procedure 2012-02 (ALJ Ex. 1).

[1] Respondent is subject to Department and federal regulations that require random drug testing. Pursuant to such federal regulations, respondent's name has been withheld from publication. *See* 49 CFR § 40.321(b), 40.323(a),(b), 382.405(g),(h) (Lexis 2019); *Dep't of Sanitation v. Anonymous*, OATH Index No. 3381/09 at 1 n.1 (July 31, 2009).

At trial, petitioner presented the testimony of four witnesses and documentary evidence. Respondent testified on his own behalf. For the reasons set forth below, petitioner did not establish the charge.

## ANALYSIS

The Department's Substance Abuse Policy and Procedure requires an employee who holds a commercial driver's license to undergo random drug testing. The Drug and Alcohol Testing Unit ("DAT") conducts testing of Department employees through its mobile testing van. The Department uses a computer program to randomly select a location and the names of employees to be tested on any given day (Tr. 71-73).

An employee who is selected for testing but calls out sick at least an hour before his or her start time is excused from testing. An employee who calls out sick less than an hour before his or her scheduled start time must report to the clinic for testing on the same day. An employee who is unable to report to the clinic must submit medical records documenting his or her inability to travel. A clinic physician reviews any medical documentation submitted to determine whether the employee is able to travel to the clinic. The employee is usually afforded one or two hours to travel to the clinic or to submit the required medical documentation. If not, the employee is deemed to have refused to take the test and is suspended (Tr. 73-79).

DAT Supervisor Kevin Sweeney testified that on the morning of August 27, 2018, he received from the computer system a testing location, the Queens West-A Broom Garage, along with the names of thirty employees to be tested from that location. The list included respondent's name. Supervisor Sweeney arrived at the garage at 5:45 a.m. and reviewed the list of names with Supervisor Donovan Alves. Supervisor Alves confirmed to him that respondent was scheduled to work the 7:00 a.m. to 3:00 p.m. shift that day (Tr. 19-27). Later that morning, Supervisor Alves informed him that at 6:30 a.m., respondent had called out sick (Tr. 29). A Department telephone log book entry evidences that respondent called at 6:30 a.m. and spoke to "L. Quinones" (Pet. Ex. 2). The entry states "[J. S.] going sick w/diarrhea."

Because respondent called out sick less than an hour before his shift was to begin, Supervisor Sweeney told Supervisor Alves to notify respondent to report to the clinic by 10:00 a.m. that day for testing (Tr. 29). Supervisor Alves testified that at 7:15 a.m. he called

respondent and left him a message to inform him that he had to report to the clinic by 10:00 a.m. (Tr. 66-67).

Chief Giuseppina Atria, the DAT Director, oversees the drug and alcohol testing process (Tr. 71). She testified that at around 7:00 a.m. on August 27, she received an email from Supervisor Sweeney notifying her that respondent was ordered to the clinic for testing. When respondent failed to appear at the clinic by 10:00 a.m., Chief Atria contacted respondent and became aware that he was in a hospital emergency room. She told respondent that if he could not report to the clinic he needed to send medical documentation confirming that he went to the emergency room. Additionally, Chief Atria ordered respondent to report to the clinic the next day by 9:00 a.m. for testing. When Chief Atria left work on August 27, she believed that respondent had not submitted the requested medical documentation (Tr. 79-82).

However, the next day Chief Atria discovered that respondent had in fact submitted a doctor's note and an emergency room report from Jamaica Hospital (Tr. 82-83). These documents were received by the clinic by fax at 2:03 p.m. on August 27 (Pet. Ex. 3). The doctor's note states that "[J. S.] was seen and treated in our emergency department on 8/27/2018. He may return to work on 8/30/18."

On August 28, Chief Atria noted that respondent did not report to the clinic by 9:00 a.m., as instructed to do so. She called respondent but spoke with a female who informed her that respondent was on his way to the hospital. In the late afternoon, Chief Atria contacted respondent. Respondent told her that he had fainted on the subway platform as he was on his way to the clinic, and that he was taken by emergency medical services ("EMS") to the hospital. Chief Atria again told respondent to submit medical documentation to explain why he could not travel to the clinic. She also ordered him to report to the clinic on the following day, August 29 at 9:00 a.m., for testing. She testified that respondent did not submit any medical documentation on August 28 (Tr. 85-89, 134-35).

At around 9:00 a.m. on August 29, respondent contacted Chief Atria and told her that he would not be able to travel to the clinic (Tr. 139). Chief Atria told him that he had to submit medical documentation or report to the clinic by 11:00 a.m. that day. Because respondent did not appear at the clinic or submit the requested documents by the time indicated, Chief Atria suspended respondent, and stated that she "had no reason" to check for documents from respondent after that time (Tr. 89-91, 139).

There is no dispute that on August 30, 2018, at 8:04 a.m., the clinic received an emergency department report for respondent from New York-Presbyterian Hospital in Queens (Pet. Ex. 4). The report evidences that respondent was treated at the hospital on August 28, 2018. The report contains instructions for a patient who has experienced syncope, which is "a medical term for fainting or passing out." The instructions include that the patient should not "drive . . . until your healthcare provider says it is okay." A doctor's note included in the records states that respondent "needs to be excused from" work and school from August 28, 2018 to September 2, 2018.

Dr. Pascale Kerlegrand, a Department Deputy Medical Director and Medical Review Officer, testified that she reviewed respondent's medical records from Jamaica Hospital to determine whether he had been able to travel on August 27 (Tr. 163, 168; Pet. Exs. 3, 6). She concluded that respondent could have traveled to the clinic because the records do not contain any objective findings regarding his condition (Tr. 172). Dr. Kerlegrand acknowledged, however, that the records state that respondent was diagnosed with inflammation of the stomach and the intestines (Tr. 172-74).

Dr. Kerlegrand also reviewed respondent's medical records from his visit to New York-Presbyterian Hospital on August 28, which also includes a report from the EMS personnel who treated respondent at the subway station (Tr. 184-87; Pet. Exs. 4, 7). While those records indicate that respondent was diagnosed with fainting, Dr. Kerlegrand again opined that the records do not show any objective findings that would have prevented respondent from traveling on August 28 (Tr. 190, 200). Dr. Kerlegrand conceded, however, that she would recommend to a patient with similar symptoms as respondent to stay home for two or three days; to not drive or travel alone on the subway; and to follow a treating doctor's order not to travel, if given (Tr. 204-08).

Respondent testified on his own behalf. His testimony differed from that of Chief Atria's in that he alleged that he mostly interacted with Chief Pompeo, Chief Atria's supervisor, on the days in question. Nevertheless, he acknowledged that on August 29, 2018, he did not report to the clinic.

Respondent began working for the Department in October 2014. During the relevant time period, he was assigned to the Queens West-A garage as a broom operator. He testified that on August 27, 2018, which was a Monday, he was scheduled to work the 7:00 a.m. shift (Tr.

218). However, he did not feel well when he woke up on that day, and during the prior weekend he had suffered from stomach pains, diarrhea and vomiting. Nevertheless, he attempted to "tough it out" and go to work (Tr. 219-21, 234-36).

Respondent stated that he left his house around 6:10 a.m. and that while driving to work he had an "episode" with his stomach and came "pretty close to an accident in [his] pants" (Tr. 219). At that point he decided to call out sick and began calling the garage at 6:20 a.m., but the line was busy. At 6:30 a.m., respondent was able to speak with sanitation worker Linda Quinones. He told her that he was calling out sick and going to the hospital (Tr. 219-20). He also called the Department's hospitalization unit, which "follows [employees] that are . . . admitted into hospitals" (Tr. 121, 220). Respondent parked his vehicle, got into a taxi, and went to Jamaica Hospital (Tr. 220).

Respondent arrived to the emergency room and told nurses he was suffering from diarrhea, stomach pains, dizziness, and vomiting. He was given fluids and an IV to keep him hydrated. Respondent was prescribed medication and was released from the hospital in the early afternoon (Tr. 221). Jamaica Hospital medical records indicate that respondent arrived to the hospital at 7:15 a.m. and was discharged at 1:21 p.m. (Pet. Ex. 6).

When respondent arrived home from the emergency room he had several missed calls on his home phone from the Department. He called back and spoke to a clinic supervisor, who told him he needed to come to the clinic. Respondent testified that this was the first time he learned that the testing van had been at the garage and that he had been selected for testing (Tr. 222-23). After telling the supervisor that he did not feel well and that he had just been released from the hospital, he was put in contact with Chief Atria, and then with Chief Pompeo. They both told respondent that he had to report to the clinic for drug testing on the next day. Chief Pompeo provided respondent with a fax number so that he could submit medical documentation (Tr. 223-26).

After the call, respondent had his brother go to Staples and fax over the doctor's note and the emergency room report from Jamaica Hospital (Tr. 225; Pet. Ex. 3). Respondent testified that Chief Pompeo spoke to him again and told him that the doctor's note was insufficient because it excused respondent from work, but did not prohibit travel. Respondent stated that the doctor told him not to travel and that his note excusing respondent from work should "cover it" (Tr. 225). Nevertheless, respondent had his brother obtain a second note from the doctor

prohibiting work and travel. While respondent stated his brother faxed over the second note, the clinic appears to have not received it. In any event, Chief Pompeo spoke to him a third time and told him that regardless of the note, respondent would be suspended from work for 30 days if he did not appear to the clinic for testing on the next day, August 28 (Tr. 225-27).

On the morning of August 28, respondent attempted to go to the clinic for testing, although he believed he was disobeying his doctor's order (Tr. 227). He went to the subway station, passed through the turnstile, and as he was proceeding down the stairs towards the subway platform, he fainted. The next thing he remembers was waking up and being surrounded by "strangers . . . EMS and police." He also stated that it was "extremely hot" on that day (Tr. 227-28). A New York-Presbyterian Hospital EMS report states that EMS found respondent on the subway platform, that witnesses saw him passed out, that respondent stated that he felt dizzy and lightheaded, that he had visited Jamaica Hospital the day before and was treated for a virus, and that he was told to stay home for a few days, but had to go to work to submit documents (Pet. Ex. 7).

Respondent was taken by ambulance to the New York-Presbyterian Hospital. He stayed in the hospital for the majority of the day, leaving in the late afternoon or early evening. After he was discharged from the hospital he was picked up by a family member. He did not speak with anyone from the Department on that day (Tr. 228).

On the morning of August 29 respondent did not feel well. He called Chief Pompeo and told him that he had fainted on the subway the day before. Chief Pompeo told him that he had thirty to forty minutes to fax over the additional hospital documents. Respondent answered that his brother, who was at work, would be able to fax over the documents in the afternoon. Chief Pompeo replied that he would be suspended in half an hour if the documents were not received. Respondent answered that he could not leave his house because it was still "90-something degrees" outside, he was not feeling better and because when he left his house the day before, he had fainted (Tr. 228-31).

Forty-five minutes after speaking to Chief Pompeo, respondent was informed that he had been suspended. On September 13, 2018, respondent reported to the clinic as ordered, where he was seen by a neurologist, a cardiologist, and where he provided a urine sample and took a breathalyzer test. The doctors at the clinic told him that his fainting spell on August 28 was due

to dehydration. After the tests, respondent was cleared to return to work, and his suspension was lifted (Tr. 91, 231-32).

In its complaint and at trial, petitioner alleged that on August 29, 2018, respondent refused a command to report to the clinic and also failed to submit medical documentation justifying his inability to travel by the established deadline (ALJ Ex. 1). Respondent is not charged with refusing to appear at the clinic on either August 27 or 28, as he was instructed on each of those days to come to the clinic the next day (Tr. 10-11).

In a disciplinary proceeding, the Department "has the burden of proving its case 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 08-33-5A (May 30, 2008). An employer must prove three elements to establish a charge of insubordination: (1) that an order was communicated to the employee and the employee heard and understood the order; (2) the contents of the order were clear and unambiguous; and (3) the employee willfully refused to obey the order. *Dep't of Homeless Services v. Chappelle*, OATH Index No. 1918/07 at 3 (Aug. 30, 2007).

Chef Atria credibly testified that on August 28, she ordered respondent to report to the clinic for testing on August 29 at 9:00 a.m. (Tr. 88, 136-37). Respondent recalled communicating on these issues mostly with Chief Pompeo, not Chief Atria. Nevertheless, respondent testified that on August 29, at around 9:00 a.m., Chief Pompeo told him that he had thirty to forty minutes to fax over medical documentation justifying his inability to travel. As respondent's counsel argued during closing, it seems that respondent also understood that he was being ordered to travel to the clinic for testing if he could not send the requested documents (Tr. 270).

Respondent testified that he refused to leave his house because he was not feeling better; it was still hot outside; and because when he attempted to travel to the clinic the previous day, against his doctor's instructions, he had fainted. Respondent offered instead to have his brother fax the requested documents to the clinic in the afternoon, but that offer was not accepted by Chief Pompeo (Tr. 228-31).

Therefore, the credible evidence established that on August 29, 2018, respondent was ordered to report to the clinic or to send medical documentation justifying his inability to travel, but respondent did not leave his home to do so.

Under the "obey now, grieve later" principle, employees are required to follow their supervisor's direct orders when given and, if they have an objection, contest the order subsequently through formal grievance procedures. *See Dep't of Sanitation v. Morrison,* OATH 894/09 at 10 (Feb. 25, 2009) ("it is well settled that once a directive has been given, an employee must abide by the principle of 'obey now, grieve later.' This means an employee is required to obey the order when it is given and subsequently challenge it through formal grievance procedures . . . "); *see also Dep't of Sanitation v. Centeno*, OATH Index No. 857/11 at 14 (June 6, 2011), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-92-SA (Nov. 30, 2011); *Ferreri v. NYS Thruway Auth.*, 62 N.Y.2d 855, 856 (1984).

However, there are three recognized exceptions to this principle: where the order is clearly outside the supervisor's authority, where obeying would threaten the health or safety of any person, or where the order is unlawful. *Donofrio v. Spinnato*, 144 A.D.2d 672 (2d Dep't 1988); *Alper v. Gaffney*, 73 A.D.2d 644 (2d Dep't 1979); *Reisig v. Kirby*, 62 Misc.2d 632 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008 (2d Dep't 1969); *Human Resources Admin. v. Royal*, OATH Index No. 1087/04 at 6 (July 2, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD05-59-SA (Aug. 26, 2005).

The crux of respondent's argument is that he was too ill to travel, and that his doctor instructed him not to do so. Thus, if he complied with the order and left his home, he would have endangered his health and safety. To establish this exception, respondent bears the burden of demonstrating that the health threat was not only both "imminent and serious" but also that his assessment of the risk was reasonable and the actual reason for his conduct. *Dep't of Sanitation v. Alston*, OATH Index No. 473/15 at 8 (Dec. 4, 2014), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2015-0060 (Dec. 15, 2015); *Dep't of Probation v. James*, OATH Index No. 535/90 at 9-10 (Feb. 6, 1990), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 90-112 (Dec. 13, 1990); *Dep't of Parks & Recreation v. Kotch*, OATH Index No. 101/87 at 6 (Mar. 20, 1987).

Here, respondent testified in a manner that was consistent, forthright and credible. He testified that he felt sick while driving to work on the morning August 27, 2018, and that after almost having an "accident in [his] pants" he instead went to the hospital (Tr. 219). The documentary evidence confirms that respondent called out sick with diarrhea at 6:30 a.m. on that day, and that he arrived at the hospital by 7:15 a.m. (Pet. Exs. 2, 6). The Jamaica Hospital

records indicate that respondent reported experiencing diarrhea over the prior two days, which is consistent with his testimony at trial (Pet. Ex. 6).

Further, respondent testified that the treating doctor at Jamaica Hospital told him that he should not travel for a few days, and provided him with a note excusing him from work until August 30, 2018, which the doctor believed would also "cover" the travel restriction (Tr. 225; Pet. Ex 3). Respondent's testimony on this point is corroborated by the New York-Presbyterian Hospital EMS report for August 28, 2018 (Pet. Ex. 7). That report states that witnesses saw respondent passed out. Respondent was found on the subway platform, and stated that he felt dizzy and lightheaded. Notably, the report indicates that respondent told EMS personnel that he had visited Jamaica Hospital on the previous day, that he was treated for a virus, and that he was told to stay home for a few days. Nevertheless, he attempted to go to work because he had to submit documents. At the hospital, respondent was given another doctor's note that excused him from work until September 2, 2018.

Under these circumstances, where the credible evidence established that a Jamaica Hospital doctor told respondent on August 27, 2018, not to travel until August 30, 2018, and where respondent attempted to travel to the clinic on August 28, 2018, but fainted, respondent proved that leaving his house again on August 29, 2018, when he was still feeling ill and it was still hot outside, would have posed an "imminent and serious" threat to his health and safety. Moreover, respondent's assessments of the risk was reasonable and was the actual reason for not leaving his house to either report to the clinic or to submit documents. *See Dep't of Sanitation v. McCaffrey*, OATH Index No. 2518/10 (Aug. 16, 2010) (recommending dismissal of charges where sanitation worker did not report to clinic for legitimate medical reasons); *see also Dep't of Sanitation v. Keyes*, OATH Index No. 1872/06 (Nov. 16, 2006) (finding that vertigo was an imminent and serious health threat that excused a supervisor's failure to investigate an accident).

The Department correctly noted that it has a duty to maintain the integrity of its drug testing program. But its speculative suggestion that before arriving to work on August 27, 2018, respondent somehow became aware that the testing van was at his garage, and that he faked his illness and fainting spell to avoid testing, is unsupported by any credible evidence and without merit.

Instead, the credible evidence established that respondent made persistent efforts to comply with the Department's orders despite feeling ill. For instance, when he returned home

from Jamaica Hospital and was directed to fax to the clinic medical documentation, he stayed home but sent his brother to Staples to perform the task (Tr. 225). On the next day, he attempted to go to the clinic, but fainted (Tr. 227-28). On August 29, 2018, respondent stated that he would again ask his brother to fax over the New York-Presbyterian Hospital records as soon as his brother returned from work in the afternoon (Tr. 228-31). While respondent was never questioned as to why this task was not performed on August 29, it is undisputed that the documents were faxed to the clinic at 8:04 a.m. the next morning, which I find to be within a reasonable time frame (Pet. Ex. 4).

After respondent was suspended on the morning of August 29, 2018, he was not asked again to report to the clinic until September 13, 2018. He complied with that request, was subjected to various medical examinations including providing a urine sample, and was cleared to return to work (Tr. 91, 231-32). In short, respondent did not fake illness to thwart the testing process, and made reasonable attempts to comply with the orders he was given.

Lastly, the Department alleges that the medical records respondent submitted do not prove that he could not travel. The Department correctly argues that a doctor's note excusing an employee from work is usually insufficient to justify a failure to travel to the clinic. *See Dep't of Sanitation v. Field*, OATH Index No. 1977/08 (July 24, 2008), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD-08-62-SA (Dec. 12, 2008) (finding that doctor's note excusing sanitation worker from work did not prove worker was unable to travel to the clinic). But as noted, the evidence showed that a doctor verbally instructed respondent not to travel on the days in question. Indeed, petitioner's own witness, Dr. Kerlegrand, conceded that a patient with similar symptoms as respondent should obey a doctor's order not to travel when such orders are given, and should stay home for two or three days (Tr. 205, 208). Further, the evidence did not prove that respondent had a safe or feasible method of travel from his home in Forest Hills, New York, to the clinic in downtown Manhattan (Tr. 101-02; ALJ Ex. 1). Respondent was given instructions not to drive, the subway had already proven dangerous, and he referenced his financial concerns, such as his bills and taking care of his mother, when Chief Pompeo told him he should have taken a car service to the clinic on the day he fainted (Tr. 229-30).

In any event, the doctor's instruction to respondent not to travel, and his continuous ill health, were sufficient to justify respondent's refusal to leave his home on August 29, 2018.

## FINDINGS

Evidenced established that on August 29, 2018, due to imminent and serious threat to his health and safety, respondent did not follow an order to appear at the Department's clinic or submit medical documentation by the Department's deadline. Charge that sanitation worker refused to test should be dismissed.

## CONCLUSION

The charge should be dismissed. In addition, respondent's pay should be restored for the work days during which he was suspended from August 29, 2018 to September 13, 2018.

Noel R. Garcia
Administrative Law Judge

August 5, 2019

SUBMITTED TO:

**STEVEN COSTAS**
*Acting Commissioner*

APPEARANCES:

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*Attorney for Petitioner*

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**Department of Sanitation's Decision, September 26, 2019**

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In the Matter of

**DEPARTMENT OF SANITATION**

Petitioner

-against-

**J.S.**

Respondent

OATH Index No. 1454/19

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# COMMISSIONER'S DECISION

**KATHRYN GARCIA**, *Commissioner*

I have received and carefully reviewed the report and recommendation of Administrative Law Judge (ALJ) Noel Garcia concerning charges brought against the respondent, Sanitation Worker J.S, for violating the Department of Sanitation (The Department) Substance Abuse Policy and Procedure (PAP) 2012-02. Upon review of the testimony and exhibits presented at the formal hearing concluded at the Office of Administrative Trials and Hearing on March 26, 2019, I make the following findings of facts and conclusions of law.

I conclude that on August 29, 2018, the respondent violated the Department's Policy and Procedure (PAP) 2012-02 when he failed to report for drug testing at the Department's Health Care Facility (HCF) and failed to provide sufficient proof that he had a health condition that prevented him from traveling. My conclusions are based on the following.

**ANALYSIS**

Federal Law 49 U.S.C. §31306(b)(1)(A) directs the Secretary of the Department of Transportation (DOT) to promulgate regulations mandating employers to conduct pre-employment, reasonable suspicion, random and post accident testing for controlled substances of drivers of commercial vehicles. Pursuant to these regulations, 49 C.F.R. Part 382, 40 C.F.R. Part 40, the Department of Sanitation (DOS) maintains a drug-testing program for employees such as the respondent, who, as a condition of employment, hold commercial drivers licenses and operate commercial vehicles including sanitation trucks.

Under the Department's random drug testing procedures when a sanitation worker scheduled to work is selected for random testing and calls out sick less than one hour prior to his shift, the employee is ordered by phone the same day to report to the Department's Health Care Facility (HCF) to conduct the DOT mandated random drug test (Tr. 75). If the employee is too ill to travel, that employee is directed to fax medical documentation from a treating physician that proves he has an illness which prevents him from traveling. The medical documentation is reviewed by a doctor at the Department's HCF, and if the doctor determines that in his/her professional judgement the note is insufficient to prove that the employee cannot travel, then the employee is ordered to report to the HCF for the drug test (Tr. 78).

It is undisputed that on August 27, 2018, the respondent was randomly selected for DOT mandated drug testing by the Department's Drug and Alcohol Testing Unit's Mobile Drug Testing Van (Pet. Ex. 1). The van arrived at QW5 garage at 5:45am that morning (Tr. 26), about 15 minutes before most employees selected for testing begin their shift. However, the respondent works out of the adjoining broom garage and was scheduled to start his shift that morning at 7:00am, about an hour and fifteen minutes after the mobile testing van was already on location. That morning the respondent called out sick at 06:30am with diarrhea, *after* the van was already on location and visible to all employees, and, more importantly, less than an hour before the start of his shift (Pet. Ex. 2). Because the respondent was selected for random testing and had called out sick less than an hour prior to the start of his

shift, he was called at home and ordered to report to HCF for the random drug testing by 10:00 am that day (Tr. 79; Pet. Ex. 2). The respondent did not report (Tr. 80). Instead, he called to report that he was at the emergency room (ER). He faxed a doctor's note to the HCF showing that he went to the ER, was released, and advised that he could return to work on August 30, 2018 (Pet. Ex. 3).

This note was reviewed, and the respondent was advised that it was insufficient to prevent him from traveling to the HCF (Tr. 225). He was given another order to report to the HCF for drug testing by 9am the next day August 28, 2018. The respondent again failed to report.

That morning DAT learned that the respondent again went to the ER, after reporting that he fainted while he was at the subway station on his way to the HCF (Tr. 80). He was again contacted by DAT that day and given another opportunity to report by 9:00am the next day, August 29, or submit medical documentation sufficient to show that he could not travel (Tr. 80-81). The respondent did not report by the 9:00am deadline but called the HCF and was given an extended deadline to report by 11am or submit medical documentation showing that he could not travel (Tr. 89). The respondent failed to report or submit the required medical documentation by the 11:00am deadline (Tr. 90). As a result, he was suspended and issued a complaint for a refusal to report to the HCF for drug testing and failing to present sufficient proof that he could not travel (Tr. 91).

Since there is no dispute that the respondent failed to obey the order to report to the HCF, the only issue is whether the respondent can claim an exception under "the obey now, grieve later" principle. Under the principle, employees are obligated to obey an order unless they can claim one of three recognized exceptions to the rule. Exceptions to "obey now, grieve later" are recognized where the orders clearly exceed the supervisor's authority, are unlawful, or would threaten the health and safety of any person if followed. *See Law Dep't v. Lawrence*, OATH Index No. 1312/10 at 10 (Mar. 30, 2010), aff'd, NYC Civ. Serv. Comm'n Item No. CD 11-36-A (May 11, 2011). Here, the respondent claims the health and safety exception of the rule which holds that an employee can be excused from obeying an order if doing so would threaten the health and safety of himself or an individual. *Dep't of Sanitation*

*v. Alston*, OATH Index No. 473/15 at 8 (Dec. 4, 2014), aff'd, NYC Civ. Serv. Comm'n Case No. 2015-0060 (Dec. 15, 2015); Dep't of Probation v. James, OATH Index No. 535/90 at 9-10 (Feb. 6, 1990), aff'd, NYC Civ. Serv. Comm'n Item No. CD 90-112 (Dec. 13, 1990); *Dep't of Parks and Recreation v. Kotch*, OATH Index No. 101/87 at 6 (Mar. 20, 1987). The burden of proof is on the employee to demonstrate, by a preponderance of the credible evidence, that he is entitled to claim a health and safety exception. *Health & Hospitals Corp. (Coler-Goldwater Hosp.) v. Hinkson*, OATH Index No. 163/04 at 4 (Nov. 21, 2003); *Human Resources Admin. v. Minima*, OATH Index No. 1532/01 at 14-18 (May 16, 2002). Therefore, the central issue to be decided is whether the respondent met his burden to prove that a health condition prevented him from obeying the order to travel to the clinic for drug testing.

I find that the respondent failed to meet his burden to show that his health condition was such that it prevented him from traveling to the clinic for drug testing and hereby reverse the findings of ALJ Garcia. I come to this conclusion after reviewing the documents the respondent submitted that are part of the record (Pet. Ex. 3, 4), medical records the respondent released to the HCF (Pet. Ex. 6, 7), the respondent's own testimony, and, in particular, the testimony of Dr. Pascal Kerlegrand.

Dr. Kerlegrand is the deputy director of the HCF and a highly qualified and experienced physician in occupational health (Pet. Ex. 5). She has an undergraduate degree from Columbia University and received her medical degree from the University of Buffalo Medical School. She completed her medical internship at Columbia Presbyterian Medical Center. She has over twenty years' experience in diagnosing and treating occupational/work related health issues, including work-related injuries and non-occupational disabilities, as well as conducting physicals to determine work eligibility from occupational and non-occupational illness. In addition, as a medical case reviewer, staff physician, and Medical Review Officer at various public authorities, she has extensive experience reviewing and evaluating medical documentation including drug screenings, pre-employment medical information, clinical visits, emergency sickness, line of duty injury and necessity of medical care and appropriate utilization (Pet. Ex. 5; Tr. 161-169).

Dr. Kerlegrand testified that she reviewed all the documentation that the respondent submitted, ostensibly to prove because of a health condition he could not travel to the HCF on any of the dates he was ordered, including on August 29, 2018. The first document she reviewed was a document faxed by the respondent and received in the HCF on August 27 (Pet. Ex. 3), the first day that he was ordered to the HCF. She concluded that this document by itself was not sufficient to preclude the employee from traveling to the HCF that day (Tr.172). She explained that one of the factors that lead to her conclusion was that the note only stated that the employee could not return to work until August 30, 2018. She noted that the document "did not give her enough objective findings that would suggest...whether he is able to travel." (Tr. 172). So, after obtaining a release from the respondent, Dr. Kerlegrand also received and reviewed the hospital records of his visit to Jamaica Hospital emergency room on August 27, 2018 (Pet. Ex. 4). She looked at his clinical findings such as blood pressure, pulse and oxygenation (Tr.181). She noted that none of the tests were repeated prior to discharge the same day, leading her to conclude that all the clinical tests were normal and benign (Tr. 181-182). In sum, after reviewing the hospital records of the respondent's emergency room visit on August 27, 2018, in addition to the note he submitted, she still did not find that the respondent had a medical condition that should have prevented him from traveling to the HCF that day or the next. (Tr. 184).

She then reviewed a second note that the respondent submitted on August 30, 2018 (Pet. Ex. 4), to document his visit to the emergency room on August 28 and to show that he had a medical condition that prevented him from traveling to the HCF on August 28 and on August 29. After reviewing this document Dr. Kerlegrand concluded that it did not excuse the employee from traveling to provide a urine sample. (Tr. 185). She testified that in reaching her conclusion she looked at the date of the note, the diagnosis, and what his health care provider was excusing him from. She noted that while the provider checked off boxes indicating that he should be excused from work and school, the box referencing "physical activity" was not checked off. In her professional judgement she took that to mean that the respondent had no restriction on travel (Tr. 185). She reviewed three other pages that were attached as part of the documents the respondent submitted and are a part of Pet. Ex. 4. In

particular, she reviewed two pages of the document with the heading "Patient Discharge Instruction." Dr. Kerlegrand testified that nowhere in these pages does the health care provider instruct the respondent that he should not travel or walk or stand (Tr. 189). There are also boxes on the discharge instruction form that reference specific medical conditions. None of these boxes were checked off that would indicate that he was treated or suffered from any conditions what would render him unable to travel. For example, there was nothing checked off showing that the respondent was treated for any head injury, high blood pressure, abdominal pain, sprain and bruises, neck and back injury nor any fractures. (Tr. 189). Further down at the bottom of the instruction page, the provider listed a diagnosis of syncope which Dr. Kerlegrand explained meant passing out or fainting (Tr. 189). But significantly, in that same section where the form requires the provider to list any "restrictions," the section is left blank. A box for "other instructions" is also left blank. All this left Dr. Kerlegrand to conclude that there were no objective findings in the documents submitted by the respondent that would lead her to conclude that he had a health condition that precluded him from traveling to the HCF on August 29, 2018 (Tr. 200).

Besides the document the respondent himself submitted, Dr. Kerlegrand later obtained and reviewed the hospital records from the respondent's visit to the ER on August 28, 2018 (Pet. Ex. 7). She specifically wanted to review the Emergency Medical Services (EMS) report to determine what his presenting condition was when he was treated by the first medical professional who evaluated him on the scene where he allegedly passed out (Tr. 190). She also wanted to review the emergency room reports for the results of any objective diagnostic tests that were done (Tr. 190). She noted that though the EMS report indicates that "witnesses state patient passed out" and that he "felt dizzy" on the train, all the objective on-scene evaluations the EMS techs conducted were normal including all his vital signs (Tr. 190). They noted that he was conscious and had no injuries or fall. He was able to respond to their questions and tell them that he had gone to the ER the day before and treated for diarrhea and dehydration (Pet. Ex. 7). She concluded that there was nothing in the objective evaluations and findings at the scene that showed he had any underlying condition that would have caused him to pass out (Tr. 198-199).

She next reviewed the emergency room report she obtained from New York Presbyterian Queens Hospital where he was taken that day August 28, 2018 (Pet. Ex. 6). She concluded that though the emergency room personnel suggested he had dehydration which could have caused the reported episode of syncope, there was no clinical findings in the record she reviewed that shows a correlation (Tr. 199). For example, she testified that when looking for dehydration she would look for "changes in the patient's skin, mucosa, the tongue, the lips, the eyes." Yet, a review of his vital signs and physical examination performed in the ER was unremarkable and showed none of the symptoms consistent with someone presenting with dehydration (Pet Ex. 4, p2).

Dr. Kerlegrand concluded that based on her review, the note the responded presented for his hospital visit on the August 28 was insufficient to show that he could not travel. Further, there was nothing in the objective medical findings in the EMS and ER medical records that showed that he had a medical condition that precluded him from traveling to the HCF (Tr. 200). Nor was there evidence of any instruction he was given by his treatment professional advising him to refrain from any physical activity or to travel. I therefore completely credit the testimony and judgement of Dr. Kerlegrand that the medical evidence did not support a finding that the respondent had a health issue that put him at risk or prevented him from traveling to the HCF on August 29, 2018. *See Dep't of Sanitation v. R. L.* OATH Index No. 806/16 (Mar. 16, 2016), modified on penalty, Comm'r Dec. (Apr. 19, 2016), appended; (*Doctor credibly and knowledgeably testified about his review of that note and the basis for his conclusion that it did not establish respondent's inability to travel to the clinic for testing*).

Yet, against the weight of all the credible medical evidence in the record and the sworn unrebutted testimony and judgement of a highly qualified and experienced medical professional, ALJ Garcia relies largely on the uncorroborated testimony of the respondent to find that he met his burden to show not only that he had a health threat that prevented him from traveling, but to overcome all the evidence to the contrary. I disagree.

To establish an exception to the "obey now, grieve later" rule, respondent must demonstrate, by a preponderance of the evidence, that he had a health threat that was not only "imminent and serious" but also that his assessment of the risk was reasonable and was the actual reason for his conduct. *Dep't of Sanitation v. Alston*, OATH Index No. 473/15 at 8 (Dec. 4, 2014), aff'd, NYC Civ. Serv. Comm'n Case No. 2015-0060 (Dec. 15, 2015). The two documents that the respondent submitted to meet his burden (Pet. Ex. 3, 4) were reviewed by Dr. Kerlegrand and deemed insufficient to prove that he had an imminent and serious health threat that prevented him from traveling to the HCF. While both documents excused him from work, none excused him from physical activity that would include traveling to the HCF just for drug testing. OATH has consistently found that a doctor's note excusing an employee from work is insufficient to justify the employee's inability to travel to the HCF. *Dep't of Sanitation v. Field*, OATH Index No. 1977/08 (July 24, 2008), aff'd, NYC Civ. Serv. Comm'n Item No. CD 08-62-SA (Dec. 12, 2008); *Department of Sanitation v. R. L.*, OATH Index No. 806/16 (Mar. 16, 2016), modified on penalty, Comm'r Dec. (Apr. 19, 2016). In addition, Dr. Kerlegrand's review of the hospital records the respondent released to the HCF found no objective medical evidence that would suggest he had an imminent and serious health condition that would have precluded him from traveling or where any treating professional instructed him not to travel.

With a lack of any evidence in his medical records showing the respondent could not travel or that he was instructed not to travel, the ALJ erroneously relied on the respondent's self-serving and uncorroborated hearsay representation that a doctor told him not to travel (Tr. 225). Though hearsay is admissible in administrative proceedings. *See Police Dep't v. Clark*, OATH Index No. 639/00 (Mar. 29, 2000), such evidence, without more, should not be given more weight than the unrebutted testimony of a sworn witness who testified to the contrary at the hearing. *See Dep't of Correction v. Tatum*, OATH Index No. 2062/04 (July 19, 2005), modified on penalty, Comm'r Dec. (Aug. 28, 2005) (*declining to sustain charge based solely on hearsay evidence, in light of contrary trial testimony*). Further, an employee's uncorroborated testimony relating an out of court statement as to what a doctor told him, standing alone, is insufficient to meet his burden under the "obey now, grieve later" rule. *See Dep't of Sanitation v. Alston*, OATH Index No. 473/15 at 8 (Dec. 4, 2014), aff'd, NYC Civ.

Serv. Comm'n Case No. 2015-0060 (Dec. 15, 2015) (*Respondent's testimony, standing alone and without corroboration, failed to meet her burden under the obey now and grieve later rule). See also, Dep't of Correction v. Rocchild*, OATH Index No. 318/90, at 18 (Feb. 6, 1995) (*one of the factors used to analyze weight to be accorded hearsay evidence include the degree to which it is corroborated*). The insufficiency of the respondent's testimony is especially stark when weighed against objective medical records and documents completed by the doctor(s) who treated him and the testimony and conclusions of a highly qualified medical doctor from the Department who reviewed those documents. The respondent chose not to call as a witness the doctor who allegedly told him not to travel. Nor did he call any other medical professional who could corroborate the statement or rebut or offer a different opinion from Dr. Kerlegrand's conclusions.

ALJ Garcia highlighted Dr. Kerlegrand's testimony conceding on cross examination that a hypothetical patient with similar symptoms should follow his doctor's orders not to travel when such orders are given (Tr. 205). But a close examination of the transcript reveals that Dr. Kerlegrand testified, more precisely, that she would probably agree that he should follow his doctor's orders not to travel *if* the order was told to the patient and *if* it was written (Tr. 205).

Yet, other than the respondent's own testimony, I find absolutely no evidence in the record that such orders were ever given. I therefore do not credit the respondent. *See Department of Correction v. Claxton*, OATH Index No. 839/95 (June 5, 1995); *In the Matter of New York City Department of Environmental Protection v. New York City Civil Service Commission et al.* 78 N.Y.2d 318, 574 N.Y.S2d 664 (Ct. of Appeals, 1991) (*finding of an ALJ on credibility may be reversed*). In analyzing credibility, the trier of fact may consider such factors as witness demeanor; consistency of a witness' testimony; supporting or corroborating evidence; witness motivation; bias or prejudice; and the degree to which a witness' testimony comports with common sense and human experience. *See Dep't of Sanitation v. Kaplan,* OATH Index Nos. 2269/09 & 2270/09 (Sept. 4, 2009) citing *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 5,1998), *aff'd* NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998). Here the respondent has a self-interested and compelling motive to be untruthful

considering the Department was seeking his termination. In addition, his hearsay representation that a doctor told him not to travel is unsupported by any other evidence and is inconsistent with the medical documents he himself presented. Further, it does not comport with common sense that if his doctor specifically wanted to restrict him from traveling, the doctor would not have indicated such a restriction on the form he gave respondent for his employer/school. And whereas the doctor excused him from work or school, he/she specifically did not excuse him from physical activity.

ALJ Garcia seems to suggest that respondent's testimony that he was told by a doctor at Jamaica Hospital not to travel is corroborated by the New York-Presbyterian Hospital EMS report for August 28, 2018 (Pet. Ex. 7). Yet I find nothing in this report or the document the respondent submitted for his ER visit on August 27 (Pet. Ex. 3), where any medical professional instructed the respondent not to travel. Likewise, there was nothing in the submitted medical note (Pet. Ex. 4) or the medical records of the respondent's ER visit on August 28, 2018 (Pet. Ex. 7), where any doctor restricted the respondent from travelling.

Since medical documents the respondent submitted and the objective findings in the hospital records failed to show that the respondent had a health threat that precluded him from traveling to the HCF or was instructed not to travel, I conclude that the respondent did not carry his affirmative burden to show by a preponderance of the credible evidence that there was a "serious and imminent" threat to his health if he were to travel to the HCF. Moreover, considering the lack of supporting objective evidence, his assessment of such a risk was not reasonable and was likely not the real reason why he failed to report to the HCF for drug testing as ordered three days in a row. *See Department of Sanitation v. R. L., OATH* Index No. 806/16 (Mar. 16, 2016), modified on penalty, Comm'r Dec. (Apr. 19, 2016), (*Respondent failed to demonstrate that he was too ill to report to the clinic; the fact that respondent claimed he was unable to travel to the clinic on the day he was ordered to report there for a substance use test calls into question the actual reason for his conduct).*

## FINDINGS AND CONCLUSIONS

Based on the foregoing I find that by a preponderance of the credible evidence, the respondent, J.S., violated the Department's Policy and Procedure 2012-02 by refusing to test on August 29, 2018.

## PENALTY DETERMINATION

Having found the respondent guilty of the charges, I reviewed the respondent's personnel record to determine an appropriate penalty. The respondent has been employed with the Department since October 13, 2014, a little less than five years. In 2018 he pleaded guilty to three complaints involving unauthorized leave and accepted 2 days suspension. Prior to that in 2016, he was issued a complaint, also for unauthorized leave, and pleaded guilty and accepted a reprimand to resolve that complaint.

For the present complaint, the respondent was suspended pre-trial from August 29, 2018, to September 13, 2018. Upon being lifted from pre-trial suspension, the respondent was tested in order to be evaluated for regular duty, and the tests were negative. Pending a hearing to resolve the charge against him, he voluntarily agreed to consult with the Department's Employee Assistance Unit and to be subject to random follow up testing for one year from September 13, 2018. To the respondent's credit, all his tests to date have been negative and he has not subsequently violated the Department's Substance Use Policy by refusing to report for testing.

Considering these factors, I find that the penalty in this case should be mitigated to time served for the pre-trial suspension. In addition, this violation will not be treated as a first strike against the respondent under the Department's Policy and Procedure 2012-02.

[redacted]