

Dep't of Education v. Kherbouche

OATH Index No. 266/20 (May 14, 2021), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2021-0792 (Feb. 11, 2022), **appended**

Petitioner proved that Respondent, a customer information representative, failed to perform her assigned duties in a timely manner, refused to complete assignments from her supervisor, was discourteous to her supervisor, and spent excessive time on the internet for non-work-related purposes. ALJ recommends termination of Respondent's employment.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF EDUCATION
Petitioner
- against -
KARIMA KHERBOUCHE
Respondent

REPORT AND RECOMMENDATION

JOYCELYN MCGEACHY-KULS, *Administrative Law Judge*

Petitioner, the Department of Education ("Department" or "DOE"), brought this disciplinary proceeding under section 75 of the Civil Service Law, alleging that between February 2018 and June 2019, Karima Kherbouche, a customer information representative, engaged in misconduct by failing to comply with supervisors' instructions, refusing to work cooperatively with co-workers, and excessive use of the internet during business hours for non-work-related matters (ALJ Ex. 1).

The trial was conducted over five dates. The first two dates were conducted in person. However, the remaining trial dates were conducted remotely using the Zoom audio and video platform due to the COVID-19 pandemic. Petitioner produced documentary evidence and called five witnesses. Respondent, who was represented by counsel, denied the charges. She produced documentary evidence and testified in her own behalf. Respondent did not produce any additional witnesses and asked that the charges be dismissed.

Based on the record of the proceeding, I find that Petitioner established that Respondent engaged in misconduct and recommend termination of her employment.

BACKGROUND

Respondent is employed by the Board of Education Retirement System (“BERS”) as a customer information representative in the records management department. She has worked at BERS for 12 years and has performed multiple duties within the records management department including shredding, scanning, sorting, and filing documents (Tr. 442-44).

The charges in this matter relate to Respondent’s productivity in her various assignments, her interactions with her peers, and her use of the internet during business hours for non-business purposes. The Department contends that Respondent failed to comply with directives from her supervisor and that her behavior has been disruptive to the department.

Petitioner’s Evidence

Specification 1

This Specification outlines the allegations contained in Specifications 2 through 16 in very general terms and contained no specific instances of misconduct.

Specifications 3-6, and 7: Low Productivity, Conflict with Quality Assurance, and Internet Usage

Mr. Sebili has worked for BERS for 25 years and is currently the director of IT for BERS. He was previously the director of document management and records. While serving as director, Mr. Sebili was responsible for ensuring the accuracy of the digitized and archived documents and ensuring that all documents are associated with member-pensioner accounts. Mr. Sebili testified that he hired Respondent and was her supervisor for 10 years. He recalled that Respondent did “tremendous” work for him in the past but performance issues began in 2018 (Tr. 323-25).

In 2018, Respondent was assigned scanning duties and was responsible for verifying the member numbers and other information on documents in order to assign the documents to the appropriate member file. Mr. Sebili testified that on February 22, 2018, he observed that Respondent was performing minimal work compared to her peers and her past performance.

According to Mr. Sebili, Respondent completed one scan job for the month of February and characterized this as not performing (Tr. 334). Mr. Sebili subsequently met with Respondent on March 5, 2018, addressing her “abuse of the internet” and her work performance. Mr. Sebili noted that work was “piling up” in the office and advised Respondent she needed to do her share. He said that Respondent “wasn’t doing the work that she’s expected to do.” Mr. Sebili further explained that if documents are not scanned, other units within BERS cannot process paperwork or address customer needs. In the email, Mr. Sebili also advised Respondent that he observed that she spent most of her time texting rather than working. He elaborated that Respondent would sit at her desk “not doing what she is expected to do.” Mr. Sebili emailed Respondent several months later referencing their March 5 meeting and informing her that her work performance had not improved. He advised Respondent to stop browsing the internet during the work hours and told her to let him know if she needed to access the internet briefly to check her e-mail (Pet. Exs. 12, 13, 14; Tr. 334-39, 343, 347). Mr. Sebili also testified that he disabled Respondent’s internet access because he observed Respondent browsing the internet instead of working (Pet. Ex. 16; Tr. 371).

Mr. Sebili testified that scanned documents are forwarded to Quality Assurance (“QA”) to review and identify any discrepancies between the information entered by a records department employee and the information on the documents. In the event that QA identifies an error or other issue with the scanned document, the document is returned to the employee who scanned it for correction (Tr. 359, 411, 425). Mr. Sebili noted that Respondent often argued with her colleagues in QA, rejecting scanned documents that QA returned to Respondent for correction. In short, Respondent told QA colleagues that if they found the error, they should correct it. According to Mr. Sebili, the QA supervisor complained that they were not able to work with Respondent and this dynamic “created tension in the workplace.” The QA supervisor relayed to Mr. Sebili that the QA workers did not want to deal with Respondent and did not want to return scanned jobs to Respondent because “it’s going to be a fight.” The supervisor also advised Mr. Sebili that she was upset by the conflicts with Respondent and wanted to avoid interactions with Respondent because she “did not want to have a heart attack at work” (Tr. 358-63).

Mr. Sebili also had concerns about Respondent’s performance noting that her scanning productivity was lower than her co-workers. He explained that if a scanner was not scanning

documents, then the verifiers in QA would have no work to do and this would affect the productivity of the department (Tr. 147). He confirmed Respondent's low productivity by reviewing Kofax productivity reports that the department used to track the number of scan jobs completed by an employee in addition to the number of pages scanned. Mr. Sebili noted that on September 14 and 21, 2018, Respondent performed very little work compared to her peers. Mr. Sebili also observed that Respondent was using the internet to shop for clothes during work hours. Mr. Sebili advised Respondent that she spent "more time on the internet and text messaging than working on [her] assignments" (Pet. Ex. 1; Tr. 358, 363).

On October 3, 2018, Mr. Sebili conducted a disciplinary meeting with Respondent to discuss her decreased productivity and her internet usage. Also present at the meeting were human resources director, Ms. Pyrum and information and technology deputy director, Mr. Shen. Mr. Sebili noted that he had spoken to Respondent several times about her work performance and that Respondent ignored his warnings. Respondent explained that she needed to take breaks and could not be expected to work all day long. She claimed that she needed to look at different screens to avoid damaging her vision. Alternatively, Respondent offered that she needed to check the news or check BERS internal training program, Lynda.com. Mr. Sebili referenced the productivity reports and Respondent responded that she did not want to compare herself to other co-workers and that "I do what I can do and that's it" (Pet. Ex. 1).

Mr. Sebili also spoke to Respondent about difficulties that Respondent was having with co-workers and arguments with QA colleagues. He advised Respondent that QA is not responsible for correcting her mistakes. Mr. Sebili advised Respondent that he expected Respondent "to maintain respectful interactions with BERS colleagues." Mr. Sebili advised Respondent that her conduct and work performance had an impact on the work environment and the productivity of the unit. Mr. Sebili documented this meeting in a letter that was delivered to Respondent on October 25, 2018, advising that "these incidents may lead to further disciplinary action including charges leading to your termination." Ms. Pyrum corroborated Mr. Sebili's account of the meeting. Ms. Pyrum also witnessed Respondent refusal to sign the letter to acknowledge her receipt of the letter and the placement of the letter in her personnel file (Pet. Ex. 1; Tr. 357-63).

Specifications 10, 11, and 12: Reassignment to File Room and Low Productivity

Mr. Yeung, Respondent's current supervisor, began supervising Respondent in 2019. He characterized his interactions with Respondent as "pretty rough" from the beginning and believed that Respondent was "determined to fight me all the way." He recounted that Respondent reminded him that she had been with the department for 12 years and told Mr. Yeung that she did not need him to tell her what to do (Tr. 127). He was aware of Respondent's negative interactions with QA and Respondent's low productivity as a scanner and reassigned Respondent from scanning duties to the file room in January 2019. The file room is located in the basement of the building while the other functions of the department are performed on the 16th floor. Mr. Yeung designated Mr. Bolden, the lead filing clerk, to distribute and oversee Respondent's filing assignments. Mr. Bolden reported Respondent's productivity to Mr. Yeung twice daily when Mr. Bolden went to the 16th floor to retrieve documents for filing. Sometimes he would report that Respondent had not performed any work and at other times he would report that Respondent "did a little bit of work" (Tr. 168, 295). Mr. Yeung recounted that on January 23, Respondent did not file any documents and on January 25, Respondent did not report to the filing room until 10:37 a.m. and that she remained on the 16th floor talking on her cell phone until that time (Tr. 136). Respondent's regular work hours are 9:00 a.m. to 5:00 p.m.

On January 28, 2019, Mr. Yeung noted that Respondent did not do any work for the entire day and that she did not report to Mr. Bolden or to the file room for assignment that day. Mr. Yeung recounted that on January 29, Respondent did not report to the file room and he observed Respondent using her cell phone to browse the internet (Tr. 139). Mr. Yeung noted that on January 30, Respondent was assigned to the file room but she did not do any work on that date (Pet. Ex. 6; Tr. 136). Mr. Yeung testified that Respondent is supposed to report to Mr. Bolden in the file room for assignments and if Mr. Bolden is not available, Respondent should come to Mr. Yeung. Mr. Yeung asked Respondent why she did not report to Mr. Bolden between January 28 and 31 and Respondent responded that she was "chilling" (Tr. 140).

Mr. Bolden testified that Respondent rarely worked during the time that Respondent was assigned to the file room. He estimated that Respondent performed work for 45 minutes each day. Mr. Bolden often observed Respondent "sitting at the desk, chair back, feet up, legs crossed on the desk, shoes off, phone in the hand" (Tr. 288). He concluded that Respondent was not working

during those times and emphasized that a personal cell phone is not necessary to complete any work in the filing area.

Ms. Kim, a newly hired associate, was briefly assigned to the file room with Respondent in February 2019. Ms. Kim similarly testified that she observed that Respondent sat in a chair in the file room for hours and did not do any work (Tr. 230, 231). She characterized Respondent as usually leaning back in the chair with her head back and her arm out with “her cell phone in her hand and looking at it very comfortably.” Ms. Kim did not see Respondent performing any work in the file room; she was “just sitting” (Tr. 234, 274). Ms. Kim stressed that teamwork is important in the records unit and that her peers work well together. She noted that if one person does not do their job, “things get stuck and it creates problems” (Tr. 220).

Mr. Bolden noted that there were days that Respondent did not report to the file room however, he assumed that Respondent was given another assignment from Mr. Yeung on those days. Mr. Bolden testified that he regularly gave Respondent batches of work to file throughout the day but the majority of the documents remained unfiled on her desk at the end of the workday. He testified that Respondent’s failure to file documents resulted in a backlog in the file room. He stated that in order to lessen the backlog, he and another co-worker filed the documents assigned to Respondent (Tr. 287-88).

On January 31, 2019, Mr. Yeung conducted a disciplinary meeting with Respondent and Ms. Pyrum to discuss Respondent’s observed work performance on January 23, 25, and 28-31, 2019. Mr. Yeung also brought up Respondent’s use of her cellphone and BERS computer to browse the internet during business hours. Mr. Yeung documented this meeting in a letter to Respondent (Pet. Ex. 2). During this meeting Respondent stated that she had nothing to say about the allegations that she did not file documents on January 23 and 25. On the dates that Respondent failed to report to the file room, Respondent told Mr. Yeung that she was “chilling,” that she did not like doing the work, and that nothing could motivate her. Mr. Yeung advised Respondent that she is expected to get her daily work assignments from Mr. Bolden and that if she completes her work assignments, she should report to Mr. Bolden or Mr. Yeung for additional assignments. Mr. Yeung documented this meeting in a letter that was delivered to Respondent on or around February 26, 2019, advising that “these incidents may lead to further disciplinary action including charges

leading to your termination.” Respondent refused to sign to acknowledge her receipt of the letter that it would be placed in her personnel file (Pet. Ex. 2).

Specifications 13 and 14: Interactions with Co-workers

Ms. Kim testified that on the morning of February 14, 2019, she was assigned to scan documents. Ms. Kim was assigned to the desk next to the scanner in order to facilitate this task. Respondent was previously assigned to this desk when she performed scanning duties. When Ms. Kim arrived that morning, Respondent, who was still assigned to the file room was seated at Ms. Kim’s assigned desk. Ms. Kim recalled that Respondent was drinking coffee and looking at the computer monitor. Mr. Yeung asked Respondent to move from the desk so that Ms. Kim could begin her work and Respondent yelled at Mr. Yeung telling him that she was drinking her coffee. Respondent remained at the desk drinking coffee and looking at the computer monitor. Because Respondent refused to move, Ms. Kim was not able to begin her scanning work on time. Respondent left the desk a few hours later and Ms. Kim was able begin working (Tr. 144-45, 246).

Mr. Bolden recounted an incident with Respondent that occurred on February 28, 2019, when Respondent began her lunch break before her scheduled time. He recounted that he asked if she would be able to finish her filing assignments by the end of the day. Respondent asked Mr. Bolden “who are you?” adding that he was not her supervisor. Mr. Bolden again asked if Respondent would be able to finish the filing assignments. Respondent responded by telling him to shut up several times. After Respondent finished eating her lunch, she left the filing area and complained to HR Director that Mr. Bolden had threatened her. Several minutes later, Mr. Bolden was called to a meeting with Ms. Pyrum, Mr. Yeung, and Respondent to discuss the incident in the file room. During the meeting, Respondent admitted that she told Mr. Bolden to shut up several times and told him that he was not her supervisor. Respondent also reported that Mr. Bolden threatened her by telling her “you’re done here.” Mr. Bolden denied that he threatened Respondent. Mr. Bolden explained that he meant that Respondent would no longer be working in the file room. Mr. Bolden asked Mr. Yeung to reassign Respondent from the filing department to avoid further false allegations by Respondent (Tr. 288-89).

On March 18, 2019, Mr. Yeung conducted another disciplinary meeting with Respondent to discuss the incidents that occurred on February 14 and 28, 2019. Also present at the meeting

were Respondent's union representative and Ms. Pyrum, who testified that she was present at this meeting. Respondent admitted that she refused to leave Ms. Kim's desk and that she ignored Mr. Yeung's directives to do so. Respondent also "openly and unapologetically" acknowledged that she told Mr. Bolden to shut up, advising him that he was not her supervisor. Respondent also acknowledged that she took her lunch break early on that date and did not clock out for lunch until 30 minutes after she began her break. Mr. Yeung concluded that Respondent violated agency rules by taking lunch early. Mr. Yeung expressed that Respondent's conduct toward Mr. Bolden was "unprofessional and rude" and "especially egregious" given Mr. Bolden's routine inquiry that prompted it. Mr. Yeung documented this meeting in a letter that was delivered to Respondent on April 3, 2019, noting that "these incidents may lead to further disciplinary action including charges leading to your termination." Respondent refused to sign to acknowledge her receipt of the letter and the placement of the letter in her personnel file (Pet. Ex. 3; Tr. 51-53).

Specifications 15 and 16: Reassignment to Shredding, Low Productivity, and Internet Usage

Respondent was reassigned from the file room to shredding paper and was given a desk on the 16th floor. Mr. Yeung stated that he was limited in his choice of assignments for Respondent explaining that she could not work as a scanner "because she could not work with the verifier" and she could no longer be assigned to the file room "because she cannot work with Mr. Bolden." Mr. Yeung also provided a written list of assignments and expectations for Respondent (Pet. Ex. 10; Tr. 167). Respondent was given a desk that was in an open area on the 16th floor. Mr. Yeung ultimately moved her desk to another location closer to him because the Deputy Director and Ms. Pyrum told him that they observed Respondent using the internet "virtually every time they passed [Respondent's] desk" (Tr. 188). Further, Respondent's internet activity during work hours was visible to other workers and was bad for morale in the group (Tr. 165). While Respondent was seated at the new desk, Ms. Kim testified that she was able to see Respondent's monitor. She testified that Respondent was looking at Facebook and other social media and that she never saw Respondent working (Tr. 247-48, 264, 267, 274).

In May 2019, Mr. Yeung emailed Respondent regarding her productivity. In response to Mr. Yeung's attempt to track the amount of work Respondent completed during the course of a day. Respondent advised him that "it was not a race." Respondent also suggested to Mr. Yeung

that he “have some lunch and chill” (Pet. Ex. 7; Tr. 158-59). She told Mr. Yeung that it would take a week or two to shred a box of documents. Mr. Yeung testified that the boxes are a similar size to the boxes that contain reams of paper; 17 inches by 11 inches and the height of six reams of paper. He said that in his experience, a box of documents of that size could be shredded in 45 minutes. Ultimately, Respondent was able to shred a box of documents in under one hour (Tr. 154, 161). Mr. Yeung emailed Respondent on several occasions asking her to let him know when she finished her tasks. She expressed resistance to this directive (Pet. Ex. 8).

Mr. Yeung testified that he monitored Respondent’s productivity because he noticed that Respondent was taking “excessive breaks” and he observed her browsing the internet and viewing shopping websites when he walked by her desk. Specifically, between January 25 and June 26, 2019, Mr. Yeung documented when Respondent was working, when she took breaks, and when she clocked out and collected this information on a spreadsheet. He testified that the information that he collected “confirmed his suspicion” that Respondent took excessive breaks. Mr. Yeung did not keep notes on the other employees that he supervised; only Respondent because he observed that she was not productive (Pet. Ex. 6; Tr. 91, 129, 133).

Mr. Yeung testified that he reviewed the report generated by a software program, Teramind, that monitors internet usage on the computers in his department. The Teramind report shows the email address of the employee, the date and time of the internet usage, the site visited, and the length of time the employee spent at the site. In addition, the report categorized the internet usage as either unclassified or unproductive. Mr. Yeung explained that the unproductive category contained sites that were obviously not work-related such as shopping and social media websites. The unclassified category pertained to websites that have not been classified as productive or unproductive. Mr. Yeung testified that between May 7 and June 4, 2019, Respondent was assigned to review and correct addresses for email correspondence that was undeliverable. According to the Teramind report, Respondent spent 33 hours and 38 minutes on websites categorized as “unproductive” during that period. Mr. Yeung noted that was the equivalent of one work week during the four-week period. He asserted that 25 percent of time not working was excessive (Pet. Ex. 11; Tr. 175, 199). He noted that other than checking work emails and recording her time in Cybershift, Respondent did not need to use the internet to complete tasks of filing or shredding. He also testified that he ultimately blocked Respondent’s access to Facebook from her workstation

because her time on that site had a negative impact on productivity. According to Mr. Yeung, the Facebook site required increased bandwidth and when Respondent visited this site it affected the unit's ability to access other work-related sites hindering productivity in the department (Tr. 91, 184, 200).

On June 10, 2019, Mr. Yeung conducted another disciplinary meeting with Respondent. Ms. Pyrum testified that she was present at the meeting. However, Respondent declined union representation. Mr. Yeung convened this meeting to discuss Respondent's most recent job performance including her low productivity and excessive internet usage. Mr. Yeung documented this meeting in a letter that was delivered to Respondent on June 20, 2019. Mr. Yeung noted that these issues had been discussed previously with Respondent and there was no change in her performance. Mr. Yeung further documented that "these incidents may lead to further disciplinary action including charges leading to your termination." Respondent refused to sign to acknowledge her receipt of the letter and the placement of the letter in her personnel file (Pet. Ex. 5; Tr. 42).

Specifications 2, 7, and 9: Statements by Respondent

Each of these specifications is comprised of one or two statements allegedly uttered by Respondent and the dates of those utterances. The record does not contain any evidence that on or around February 22, 2018, Respondent stated that in sum and substance that she does her work and that she does not need to talk to anybody.

In a letter documenting the October 3, 2018 disciplinary meeting with Respondent, Mr. Sebili reported that Respondent stated that "I can take breaks but I cannot work all day. I can do minimum work because I cannot keep looking at the screen all day because of my eyesight. I have to take a break when I want to not damage my vision." He documented that Respondent also stated that nobody talks to me and I don't want to talk to anybody. I have been working here for 10 years and I cannot accept someone that came yesterday, telling me what to do." Mr. Sebili also documented that Respondent told him "I don't want to compare myself to others. I do what I can and that's it. I worked in the past and now I don't need to work the same way I used to" (Pet. Ex. 1; Tr. 357, 363).

Respondent's Evidence

Respondent has associates degrees in applied sciences and accounting (Tr. 485). She testified that she would like to retain her employment at DOE and continue working in the BERS Department. She offered a general assessment of her performance and explanation of her conduct in 2018 and 2019. Respondent denied that her use of the internet was excessive, contending that internet access was necessary in order to perform her job duties. She insisted that in addition to checking emails and recording her time, she used the internet to verify customer information on scanned documents. Respondent said that she also used the internet to access on line professional training and mentioned that Mr. Yeung referred Respondent to training videos on LinkedIn (Resp. Ex. I).

Respondent further explained that she only browsed the internet when she was taking a break noting that there were no designated break times. According to Respondent, her co-workers "just get up and walk around" when they need a break (Tr. 577). Respondent explained that some co-workers chatted with their colleagues for their breaks but she preferred to use the computer. She maintained that when she used the internet for personal reasons her usage was brief "a minute or two minutes, just to browse something" and that she also checked email. She conceded that "once in a while she bought something quick" but asserted that that was the extent of her personal usage. Respondent recalled Mr. Yeung telling her that he had documented over 33 hours of Respondent's personal internet usage during the course of a month. She did not offer any explanation however, she doubted that her usage was actually 33 hours a month. She testified that her internet usage definitely changed after she was given a desk closer to Mr. Yeung (Tr. 497, 566). Respondent acknowledged that Mr. Yeung and Mr. Sebili each warned her about her internet usage and that each supervisor had disconnected her internet access on separate occasions (Tr. 481).

Respondent expressed her understanding that as a member of BERS, she has to work cooperatively with her colleagues. She further acknowledged that employees should complete assignments in a timely fashion and follow directives of their supervisors (Tr. 489). Regarding her productivity, Respondent said that some projects take a long time to complete but insisted that she communicated with Mr. Yeung regarding the status of her assignments (Tr. 453-70, 483). Respondent produced nine of email exchanges between May 22 and June 20, 2019, demonstrating

her increased communication with Mr. Yeung. In these several emails, Respondent updated Mr. Yeung on the status of assignments and received new assignments from him (Resp. Exs. A-H; Tr. 453-70).

Respondent recalled that during the morning of February 14, she was drinking her morning coffee at the desk she used when she was assigned scanning duties. Mr. Yeung asked her to leave the desk and she declined because she did not have a desk or another place to sit. Respondent recounted that before Ms. Kim was hired, that desk was assigned to Respondent and now Ms. Kim “was tak[ing] over my desk.” Respondent maintained that when she was performing scanning duties, she was assigned to that desk and she believed that Mr. Yeung should have assigned Ms. Kim a different desk and moved the scanner closer to the new desk. She opined that it would be better to move a new person and the scanner to a new desk since her belongings were already in the old desk. Respondent acknowledged that she did not leave the desk when Mr. Yeung asked but she did not characterize her failure to comply with his request as a refusal. She expressed that she would have left that desk if she had another place to sit (Tr. 531, 557).

Respondent expressed displeasure at being reassigned to the file room and believed that she has been treated unfairly in light of her tenure in the unit. She noted that she has been in the unit for 12 years and was transferred to the file room in the basement without a desk and internet connection. She elaborated that “everyone in the department has a desk except for in the filing room – no desks and no internet” (Tr. 579). Respondent testified that she was not happy about the reassignment and likened the file room to jail. She stated that she was “working 12 years in the computer and scanning and doing your best, and the next thing, they’re gonna send you to the jail” (Tr. 539). She stated that Mr. Bolden gave her filing assignments but stressed that Mr. Bolden was her co-worker and not her supervisor and they both were assigned to do the same job. Respondent further stated Mr. Bolden was not her boss she was not going to take directions from him (Tr. 541, 550). She recalled that on February 28, she was eating her lunch five minutes before her scheduled noon lunchtime and she failed to clock out. Mr. Bolden gave her documents to file and asked several times when she would be able to file them. She admitted that she wanted Mr. Bolden to leave her alone so she told him to shut up. Respondent denied that Mr. Bolden did any of her assignments. She believed that Mr. Bolden was giving her all the work that needed to be filed and that she was the only person doing any work in the file room. Respondent said that she

did not want to be taken advantage of and asserted that she was fighting for her rights (Tr. 548, 552, 554). After telling Mr. Bolden to shut up, Respondent left the file room and Mr. Bolden told her that she would not be coming back. Respondent believed that was a threat and insisted that “you don’t talk to women like that” (Tr. 573).

Respondent acknowledged that her supervisors had spoken to her regarding her interactions with QA and co-workers. Respondent expressed her belief that her co-workers would take advantage of her and would give her more work. Respondent testified that QA should correct errors that they discovered and believed that advising her supervisor of her scanning errors was “snitching” (Tr. 498, 529). She elaborated that she had to defend herself “because people, come today to work and they think they are the bosses. I’m not that type of person who’s gonna take any shit from anyone” (Tr. 491). She maintained that she never did anything wrong and never treated anyone badly. However, she expressed annoyance that new employees seem to be critical of her job performance. She elaborated that she was doing her job correctly for 12 years and then “somebody that came yesterday” is going to tell her what to do (Tr. 494).

Respondent acknowledged that she received various disciplinary memos and that she refused to sign them because they were not accurate and she did not agree with what the supervisors wrote. She believed that she did a good job and that Mr. Sebili was lying about her performance. Respondent testified that writing a rebuttal in an attempt to refute allegations in the memos was futile because “you always lose” and “you’re not going to change [the supervisor’s] mind” (Pet. Ex. 1; Tr. 491, 524).

Respondent also expressed that she was frustrated and discouraged about not being promoted and noted that others who were more recently hired had been promoted ahead of her. She insisted that she does a good job and takes her job seriously but wondered if it made sense to work hard if she would not be promoted (Tr. 509, 515). She observed that employees come to the department and within a year or two, they got promoted. She implied that the documented performance issues were exaggerated and are pretexts to deny her promotion (Tr. 579).

ANALYSIS

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); *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). 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). The Department has met that burden.

In order to establish that an employee committed misconduct under section 75 of the Civil Service Law, the agency must show that the employee acted willfully or intentionally, *Reisig v. Kirby*, 62 Misc.2d 632, 635 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008 (2d Dep't 1969), or carelessly or negligently, *McGinagle v. Town of Greenburgh*, 59 A.D.2d 908, 908-09 (2d Dep't 1977), *rev'd on other grounds*, 48 N.Y.2d 949, 951 (1979). This tribunal has repeatedly held that an employee cannot be held to a strict liability standard in a disciplinary proceeding. *See Dep't of Environmental Protection v. Hewlett*, OATH Index No. 644/07 at 9 (Mar. 9, 2007); *Dep't of Sanitation v. Richards*, OATH Index No. 529/06 at 3 (Feb. 3, 2006); *Fire Dep't v. Maxwell*, OATH Index No. 490/79 (Jan. 25, 1980).

An employee is obligated to obey the lawful order of a supervisor and, if he disagrees with it or feels it to be improper, to grieve it at a later time through available procedures. *See Ferreri v. NYS Thruway Auth.*, 62 N.Y.2d 855 (1984); *Strokes v. City of Albany*, 101 A.D.2d 944 (3d Dep't 1984); *Health & Hospitals Corp. (Bellevue Hospital Ctr.) v. Tanvir*, OATH Index No. 797/10 at 6 (Dec. 17, 2009). To establish disobedience of an order, the employer must prove: (1) that 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. *Dep't of Correction v. Hipp*, OATH Index No. 337/00 (Dec. 3, 1999).

The Department produced five witnesses who observed Respondent's conduct or performance as alleged in the complaint. Each of the Department's witnesses testified in a compelling and straightforward manner and none of the witnesses had any motivation to fabricate or embellish their testimony. In addition to their observations, Respondent's supervisors relied on objective measures in assessing Respondent's productivity. Mr. Sebili reviewed the Kofax report and Mr. Yeung reviewed Teramind. Mr. Yeung also recorded his daily observations of Respondent's breaks and work habits from January through June 2019 and received daily reports from Mr. Bolden while Respondent was assigned to the file room. The supervisors and Mr. Bolden

offered credible testimony establishing that Respondent's failure to work or low productivity caused backlogs within the department and affected her co-workers' ability to work efficiently. The Department further established that Respondent's misconduct was intentional by producing documentary and testimonial evidence that Respondent had been advised informally and during several disciplinary meetings that her work performance deficient and Respondent declined to take any action to improve her performance or conform her conduct to expected standards.

Respondent's testimony, on the other hand, was vague at times. She did not deny some of the charged conduct, instead justifying her decreased productivity and lack of motivation by citing unfair treatment from her supervisors. Despite documentary evidence regarding her productivity, she disputed that hers was lower than other workers offering only a self-assessment that she does good work. Respondent acknowledged the numerous warnings about excessive internet use and having her internet access blocked because of excessive internet use. Regarding the Teramind report that documented over 33 hours of her internet use, she testified only that she doubted that was correct. Respondent admitted that she told her co-worker to shut up when he gave her documents to file. Respondent admitted that she refused to move from a co-worker's desk when directed to do so by her supervisor. Respondent admitted that she argued with her QA peers insisting that they should correct any of her errors that they discover. Respondent also acknowledged that Mr. Yeung asked her to move from desk in order for her co-worker to begin her assignment and that she refused. Nonetheless, Respondent maintained that she is good colleague and treats everyone fairly.

This tribunal's observations of Respondent during these proceedings are consistent with the testimony given by Respondent's co-workers. Respondent not present on the first day of trial advising her counsel that she was ill. However, the Department's counsel confirmed that Respondent was attending an event at work and did not call out sick.¹ Respondent was present for the second day of trial and was using her cell phone to check emails during the proceedings. I interrupted witness testimony to ask Respondent not to look at her phone during the trial. However, I again observed Respondent looking at her phone again several minutes later. She interrupted me as I spoke to her about this.² Moments later, Respondent appeared to be sleeping

¹ Tr. 7-8.

² Tr. 145; 149-50.

during witness testimony and her attorney had to advise her to keep her eyes open³. Department counsel also observed Respondent laughing while documents were being discussed causing her attorney to tell Respondent to stop⁴. I also had to ask Respondent to remain visible and on screen during the proceedings as she had either left the screen or was sitting in the dark.⁵ Respondent's failure to attend the first day of trial in order to attend another event demonstrated a disregard for these proceedings. Her conduct during the trial was disrespectful to this tribunal and bespoke an indifference that was also reflected in her conduct at work.

Specifications 2, 7, and 9 consist only of statements Respondent made during disciplinary meetings with her supervisors. The Department charged her with misconduct based on those statements. This tribunal has determined that not every disagreement in the work place or expression of frustration rises to the level of misconduct. *See Dep't of Correction v. Martin*, OATH Index No. 431/95 at 13 (Jan. 17, 1995); *Human Resources Admin. v. Bichai*, OATH Index No. 211/90 at 12 (Nov. 21, 1989), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 90-54 (June 15, 1990). Relevant factors in determining whether an employee's statements rise to the level of misconduct include the context, substance, tone, and duration of the remarks. *Human Resources Admin. v. Smart*, OATH Index No. 1325/16 at 7 (May 6, 2016). However, this tribunal has held that an employee's complaints or statements of frustration alone are not sufficient to establish misconduct. *Transit Auth. v. Fedey*, OATH Index No. 633/97 at 7 (Mar. 14, 1997), *modified on penalty*, Auth. Dec. (Apr. 21, 1997), *aff'd*, NYC Civ. Serv. Comm'n Item No. 98-102-SA (Sept. 28, 1998). (employee's complaint about doing someone else's work not misconduct where neither tone nor volume were insubordinate or disrespectful). Although the Department produced documentary or testimonial evidence of some of Respondent's statements referenced in those Specifications, the witnesses did not describe Respondent's tone, gestures or other actions. Respondent stated that she did not want her productivity compared to other co-workers, and similar comments. Respondent also commented that she did not need to talk to her co-workers, did not like certain tasks, was not motivated to work. The Department's evidence indicates that Respondent made these statements while explaining her low productivity in comparison to co-workers and her resistance to instructions from colleagues. These remarks without context or other

³ Tr. 169.

⁴ Tr. 170.

⁵ Tr. 246.

details, are complaints or expressions of frustration and without evidence establishing that the tone or volume of these comments was disrespectful, the remarks alone would not warrant an additional charge of misconduct.

Specification 1 of the petition alleged generally that Respondent engaged in three areas of misconduct “on about or between February 1, 2018 and June 4, 2018” (ALJ Ex. 1). This Specification is confusing and unnecessary as it does not reference any specific conduct or dates. To the extent that this relied on the factual allegations addressed in the ensuing Specifications, it is cumulative and sustained in part and dismissed in part consistent with the preceding analysis of the charges and specifications. Where charges are sustained, there would be no additional penalty. *See Savello v. Frank*, 48 A.D.2d 699 (2d Dep’t 1975) (petitioner should not receive two punishments for one offense when the two departmental rules cited covered identical conduct and were duplicative); *Human Resources Admin. v. Mays*, OATH Index No. 1299/11 at 2 n.1 (Mar. 16, 2011), *modified on penalty*, Comm’r Dec. (Apr. 19, 2011), *rev’d*, NYC Civ. Serv. Comm’n Item No. CD 12-8-Respondent (Jan. 31, 2012) (“This tribunal has held that if the same conduct violates multiple provisions of petitioner’s executive order, such conduct will only exact a single penalty”); *Fire Dep’t v. Feret*, OATH Index No. 885/00 (Mar. 10, 2000).

A final issue bears mentioning. None of the 16 specifications in the petition identify any rule which was allegedly violated. Instead, in the final paragraph, the Department declared that “the foregoing constitutes just cause for termination under Civil Service Law section 75, misconduct and/or incompetency under Civil Service Law section 75, neglect of duty, insubordination, conduct unbecoming Respondent’s position or conduct prejudicial to the good order, efficiency, or discipline of the service, a violation of the by-laws, rules and regulations of the Chancellor, Department, School or District, just cause for termination” (ALJ Ex. 1). As this tribunal has noted, disciplinary pleadings are best written simply and concisely, identifying the actions alleged to be misconduct and citing the rules allegedly being violated, thus placing the employee on clear notice of what they did wrong. *Dep’t of Education v. Logan*, OATH Index No. 494/19 at 18 (Aug. 19, 2019) (ALJ criticized the agency’s allegations of misconduct without citations to rules); *Admin. for Children’s Services v. Hallman*, OATH Index No. 1269/05 at 2 n.1 (Mar. 16, 2005) (ALJ discouraged verbose and confusing pleadings); see Charter § 1046(a)(3); 48 RCNY § 1-22 (Lexis 2021).

Well-organized and concise pleadings enhance the fairness and efficiency of the adjudicative process. *See Dep't of Education v. Kingston*, OATH Index No. 1642/19 at 8 (Sept. 16, 2019), *adopted in part, rejected in part, modified on penalty*, Chancellor's Dec. (Nov. 12, 2019), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2019-1171 (Dec. 1, 2020) (ALJ encouraged DOE to draft future disciplinary charges in a clearer manner, for the benefit of the Department, the employee charged, the employee's attorney, and this tribunal). In previous decisions, this tribunal has referenced issues in the Department's petitions and requested that the Department provide clarity regarding the charges being brought against its employees. *See Kingston*, OATH 1642/19; *Logan*, OATH 494/19. I again urge the Department to draft petitions that identify the specific provisions of specific rules or regulations at issue, then describe the allegedly violative conduct in associated specifications. *See Hallman*, OATH 1269/05 at 2 n.1 (where the agency was admonished for verbose and confusing pleadings, ALJ encouraged pleading identifying a single factual allegation and citation to the agency rules which are alleged to have been violated). This would improve the quality and efficiency of the adjudicative process. Identifying conduct without stating the section of the rule or regulation that is implicated requires that the ALJ match the conduct to the charges listed at the end of the petition. *Logan*, OATH 494/19 at 18. This information should be readily discernable from the Department's pleadings.

FINDINGS AND CONCLUSIONS

1. Petitioner established that Respondent committed misconduct by failing to perform her job duties as alleged in Specifications 3.
2. Petitioner established that Respondent committed misconduct by failing to complete assigned tasks and used the internet for non-work-related purposes during business hours as alleged in Specifications 4, 5, and 6.
3. Petitioner established that Respondent committed misconduct by refusing to correct errors in her work and causing QA co-workers to correct Respondent's errors as alleged in Specification 8.
4. Petitioner established that Respondent committed misconduct by failing to perform work or complete work assignments as alleged in Specifications 10, 11, and 12.
5. Petitioner established that Respondent committed misconduct by failing to comply with her supervisor's directive as alleged in Specification 13.

6. Petitioner established that Respondent committed misconduct by failing to clock out for lunch, making a false time card entry, and telling a co-worker to shut up as alleged in Specification 14.
7. Petitioner established that Respondent committed misconduct by failing to perform work or complete work assignments as alleged in Specification 15.
8. Petitioner established that Respondent committed misconduct by browsing the internet for over 33 hours during business hours for non-work-related purposes between May 7, and June 4, 2019, as alleged in Specification 16.
9. Petitioner did not establish that Respondent committed misconduct as alleged in Specifications 2, 7, and 9.
10. Specification 1 provided a general overview of Specifications 2-16. It is cumulative and is sustained in part and dismissed in part consistent with the analysis of the specifications.

RECOMMENDATION

Having made the above findings, I requested and reviewed a summary of Respondent's personnel record in order to make an appropriate penalty recommendation. Respondent has been employed at DOE since July 2008. She was promoted to Public Records Aide in 2010 and to Customer Information Representative in August. Petitioner did not provide performance evaluations for Respondent for the last five years. In May 2015, Respondent received an employee of the month award from the Department. Respondent has no prior disciplinary history, but in relation to the present charges, Respondent was placed on a 30-day pre-trial suspension without pay.

For the charges proven at trial, Petitioner is seeking termination. Despite mitigating considerations, I believe that this penalty is appropriate.

Where applicable, this tribunal has applied the principles of progressive discipline, underlying which is the concept of employee behavior modification through increasing penalties for repeated or similar conduct. *See Dep't of Transportation v. Jackson*, OATH Index No. 299/90 at 12 (Feb. 6, 1990) ("It is a well-established principle in employment law that employees should have the benefit of progressive discipline wherever appropriate, to ensure that they have the opportunity to be apprised of the seriousness with which their employer views their misconduct and to give them a chance to correct it."); *Health & Hospitals Corp. (Woodhull Medical & Mental*

Health Ctr.) v. Ford, OATH Index No. 2383/09 at 11 (July 10, 2009) (“The theory of progressive discipline is to modify employee behavior through increasing penalties for the same or similar misconduct, and to give employees full notice that if they do not modify their conduct, they risk termination.”); *Dep’t of Sanitation v. Parker*, OATH Index No. 1049/04 at 9 (Aug. 3, 2004) (“[T]he theory of progressive discipline assumes that, once an employee is disciplined for particular behavior, that behavior should subsequently be corrected.”).

However, progressive discipline does not preclude an agency from terminating an employee despite such mitigating factors as a relatively minor disciplinary record or long tenure. *See Office of Management and Budget v. Perdum*, OATH Index No. 998/91 at 28 (June 17, 1991) (termination appropriate for nineteen year employee with no prior disciplinary record terminated who engaged in repeated insubordination and incompetence, where employee was “on clear notice that his conduct was unacceptable and was given ample opportunity to correct it”); *Dep’t of Housing Preservation and Development v. Ray*, OATH Index Nos. 1460/00 & 2135/00 at 32 (Sept. 14, 2000), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 01-84-SA (Dec. 28, 2001). *See Health and Hospitals Corp. (Metropolitan Hospital Ctr.) v. Ahmed*, OATH Index No. 567/05 at 6 (Jan. 7, 2005) (“Despite ample warnings, respondent has not changed her conduct. Respondent’s refusal to change her behavior and unwillingness to follow supervision are grounds for termination”).

It is undisputed that Respondent’s performance issues began in 2018. Prior to that time, her supervisor testified that Respondent “did tremendous work” in the department. It is also clear from the record that Respondent believes that less senior employees have been promoted and that Respondent is frustrated at work. This frustration certainly does not excuse Respondent’s conduct and performance however, it might explain why a long-term employee with no disciplinary record would so persistently engage in misconduct over the course of 16 months. Although Respondent had not previously received any disciplinary penalty, she was on clear notice that her continued internet use for non-work-related reasons, low productivity, and interaction with co-workers could result in further discipline. Respondent participated in numerous disciplinary meetings with human resources, where union representation was offered, and received disciplinary memoranda warning that her that conduct “may lead to further disciplinary action including charges leading to your termination.” However, despite the ample warnings, Respondent’s conduct generally did not

improve. Respondent presented several emails to demonstrate that her communication with Mr. Yeung had improved. Unfortunately, these efforts were too little and too late.

Accordingly, I recommend termination of Respondent's employment.

Joycelyn McGeachy-Kuls
Administrative Law Judge

May 14, 2021

SUBMITTED TO:

MEISHA PORTER
Chancellor

APPEARANCES:

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Attorney for Respondent

**THE CITY OF NEW YORK
CIVIL SERVICE COMMISSION**

In the Matter of the Appeal of

KARIMA KHERBOUCHE

Appellant

-against-

NYC DEPARTMENT OF EDUCATION

Respondent

*Pursuant to Section 76 of the New York
State Civil Service Law*

CSC Index No: 2021-0792

DECISION

KARIMA KHERBOUCHE (“Appellant”) appealed from a determination of the NYC Department of Education (“DOE”) finding Appellant guilty of incompetency and/or misconduct and imposing a penalty of Termination following disciplinary proceedings conducted pursuant to Civil Service Law (“CSL”) Section 75.

The Civil Service Commission (“Commission”) requested written arguments from the parties on December 7, 2021. Appellant’s brief was received on January 6, 2022, and DOE’s brief was received on January 20, 2022.

The Commission has reviewed the record below, which we incorporate by reference into this decision, as well as arguments submitted on appeal, and find that there is sufficient evidence to support the final determination and that the penalty imposed is appropriate.

Therefore, the final decision and penalty imposed are hereby affirmed.

SO ORDERED.

Dated: February 11, 2022