Dep't of Housing Preservation & Development v. Abdullah

OATH Index No. 217/22 (Feb. 23, 2023), *adopted*, Comm'r Dec. (Mar. 20, 2023), **appended**

Charge of excessive lateness sustained. Penalty of 5 days suspension recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT
Petitioner
- against -
ALI ABDULLAH
Respondent

REPORT AND RECOMMENDATION

JULIA H. LEE, *Administrative Law Judge*

Petitioner, the Department of Housing Preservation and Development ("HPD"), brought this proceeding under Civil Service Law section 75 against respondent Ali Abdullah, a procurement specialist. Petitioner alleges that respondent was excessively late for work accumulating over 33 hours of lateness from 2020 to the present in violation HPD's Code of Conduct (ALJ Ex. 1; Pet. Ex. 3).

At trial conducted by video conference, petitioner called two witnesses and presented documentary evidence. Respondent presented documentary evidence and testified on his behalf.

For the reasons below, the excessive lateness charge is sustained. I recommend that respondent be suspended without pay for 5 days.

ANALYSIS

The amended charges allege that respondent was excessively late because he was late for work 33 hours and ten minutes within a calendar leave year (ALJ Ex. 1). [1] Petitioner's rules require

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[1] Petitioner amended its charges to include an additional thirty minutes of lateness incurred on May 25, 2021 (ALJ Ex. 1; Pet. Ex. 2). Excessive lateness is calculated as being late in excess of three hours during a leave year, from May 1 to April 30 (Pet. Ex. 3 at 36). Since the thirty minutes of purported additional lateness accrued in a different leave year, they will not be considered.

that employees comply with all time and leave regulations (Pet. Ex. 2 at ¶ 7). Its time and leave manual states that an employee is late if "they are not at their work location, ready to work at their scheduled starting time or by the end of their scheduled flex band, or by the end of their scheduled lunch period" (Pet. Ex. 3 at 5). Lateness that exceeds three hours in a leave year (May 1 to April 30) "does not meet acceptable Agency standards" and may result in disciplinary action (*Id*. at 36).

Motion to Dismiss

Respondent made an oral application to dismiss the matter for vagueness based on a failure to allege with specificity the exact dates and times corresponding to the accumulated period of lateness in the petition (Tr. 8-9). Rule of liberal construction of pleadings applies in administrative proceedings. Where a party attacks the pleadings as defective, it bears the burden of showing prejudice. *Fire Dep't v. Domini, OATH Index No. 2047/11* at 2, mem. dec. (July 28, 2011). While petitioner did not specify each occurrence of respondent's alleged lateness in the charges, it instead relied upon a time and leave report from the City Human Resource Management System ("CHRMS") titled "Leave Usage Details" that was included as an exhibit (Pet. Ex. 1; Tr. 16). The report lists 48 dates from July 20, 2020, to March 18, 2021, with the corresponding period of lateness for each date, *e.g*., October 19: 11 minutes; December 31: 1 hour and 22 minutes; and March 2: 17 minutes. Petitioner also relied on respondent's time sheet for the week ending May 29, 2021, which shows that respondent was 30 minutes late on May 25, 2022 (Pet. Ex. 4).

Respondent's counsel's assertion that he could not understand the report is not evidentiary basis to find prejudice to the respondent. Rather, I find that the short and plain statement in the petition gave sufficient notice to respondent of the disciplinary charges and the report provides clear notice of the dates and times of the alleged lateness (ALJ Ex. 1). The total amount of lateness as documented by these reports is 33 hours and 10 minutes, exceeding the three-hour floor permitting the agency to bring disciplinary charges (Pet. Exs. 3, 4). Respondent's motion to dismiss is denied.

Petitioner's Evidence

Petitioner called Daniel Carcana and Dennis Kowlessar as witnesses. Mr. Carcana was the HPD investigator in the Disciplinary Unit assigned to investigate a lateness complaint against respondent which was brought by his former and now retired supervisor, Mr. Kuriakose. As part of his investigation, Mr. Carcana ran a lateness query on respondent in the City Human Resources Management system, the employee database, for the leave year (Tr. 17). However, the result of

the query did not indicate that respondent had been late. Instead, the report showed that respondent had charged 32 hours and 40 minutes to compensatory time in his time sheet for the dates in which he started work later than his scheduled start time. Mr. Carcana explained that respondent should have charged this time as "lateness charged to compensatory time," which would have accurately indicated that he was late. He concluded that respondent charged the late time to his compensatory balance "so that he doesn't go without pay" (Tr. 19-20). Respondent's supervisor was told to contact timekeeping to correct the coding on the timesheet. Petitioner's Exhibit 1 shows respondent's leave usage report after the coding was amended to "LT CT", the abbreviation for lateness charged to compensatory time (Tr. 18, 20). While Mr. Carcana admitted that the best practice would have been for respondent's supervisor to have caught and corrected the coding error before approving the timesheet, he asserted that the oversight did not obviate respondent's lateness (Tr. 22).

Mr. Kowlessar, who was Mr. Kuriakose's direct supervisor, also testified during the trial but his testimony was less probative as he was not able to recall any pertinent information regarding respondent's lateness, interactions with Mr. Kuriakose, or the disciplinary process. Mr. Kowlessar did confirm that he approved less than 20% of the respondent's timesheets (Tr. 69).

Respondent's Evidence

Respondent, a procurement specialist, has been an HPD employee since 1982 (Tr. 78). Respondent works from Monday to Friday for eight hours a day including lunch. He has a flexible time band ("flex-band") from 9:00 a.m. to 10:00 a.m. which allows him to start work at any time during this hour. Starting work after 10:00 a.m. is considered late (Pet. Ex. 3 at 4; Tr. 96-97). Respondent is required to clock in and out four times a day: beginning and end of the workday and the start and end of his lunch period (Tr. 79). He submits a weekly timesheet which is approved by a supervisor (Tr. 80). During the relevant time period, respondent had a hybrid work schedule which required him to work from home due to the pandemic (Tr. 99).

Respondent denies the charges and argues that he was not late for work on any of the dates as charged and that HPD failed to follow its own rules in filing disciplinary charges against him. Respondent contends that he was not late because his late arrivals were approved by his supervisor, Mr. Kuriakose, as compensatory time usage (Tr. 83, 95). Respondent referred to the time and leave policy, which states that the use of compensatory time may be used in units of fifteen minutes and must have prior approval of the authorized supervisor (Pet. Ex. 3 at 20). Respondent also

testified that on the days he was not able to arrive to work on time, he informed his supervisor that he was running late or that he was detained. When respondent came to work and asked if it was "okay to charge comp," Mr. Kuriakose agreed and approved his timesheets accordingly (Tr. 82). Respondent claims that Mr. Kuriakose told him to "charge it to comp" (Tr. 110).

Respondent further asserts that petitioner failed to follow HPD's progressive disciplinary process as outlined in the time and leave policy by foregoing steps such as verbal or written warnings in that he was not informed that his practice of charging late arrivals to compensatory time was misconduct until the receipt of disciplinary charges approximately a year later (Pet. Ex. 3 at 36; Tr. 83, 111). Although respondent insists that he was not late because he received supervisory approval, he avers that had he been notified earlier that he was late by his supervisors, he would have corrected his behavior (Tr. 97, 111).

Lateness

Petitioner bears the burden of proving misconduct by a preponderance of the credible evidence. *See 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). Here, despite respondent's arguments to the contrary, I find that petitioner has proven that respondent was excessively late in that he was more than three hours late within a leave year in violation of section 7 of HPD's Code of Conduct.

The evidence demonstrates that during a period of eight months from July 2020 to March 29, 2021, when respondent was working from home due to the pandemic, he started work past his flex-band on forty separate occasions for a combined total of 32 hours and 40 minutes. Respondent's lateness ranged from twelve minutes to over two and a half hours (Pet. Ex. 1).

HPD's Time and Leave Policy states that "an employee is considered late if they are not at their work location ready to work … by the end of their scheduled flex-band" and when late, employees must submit a leave request of "lateness" in CityTime. When late, "employees must charge lateness to compensatory time, annual leave or leave without pay" in their timesheet (Pet. Ex. at 5). As explained by Mr. Carcana, lateness charged to compensatory time or annual leave allows an employee to be compensated from their accumulated leave bank for a full workday. An employee can charge lateness to compensatory time or annual leave if they have the accumulated time; if they have no leave time, then they do not get paid for the time they were late (Tr. 60-61).

The Time and Leave Policy also allows employees to use compensatory time with prior approval from a supervisor (*Id*. at 20). It states that "approval or disapproval for the request must be made by an authorized supervisor *prior* to the employee taking compensatory time" (*Id*.). Compensatory time can be used at any time during the workday (Tr. 54).

Charging lateness to compensatory time and receiving prior approval to use compensatory time are two distinct time and leave actions (Pet. Ex. 3 at 5, 20). I do not find any support for respondent's claim that he received prior approval to use compensatory time. Rather, the evidence shows that only after arriving late to work did respondent receive approval to charge his lateness to compensatory time so that he would be compensated for a full workday.

Referring to the days that he was late, respondent testified that "I always informed my supervisor at the time, Peter Kuriakose, I said, you know, I --- listen, I'm running – I have to do a few things. More likely I'll probably be detained…And then when I came in, you know, I noted that, and then he – and I said, well, it's okay to charge comp? he said, yes, you can use your comp time and that was it, you know" (Tr. 82). None of these actions constitute a prior request for compensatory time usage that can *be approved or denied* as defined in the Time and Leave Manual (Pet. Ex. 3 at 20). By his own words, he confirms that he notified his supervisor that he was late; he did not ask for prior approval to be late. After arriving to work late, respondent then asked if he could charge his lateness to compensatory time to which his supervisor agreed. His supervisor presumably agreed because according to the time and leave policy, an employee is required to charge lateness to either compensatory time, annual leave, or leave without pay (Pet. Ex. 3 at 5). Indeed, the conclusion that there was no prior approval given to use compensatory time is further corroborated by testimony stating that Mr. Kuriakose was the one who referred respondent's excessive lateness to the disciplinary unit for investigation (Tr. 14, 47).

Respondent's belief that he was not late because he was entering his lateness as compensatory time and that this practice was approved by his supervisor is misplaced. Arguably, it would have been better practice had his supervisors observed and corrected the coding error on respondent's timesheets, but that supervisory oversight is a mitigating factor for the penalty, not exoneration of his misconduct. Here, the evidence supports the finding that regardless of how he coded his late arrivals in his timesheets, respondent was late. As a long-time employee of HPD, abiding by the time and leave policies is an integral part of the agency's code of conduct.

Insofar as respondent's arguments that HPD did not engage in progressive discipline by giving him verbal or written warnings in lieu of disciplinary charges, I do not find that HPD was

required to do so or that its failure to issue a less severe penalty obviates respondent's violation of HPD's time and leave regulations. Therefore, I find that petitioner has proven beyond a preponderance of the evidence that respondent was excessively late.

Finally, petitioner charged respondent with several violations of its code of conduct that are duplicative to the allegations of excessive lateness such as failure to "act in a professional, courteous, and considerate manner" or engaging "in illegal, immoral, unethical or disruptive conduct" (¶¶ 3, 10 of HPD's Code of Conduct). However, no additional penalty is warranted for these charges, as they are duplicative. *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).

FINDINGS AND CONCLUSIONS

> Respondent was excessively late between July 20, 2020, and March 18, 2021, because the combined total of his lateness exceeded three hours.

RECOMMENDATION

Upon making this finding, I requested and received information pertaining to respondent's disciplinary history. It showed the following. Respondent started his employment with HPD in 1982. He was out in 1986 due to a car accident, terminated in 1987 on AWOL charges, and then reinstated in 1989 in accordance with Section 73.

Petitioner has requested a penalty of ten days suspension. Based on the mitigating evidence presented, I find this to be excessive. Respondent is an almost 40-year employee of HPD with no prior disciplinary history since his reinstatement in1989.

Generally, penalties for time and leave violations range from between four to nine days per violation, depending on the length of an employee's tenure, mitigation presented, and disciplinary history. *See Dep't of Housing Preservation & Development v. T.S., OATH Index No. 63/19 at 31 (Mar. 29, 2019); Dep't of Sanitation v. Perez,* OATH Index No. 370/17 at 8 (Jan. 20, 2017)*, modified on penalty,* Comm'r Dec. (Feb. 7, 2017)*, aff'd,* NYC Civ. Serv. Comm'n Case No. 2017-0215 (May 24, 2017) (citing cases); *Dep't of Sanitation v. James,* OATH Index No. 1789/14 (Oct. 24, 2014) (penalty of four days' suspension without pay for each of the proven time and leave charges, where employee had seven prior disciplinary penalties, mostly involving time and leave and sick leave violations); *Dep't of Housing Preservation & Development v. Jones,* OATH Index

No. 1068/00 at 17 (July 7, 2000) (imposing 30-day suspension for insubordination and excessive lateness and AWOL, where employee had been disciplined three times before for excessive lateness and had been suspended for two weeks for an alleged assault).

While respondent's lateness on forty separate dates was excessive under HPD's rules, it is apparent that respondent misconstrued compensatory time usage and lateness charged to compensatory time. Further, it is undisputed that his miscoded timesheets were approved by his supervisor, lending support to his belief that he was not in violation of any agency standard.

Considering respondent's lengthy tenure as well as the absence of any prior disciplinary history, a suspension of five days without pay is appropriate.

Julia H. Lee
Administrative Law Judge

February 23, 2023

SUBMITTED TO:

ADOLFO CARRION, JR.
Commissioner

APPEARANCES:

DAVID CINAMON, ESQ.
Attorney for Petitioner

ANTON ANTOMATTEI, ESQ.
Attorney for Respondent

In the Matter of Disciplinary Charges by the
NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT

Petitioner

-against-

ALI ABDULLAH
Real Property Manager
Emergency Operations Division

Respondent

COMMISSIONER'S DECISION

OATH Index No. 21 7/22
HPD No. D17375

On or about June 14, 2021, Real Property Manager, Ali Abdullah was served with the following amended charges based on violations of the Department's Code of Conduct:

Charge 1:	Chapter 2, Rule 1 – Acting in a manner prejudicial to good order and discipline
Charge 2:	Chapter 2, Rule 3 – Failing to act in a professional manner
Charge 3:	Chapter 2, Rule 7 – Failing to comply with Departmental Time and Leave Regulations
Charge 4:	Chapter 2, Rule 9 – Failing to comply with orders and directives issued by the Department
Charge 5:	Chapter 2, Rule 10 – Engaging in unethical and/or disruptive conduct
Charge 6:	Chapter 2, Rule 32 – Failing to comply with the Department's Time and Leave Manual

A trial based on the charges was conducted on December 13, 2022, before Administrative Law Judge Julia H. Lee online via WebEx. In her Report and Recommendation, dated February 23, 2023, Judge Lee found the Respondent guilty of Chapter 2, Rule 7. I concur with Judge Lee's findings of fact and of guilt.

I have carefully reviewed Judge Lee's recommendation and the objections to that recommendation raised by Respondent's attorney. In light of Real Property Manager Abdullah's misconduct and disregard of the Agency's rules and regulations, I concur with Judge Lee's recommendation of a five (5) day suspension without pay.

Therefore, Real Property Manager Ali Abdullah hereby will serve a five (5) day suspension without pay at a time determined at the discretion of the Division.

Date: 3/20/23