Dep't of Sanitation v. D.L.

OATH Index No. 2434/22 (Dec. 16, 2022)

Over the course of fourteen months, sanitation worker failed to document emergency leave, provided inadequate documentation to the Department's clinic, and failed to remain accessible while on sick leave. 79-day suspension recommended to resolve 51 complaints.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
- against -
D.L.[1]
Respondent

REPORT AND RECOMMENDATION

CHRISTINE STECURA, *Administrative Law Judge*

This is a disciplinary proceeding brought by the Department of Sanitation pursuant to section 16-106 of the New York City Administrative Code against respondent, sanitation worker D.L. The Department alleged that, from February 2021 to April 2022, respondent failed to document emergency leave, provided inadequate documentation to the Department's clinic, and failed to remain at home or accessible while on sick leave in violation of rules 1.5, 7.1, 7.5, 7.6, and 7.9 of the Department's Code of Conduct and Policy and Administrative Procedure (PAP) 2012-04 (ALJ Ex. 1).

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[1] Respondent's name has been redacted from this decision because it includes discussion of his daughter's health issues. *See Human Resources Admin. v. Anonymous*, OATH Index No. 1242/10 at 1-2 (May 4, 2010), *modified on penalty*, Admin/Comm'r Determination (June 16, 2010), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-17-A (Apr. 29, 2011) (redacting respondent's name from decision *sua sponte* because of the personal medical information discussed); *see also Health & Hospitals Corp. (Kings County Hospital) v. M.M.*, OATH Index No. 2245/22 at 1 (July 25, 2022) (redacting respondent's name from decision where a worker's child's medical history is discussed); 48 RCNY § 1- 49(d) (Lexis 2022) ("On the motion of a party, or *sua sponte*, the administrative law judge may determine that publication of certain information will violate privacy rights set forth in applicable law or rules and may take appropriate steps to ensure that such information is not published.").

At a three-day trial, held remotely due to the COVID-19 pandemic, petitioner presented the testimony of Superintendent Ian Satchell and Supervisor Francesco Barongi, as well as documentary evidence. Respondent testified on his own behalf. For the reasons below, I find that petitioner proved the 51 complaints and recommend a penalty of 79 days' suspension without pay.

ANALYSIS

Respondent has worked at the Department since 2008 and is assigned to District Bronx Four (the "Garage") (Tr. 15, 403). The charges against him are discussed below.

Emergency Leave Violations

Petitioner alleged that after submitting requests for emergency leave on the dates below, respondent failed to provide satisfactory documentation required by the Department's emergency leave procedure, in violation of PAP 2012-04 rule 1.5 (ALJ Ex. 2). Petitioner issued 36 complaints for incidents between February 19, 2021, and April 25, 2022. In each instance, respondent called to request emergency leave for childcare (Pet. Exs. 2-14). Petitioner alleged that on 22 occasions, respondent failed to submit proof to substantiate his request (*Id.*). Petitioner further alleged that on 14 occasions, respondent submitted documentation, but the proof was deemed unsatisfactory, and his absences were deemed excessive by the Deputy Borough Chief (*Id.*).

Rule 1.5 provides that sanitation workers must call their work location at least one hour before their assigned shift to advise the Department that they cannot report to work because of an emergency. They must give a "valid reason" for the emergency leave and submit "verifiable proof" of the emergency. Emergency is defined under the Department's General Order as "[a] sudden unforeseen situation that requires Immediate action" (Pet. Ex. 1). Satchell described an emergency as an "unscheduled" or "not planned" absence, such as a car accident, an injury, or a flood in a house (Tr. 16-17).

The General Order states that:

> The Borough Chief or Division Head can approve, subject to acceptable documentation, a combination of up to three (3) emergency leave occurrences, including Emergency Child Care leave, in a twelve (12) consecutive month period that may be charged to available compensatory time credited to such employee. A chart change, vacation time or non FMLA Leave Without Pay can also be granted at the Borough Chief/Division Head's discretion.

(Pet. Ex. 1 at 2). Petitioner presented evidence that respondent failed to submit acceptable documentation on 36 occasions (Pet. Exs. 2-14):

Request for Emergency Leave – Incident Date	**Failure to Submit Supporting Documents**	**Basis for Request (DS 274)**	**Basis for Request (Telephone Order Book)**	**Cumulative incident and denial in a 12-month period**
February 19, 2021 (Pet. Ex. 2)	Yes	N/A	"no childcare"	7th incident in a 12-month period
March 6, 2021 (Pet. Ex. 3)	Yes	N/A	"for childcare"	8th incident in a 12-month period
May 15, 2021 (Pet. Ex. 4)	Yes	N/A	"no childcare"	9th incident in a 12-month period
May 22, 2021 (Pet. Ex. 4)	No	"Was unable to obtain childcare due to Covid 19"	"for childcare"	10th incident in a 12-month period
June 10, 2021 (Pet. Ex. 5)	No	"Unable to obtain childcare"	"no childcare"	11th incident in a 12-month period
June 12, 2021 (Pet. Ex. 5)	No	"Babysitter has a family emergency"	"no childcare"	12th incident in a 12-month period
June 19, 2021 (Pet. Ex. 5)	No	"No childcare"	"no childcare"	13th incident in a 12-month period
June 21, 2021 (Pet. Ex. 5)	No	"No childcare"	"no childcare"	14th incident in a 12-month period
June 22, 2021 (Pet. Ex. 5)	No	"No childcare"	"no childcare"	15th incident in a 12-month period
June 26, 2021 (Pet. Ex. 5)	No	"Unable to obtain childcare"	"no childcare"	16th incident in a 12-month period
June 28, 2021 (Pet. Ex. 5)	No	"Unable to obtain childcare"	"no childcare"	17th incident in a 12-month period
June 29, 2021 (Pet. Ex. 5)	No	"Unable to obtain childcare"	"for childcare"	18th incident in a 12-month period
July 3, 2021 (Pet. Ex. 6)	No	"Was unable to secure childcare"	"for childcare"	19th incident in a 12-month period
July 8, 2021 (Pet. Ex. 6)	No	"Unable to find childcare"	"for childcare"	20th incident in a 12-month period
August 2, 2021 (Pet. Ex. 7)	Yes	N/A	"for childcare"	21st incident in a 12-month period
August 5, 2021 (Pet. Ex. 7)	No	N/A	"for childcare"	22nd incident in a 12-month period
August 7, 2021 (Pet. Ex. 7)	No	N/A	"for childcare"	23rd incident in a 12-month period
August 12, 2021 (Pet. Ex. 7)	Yes	N/A"	"childcare	24th incident in a 12-month period
August 24, 2021 (Pet. Ex. 7)	Yes	N/A	"childcare"	25th incident in a 12-month period

August 28, 2021 (Pet. Ex. 7)	No	"No childcare"	"no childcare"	26th incident in a 12-month period
September 2, 2021 (Pet. Ex. 8)	Yes	N/A	"no childcare"	27th incident in a 12-month period
September 3, 2021 (Pet. Ex. 8)	Yes	N/A	"no childcare"	28th incident in a 12-month period
September 4, 2021 (Pet. Ex. 8)	Yes	N/A	"no childcare"	29th incident in a 12-month period
September 22, 2021 (Pet. Ex. 8)	Yes	N/A	"for childcare"	30th incident in a 12-month period
September 24, 2021 (Pet. Ex. 8)	Yes	N/A	"for childcare"	31st incident in a 12-month period
September 29, 2021 (Pet. Ex. 8)	Yes	N/A	"no childcare"	32nd incident in a 12-month period
October 15, 2021 (Pet. Ex. 9)	Yes	N/A	"no childcare"	33rd incident in a 12-month period
November 13, 2021 (Pet. Ex. 10)[2]	Yes	N/A	(not submitted)	33rd incident in a 12-month period[3]
November 24, 2021 (Pet. Ex. 10)	Yes	N/A	"no childcare"	34th incident in a 12-month period
November 27, 2021 (Pet. Ex. 10)	Yes	N/A	"no childcare"	35th incident in a 12-month period
November 29, 2021 (Pet. Ex. 10)	Yes	N/A	"no childcare"	36th incident in a 12-month period
December 24, 2021 (Pet. Ex. 11)	Yes	N/A	"no childcare"	36th incident in a 12-month period
January 6, 2022 (Pet. Ex. 12)	Yes	N/A	"for childcare"	36th incident in a 12-month period
January 22, 2022 (Pet. Ex. 12)	Yes	N/A	(not submitted)	37th incident in a 12-month period
March 17, 2022 (Pet. Ex. 13)	Yes	N/A	"for childcare"	35th incident in a 12-month period
April 25, 2022 (Pet. Ex. 14)	Yes	N/A	"no childcare"	35th incident in a 12-month period

Satchell testified that the Borough Chief approves and disapproves emergency leave based on the documentation submitted by the requestor (Tr. 17, 22-23). After requesting emergency leave, an employee has two working days to submit to the shift supervisor a completed form DS 1005 attaching proof justifying the leave (Tr. 26). Satchell explained that "when an employee

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[2] Petitioner did not submit an excerpt from the telephone order book for the complaints dated November 13, 2021 (Pet. Ex. 10) and January 22, 2022 (Pet. Ex. 12).

[3] Per the General Order, the Department evaluates emergency leave use on a 12-month rolling basis and not a static 12-month period (Pet. Ex. 1).

goes emergency for childcare leave . . . the practice is to submit a birth certificate as well as filling out the DS 274 form, along with any other documentation supporting . . . the emergency leave itself" (Tr. 65). The DS 274 form is used for non-Family and Medical Leave Act ("FMLA") childcare leave (Tr. 66). In determining whether to recommend approval or disapproval to the Borough Chief, Satchell reviews the DS 1005 form and attached documentation, as well the worker's number of prior emergency leave requests, and then mails it to the Borough Chief for final determination (Tr. 26). Satchell did not explain what documentation would be sufficient to support approval of an emergency leave request.

In 12 of the instances where respondent submitted supporting documentation, respondent included a copy of his child's birth certificate and a DS 274 form in which he stated that the basis for his emergency request was due to a lack of childcare (Pet. Exs. 2-14).[4] In one instance, on May 22, 2021, respondent specified that he was "unable to obtain childcare due to Covid-19" (Pet. Ex. 4).

The General Order further states:

> As the occasional unavailability of a care giver is reasonably anticipated, such **repeated** unavailability of the child's care giver is not acceptable as a justification for granting a request for emergency leave. Child care leave requests that are undocumented, unsatisfactory or fraudulent, will result in a DS 249 Complaint issued to the employee. The first five complaints (DS 249) issued, within a twelve month period, for undocumented or unsatisfactory documentation, may, at the discretion of the Department, be heard at a BCAD hearing. Subsequent Complaints will be referred to the Department Advocate for adjudication.

(Pet. Ex. 1 at 3) (emphasis in original).

Satchell explained that the Garage supervisor maintains a telephone order book at the Garage (Tr. 36). Every telephone call received at the Garage is logged in the telephone order book, including any employee calls to report lateness, absence, or emergency leave (Tr. 37). Satchell conceded that in the telephone order book, all emergency leave including sick child leave is recorded as "emergency childcare" (Tr. 283).

On May 24, 2021, Satchell wrote to Deputy Chief DiNapoli stating:

[4] In two instances, the Department found that the proof submitted in connection for requests for emergency leave on August 5 and 7, 2021 was unsatisfactory, however petitioner did not submit evidence that respondent submitted a birth certificate or DS 274 form in connection with these requests (Pet. Ex. 7).

> Please be advised that [respondent] of Bronx 04 . . . is on his 10th emergency in the last 12 months (5-22-21). He was given the information regarding FMLA leave and given the [Employee Assistance Unit] contact information in case assistance is needed. Employee was reminded that excessive emergency leave will result in DS249s and loss of pay.

(Pet. Ex. 15).

Satchell testified that he did not recall whether he personally counseled respondent or if he ordered a Garage supervisor to do so (Tr. 185). Satchell explained that he may have not worked the same shift as respondent and therefore may have delegated this task, but his general practice is to follow up to ensure it has been done (Tr. 185-86). Satchell affirmed that he had personal knowledge that respondent was counseled regarding his excessive emergency leave (Tr. 185, 187, 267-68). Satchell further testified that each of the 36 complaints served on respondent in a 14-month period had the purpose of "explaining to the sanitation worker . . . this is why you're getting complaints . . . [with the] opportunity to improve or adjust . . . basically telling you how to avoid getting the complaint again" (Tr. 189). Satchell conceded that sanitation workers are supposed to receive copies of their counseling memoranda, however the May 24, 2021 letter (Pet. Ex. 15) did not specify whether respondent received one (Tr. 266).

Satchell testified that he had experience as a supervisor and a superintendent with employees applying for and being granted FMLA leave and therefore is "aware of the [FMLA] policy and . . . how it works" (Tr. 238). He stated that the FMLA policy was posted on the Garage bulletin board, and he was "pretty sure" a copy was also hanging in the locker room (Tr. 250, 263). He thought, but was not certain, that the FMLA policy was also announced at roll call once a month (Tr. 250). Satchell further testified that generally employees come to him or their supervisors to request to apply for FMLA leave, however if he was aware that an employee under his supervision had a sick child, he would give the employee FMLA leave information (Tr. 252-53). He stated that in this instance, his understanding was that respondent was requesting emergency leave in connection with not having childcare and not because of a sick child, parent, or relative (Tr. 252-53). He testified that each of the complaints he wrote regarding respondent's excessive emergency leave were in connection with respondent "not having childcare [and] not for having a . . . health issue[] or any other issues with the child . . . itself [but rather] not having

somebody to take care of or watch a child" (Tr. 278).[5] Satchell "didn't have any reason to believe that his children were not okay" or "not healthy" (Tr. 279-80).

Satchell testified that respondent's excessive emergency leave was burdensome to the Garage because his absence adversely affected shifts, routes, and other workers' assignments (Tr. 187-88). Satchell described respondent as "a good worker, hardworking guy" when he is at work but stated that respondent has a "large amount of absences, emergency leaves" (Tr. 16).

Respondent testified that his five-year-old daughter has asthma and requires medications, nebulizer treatment, and hospital visits (Tr. 407, 426-27). When his daughter requires the nebulizer treatment, respondent must hold a face mask over his daughter's face while she inhales a medication in vapor format that opens her lungs and allows her to breathe (Tr. 407). The process takes a total of two and a half to three hours to complete (Tr. 407). His daughter's asthma attacks are more frequent during drastic weather and seasonal changes, particularly in the spring and fall (Tr. 408). Respondent stated that his mother used to watch his children, but she passed away in March 2020 (Tr. 436). After her death, respondent's cousin usually watched his children but if she was unavailable, respondent would have to stay home (Tr. 426). Respondent testified that he requested emergency leave for childcare reasons, as well as because of his daughter's need for medical treatment, but did not provide details regarding specific dates or events (Tr. 410). He testified that when he requested emergency leave, he provided his child's birth certificate and filled out Department forms (Tr. 410-11).

Respondent maintained that the Department provided him with incorrect information regarding his entitlement to apply for FMLA (Resp. Br. at 6). Respondent stated that a Garage supervisor named Rodriguez had told him just prior to the COVID-19 pandemic that he was not eligible for FMLA because his child was older than one years old (Tr. 413). Respondent could not recall the supervisor's first name or exactly when the conversation occurred (Tr. 414). Respondent denied that the FMLA policy was posted in the Garage and that he was counseled regarding his excessive emergency leave or given FMLA information (Tr. 416, 432). He testified that he applied for and was granted leave under FMLA in 2022 in connection with his daughter's health issue after speaking to another sanitation worker about his eligibility (Tr. 414).

[5] Satchell wrote 35 of the 36 complaints (Pet. Exs. 2-14). One complaint was written by another supervisor while Satchell was not working (Tr. 120).

I found Satchell to be a credible witness with no sign of bias or interest in the outcome of this hearing. Satchell specified when he could not recall or if he was not completely sure about something, therefore I credited Satchell's testimony when he stated he had personal knowledge that respondent had been counseled regarding his excessive emergency leave and was given information regarding FMLA and contact information for the Department's Emergency Assistance Unit. Satchell's testimony was corroborated by his May 24, 2021 letter to Deputy Chief DiNapoli sent contemporaneous with respondent's May 22, 2021 request for emergency leave (Pet. Ex. 15). I also credited his testimony that the FMLA policy was posted on the Garage's bulletin board (Tr. 250, 263).

Respondent's testimony on the other hand that he was only given incorrect FMLA information by a supervisor was uncorroborated and self-serving. On balance, I believe it is more likely than not that respondent was counseled regarding his emergency leave requests and given FMLA information. However, I did find respondent's testimony regarding his need to provide emergency medical treatment for his daughter and his childcare issues credible.

Respondent maintained in his closing brief that the Department should have informed him of his eligibility to apply for FMLA based on his daughter's health issues, but it did not (Resp. Br. at 5). Generally, an employee may be entitled to FMLA leave to care for an immediate family member who has a serious health condition. 29 U.S.C. § 2612(a)(1)(C) (Lexis 2022). When an employee requests FMLA leave or when the employer learns that an employee's leave may qualify for FMLA, the employer must notify the employee of his or her eligibility for FMLA leave within five business days. 29 C.F.R. § 825.300(b) (Lexis 2022). Had respondent communicated to the Department that his daughter had health issues, that may, arguably have been a qualifying event for FMLA, sufficient to trigger the Department's obligation to notify respondent of his eligibility for FMLA.

Here, on at least 34 occasions, according to the telephone order book, respondent called the Garage requesting emergency leave for childcare reasons and on at least 12 occasions, respondent submitted a DS 274 form in support of his emergency leave request citing "childcare" as his reason (Pet. Exs. 2-14). His daughter's health was never mentioned in the documentation respondent provided (*Id.*). Respondent also testified that he did not inform his employer of his daughter's hospitalization or medical condition (Tr. 427, 430). Thus, the record does not establish that petitioner was aware of respondent's daughter's health issues and therefore had information

sufficient to trigger the Department's obligation to notify respondent of his eligibility for FMLA. *Compare Dep't of Sanitation v. J.L.*, OATH Index No. 2302/22 at 13-14 (Sept. 13, 2022) (employee who called stating he had to accompany a family member for emergency medical services did not trigger the Department's obligation since employee did not disclose it was an immediate family member he was accompanying), *with Triborough Bridge & Tunnel Auth. v. Frans-Nanton*, OATH Index No. 2624/18 at 8-9 (July 5, 2019), *adopted in part, rejected in part*, Pres. Dec. (Nov. 13, 2019) (finding employer's knowledge of employee's injury triggered its obligation to notify employee of her eligibility for FMLA leave). Even so, petitioner established that it placed respondent on notice that he could face disciplinary charges by taking excessive emergency leave and gave respondent information regarding FMLA (Pet. Exs. 2-15; Tr. 185, 187, 267-68).

Petitioner argued that respondent failed to provide any supporting documentation for 22 leave requests and therefore failed to comply with the Department's emergency leave rule (Pet. Br. at 4). I find that petitioner's evidence established this. Under the emergency leave rule, respondent was obligated to provide documentation to support his request for emergency leave, but he failed to submit any supporting documentation to substantiate an emergency in 22 instances: February 19, 2021, March 6, 2021, May 15, 2021, August 2, 2021, August 12, 2021, August 24, 2021, September 2, 2021, September 3, 2021, September 4, 2021, September 22, 2021, September 24, 2021, September 29, 2021, October 15, 2021, November 13, 2021, November 24, 2021, November 27, 2021, November 29, 2021, December 24, 2021, January 6, 2022, January 22, 2022, March 17, 2022, and April 25, 2022.

For the remaining, 14 requests, petitioner further argued that respondent's supporting documentation was insufficient to substantiate an emergency (Pet. Br. at 4): May 22, 2021, June 10, 2021, June 12, 2021, June 19, 2021, June 21, 2021, June 22, 2021, June 26, 2021, June 28, 2021, June 29, 2021, July 3, 2021, July 8, 2021, August 5, 2021, August 7, 2021, and August 28, 2021.

Respondent testified that he had previously submitted the same exact support for emergency leave requests that were granted (Tr. 418). However, given respondent's frequent and extensive use of emergency leave in the 14-month period at issue, I find that the decisions to deny respondent's 14 emergency leave requests because the documentation failed to substantiate an emergency were reasonable. *See, e.g., Dep't of Sanitation v. Sosa*, OATH Index No. 1527/05 at 4

(Aug. 12, 2005) (finding emergency leave request properly denied where lack of proof to substantiate an emergency). An emergency under the General Order is "[a] sudden unforeseen situation that requires Immediate action" (Pet. Ex. 1). Here, respondent was unavailable a total of 36 times over a 14-month period. The General Order explicitly contemplates that emergency leave is not to be used for repeated unavailability of childcare. It states that while the occasional unavailability of a caregiver is to be anticipated, the "**repeated** unavailability of the child's caregiver is not acceptable as a justification for granting a request for emergency leave" (Pet. Ex. 1) (emphasis in original). As such, petitioner's evidence established that respondent's repeated emergency leave requests were excessive and respondent failed to provide adequate documentation to support his emergency leave requests.

I find that petitioner established that respondent failed to submit adequate documentation for the 36 emergency leave requests. Regarding respondent's affirmative defense that petitioner failed to properly discharge its obligation to inform respondent of his FMLA eligibility, I find that respondent was informed of his eligibility under FMLA.

As such, the 36 complaints are sustained.

Respondent Failed to Provide Documentation to Support Medical Leave Requests

Petitioner alleged that respondent failed to provide medical documentation to support his medical leave requests in accordance with the Department's rules on 14 occasions. Respondent reported sick and took medical leave on five occasions in 2021: February 26, March 19, April 14, October 16, and October 22 (Pet. Ex. 16). In each instance, respondent was directed by the Medical Division to provide medical documentation to substantiate his illness but failed to do so (*Id.*). Likewise, respondent reported sick and took medical leave on nine occasions in 2022: January 14, January 20, February 15, March 8, March 11, March 14, March 16, March 24, and April 1 (Pet. Ex. 17).[6] In each instance, respondent was required to provide medical documentation to substantiate his illness but failed to do so (*Id.*). Respondent testified that on each of the 14 occasions he called out sick due to diarrhea (Tr. 422-23).

Sanitation workers are entitled to unlimited sick leave (Tr. 309). PAP 2012-04 rule 7.8 states that "[e]mployees on medical leave, or reporting sick must report to the DSNY Health Care

[6] Petitioner argued that there were ten charged occasions contained in Petitioner's Exhibit 17 (Pet. Br. at 2), however the exhibit contains nine complaints.

Facility in accordance with the Department's Medical Leave Policy and Procedure, or when ordered by authorized personnel" (ALJ Ex. 2). PAP 2012-04 rule 7.9 states that "[e]mployees must submit medical documentation as required by the Department's Medical Leave Unit. Such documentation (the medical note) must be completed by a licensed medical practitioner or must be a comparable document that is determined to be acceptable and appropriate by the Department's Medical Unit" (ALJ Ex. 2).

Employees may only be disciplined for violations of rules of which they have notice. *Dep't of Sanitation v. DeSantis*, OATH Index No. 1494/05 at 5 (Oct. 31, 2005). Respondent admitted he did not provide documentation, but contests that he was made aware of the requirement to do so (Tr. 422; Resp. Br. at 7). Respondent argued that during the COVID-19 pandemic the Department changed its rules for employees returning from medical leave without communicating such rules to respondent (Resp. Br. at 10). However, the requirement to provide medical documentation did not change. Barongi testified that during the COVID-19 pandemic, employees called the medical clinic by telephone to request permission to return to work after a sick leave, as they were not permitted to visit the clinic in person (Tr. 324). This was referred to as a "telephone resumption" (Tr. 324). Barongi testified that while the medical clinic was granting telephone resumptions and closed to in person visits, section III of the Department's Policy and Administrative Procedure PAP 2007-04, Medical Leave Control ("PAP 2007-04") remained in effect (Tr. 324, 336). PAP 2007-04 requires a Category B employee to provide a medical note on the second day of leave, and a Category C employee to provide a medical note on the first day of leave (Pet. Ex. 19). The medical note must cover each day of medical leave (*Id.*) When calling to request medical leave, an employee would be directed to provide documentation according to their category (Tr. 366-67). As a Category C employee for 11 of the medical leave requests at issue here, respondent was required to provide a medical note on the first day of each leave occasion (Pet. Exs. 17-19; Tr. 327, 330). As a Category B employee for 3 of the medical leave requests, respondent was required to provide a medical note on the second day of leave (Pet. Exs. 17-19; Tr. 311).

In addition, respondent's denial of notice is countered by the documentary evidence. Each of the 14 complaints served on respondent state that respondent "failed to present any medical documentation" putting respondent squarely on notice of the requirement (Pet. Exs. 16-17). In addition, the medical clinic notes memorialize that respondent was told at least once on March 20,

2021 by Audrey Williams, a medical clinic clerk, that a "[doctor's] note [was] required [and a] failure to comply can lead to a complaint" (Pet. Ex. 16; Tr. 332-33). On three occasions, in connection with leaves on April 14, 2021, March 16, 2022, and March 24, 2022, the medical clinic notes reflect that respondent told the medical clinic he would provide a medical note to support his leave (Pet. Exs. 16, 17). I did not find it credible that respondent was unaware that he was required to get a medical note, especially since respondent told the medical clinic clerks that he would obtain a medical note on multiple occasions (Pet. Exs. 16, 17).

Respondent testimony that he was not able to obtain a doctor's note throughout 2021 and 2022 due to the COVID-19 pandemic and was unaware of the availability of video visits (Resp. Br. at 9-10) was unconvincing. Respondent did not offer any specificity or proof that he was unable to get a medical appointment during this period. While he testified that because he worked nights, he was unable to visit an urgent care, respondent admitted on cross-examination that he could have visited an urgent care clinic during the day (Tr. 437-38).

The credible evidence shows that respondent failed to provide medical documentation in accordance with the Department's rules. As such, the 14 complaints are sustained.

Failure to remain at home and accessible while on sick leave

Petitioner alleged respondent was away from home without authorization while on sick leave on October 23, 2021 (Pet. Ex. 16). Respondent did not dispute this charge in either his testimony or argument.

Under PAP 2012-04 rules 7.5 and 7.6, sanitation workers must remain at home when on sick leave unless they have received authorization to leave their residence, and they must remain "accessible and available" for a sick leave visit (ALJ Ex. 2). A sanitation worker who wants to leave their home, is required to first call the Department to get an authorization code (Tr. 345-46). The Department monitors employees on sick leave with phone checks and a home visit from investigators (Tr. 347-48). When investigators visit an employee's home, they use a form that provides details about the visit, including a description of the home or apartment (Tr. 347-48)

Petitioner submitted a home visitation program form completed by Investigator Wai Keung Lee stating that the investigator rang the doorbell and tried to reach respondent by telephone (Pet. Ex. 16). The investigator checked the box on the form indicating that "[e]mployee [was] not at home when visited," waited 10 minutes before leaving a copy of the form and departed (*Id*.). There

is no record that respondent obtained an authorization code to leave his home on October 23, 2021 (Pet. Ex. 16; Tr. 349-50).

Thus, the credible evidence shows that respondent failed to remain at home and accessible while on sick leave on October 23, 2021. As such, the charge is sustained.

FINDINGS AND CONCLUSIONS

1. Petitioner established by a preponderance of the credible evidence that respondent violated PAP 2012-04 rule 1.5 when he failed to provide satisfactory documentation required by the Department's emergency leave procedure on 36 occasions: February 19, 2021, March 6, 2021, May 15, 2021, May 22, 2021, June 10, 2021, June 12, 2021, June 19, 2021, June 21, 2021, June 22, 2022, June 26, 2021, June 28, 2021, June 29, 2021, July 3, 2021, July 8, 2021, August 2, 2021, August 5, 2021, August 7, 2021, August 12, 2021, August 24, 2021, August 28, 2021, September 2, 2021, September 3, 2021, September 4, 2021, September 22, 2021, September 24, 2021, September 29, 2021, October 15, 2021, November 13, 2021, November 24, 2021, November 27, 2021, November 29, 2021, December 24, 2021, January 6, 2022, January 22, 2022, March 17, 2022, and April 25, 2022.

2. Petitioner established by a preponderance of the credible evidence that respondent violated PAP 2012-04 rules 7.1 and 7.9 and PAP 2007-04 when he failed to provide medical documentation to support his medical leave requests in accordance with the Department's rules on 14 occasions: February 26, 2021, March 19, 2021, April 14, 2021, October 16, 2021, October 22, 2021, January 14, 2022, January 20, 2022, February 15, 2022, March 8, 2022, March 11, 2022, March 14, 2022, March 16, 2022, March 24, 2022, and April 1, 2022.

3. Petitioner established by a preponderance of the credible evidence that respondent violated PAP 2012-04 rules 7.5 and 7.6 when he was away from home without authorization while on sick leave on October 23, 2021.

RECOMMENDATION

Upon making these findings, I requested a copy of respondent's personnel file. It shows that respondent was appointed as a sanitation worker in 2008. Since then, he has had four disciplinary dispositions resolving medical leave and time and leave violations. In March 2013, respondent received a reprimand for an absent without authorization charge. In December 2015, respondent was fined nine days to resolve seven complaints involving emergency leave procedures, absent without authorization, failure to report to the Department's clinic, and failure to provide documentation in connection with medical leave. In August 2018, respondent received

a 15-day suspension without pay to resolve 12 complaints involving emergency leave procedures, absences without authorization, and failure to report to the Department's clinic. In January 2020, respondent received a 12-day suspension to resolve 10 complaints involving emergency leave procedures, absences without authorization, and failure to report to the Department's clinic.

Petitioner requested a penalty of termination, stressing the number of respondent's unapproved and excessive absences and the burden such absences caused his employer, citing *Dep't of Sanitation v. Bello*, OATH Index No. 1238/05 (Sept. 29, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD06-22-SA (Feb. 17, 2006) in support. In that case, ALJ Richard recommended termination after finding an employee was absent without leave on four occasions and failed to report to the clinic on one occasion. *Id.* at 7-9. There, the employee had 19 prior disciplines and a prior "last chance" agreement, which he had successfully completed. *Id.* at 8. ALJ Richard found that the employee's stressful family situation was outweighed by his "overwhelming history of misconduct" and "absence of compelling mitigation evidence," leading her to find that "the only justifiable penalty is termination." *Id*. at 8-9. This case is different.

Here, while it is unfortunate that respondent never applied for FMLA instead of relying on emergency leave, respondent did present compelling mitigation evidence. It was undisputed that respondent's daughter has a serious chronic medical condition. It was also undisputed that subsequent to the complaints here, respondent was approved for FMLA leave in connection with his daughter's medical condition (Tr. 414-15). According to petitioner, "[t]he Department was not on notice of [r]espondent's child's medical condition until shortly before this trial, and upon applying for FMLA leave, [r]respondent was immediately approved based on that same condition" (Pet. Br. at 10). Therefore, it is more likely than not that had respondent applied for FMLA leave earlier, he would have been approved and avoided receiving the complaints for violating the Department's emergency leave procedures at issue here. *See e.g. Dep't of Sanitation v. Nicchitta*, OATH Index No. 799/10 at 6-7 (Jan. 7, 2010) (finding mitigating circumstances where employee would have been granted FMLA leave had he applied and recommending penalty short of termination for time and leave violations); *Dep't of Sanitation v. Anonymous*, OATH Index No. 181/11 at 10 (Dec. 9, 2010) (same). There was also evidence from respondent's supervisor that notwithstanding his time and leave issues, he is a good employee. Satchell testified that when respondent was able to work, he was "a good worker, hardworking guy" (Tr. 16).

Under these circumstances, a substantial penalty short of termination would penalize respondent for his misconduct while recognizing the compelling mitigation evidence presented and would be consistent with prior precedent. *See, e.g., Dep't of Sanitation v. Perez*, OATH Index No. 370/17 at 9 (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) (a 63-day suspension recommended for a sanitation worker for violating emergency leave rules); *Dep't of Sanitation v. James*, OATH Index No. 1789/14 at 10-11 (Oct. 24, 2014) (a 52-day suspension recommended for emergency leave violations, and other violations, where employee had an extensive disciplinary history, but none of the proven misconduct required termination of employment); *Dep't of Sanitation v. Cunningham*, OATH Index No. 2507/11 at 22 (Nov. 10, 2011), *modified on penalty*, Comm'r Dec. (Jan. 19, 2012) (40 work-day suspension imposed on a sanitation worker for violating emergency, medical and time and leave rules, where seven-year employee had received six prior disciplinary penalties); *Dep't of Sanitation v. Straker*, OATH Index No. 400/12 at 8-9 (Dec. 6, 2011) (77-day suspension recommended for violations of emergency leave and absence without leave where sanitation worker had a lengthy disciplinary history); *Dep't of Sanitation v. Figueroa*, OATH Index Nos. 940/10 (Apr. 26, 2010) & 1914/10 (June 3, 2010), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-47-A (July 12, 2011) (33-day suspension imposed for time and leave and sick leave violations, where long-term employee had six prior disciplinary penalties, primarily for violating attendance and sick leave rules); *Nicchitta*, OATH 799/10 at 6-7 (70-day suspension recommended where sanitation worker found to have submitted false notes to substantiate emergency leave where extraordinary, mitigating circumstances presented and sanitation worker would have likely been granted FMLA leave).

Thus, based on the substantial mitigation in this case, I recommend a 35-day suspension for the proven PAP 2012-04 rule 1.5 violations, a 40-day suspension for the proven PAP 2012-04 rules 7.1 and 7.9 and PAP 2007-04 violations, and a 4-day suspension for the proven PAP 2012-04 rules 7.5 and 7.6 violation, for a cumulative penalty of 79 days' suspension without pay. This is a substantial penalty short of termination which strikes the proper balance between penalizing serious misconduct and recognizing the serious family predicament that respondent faced. This penalty should also act to deter respondent from similar misconduct. The Commissioner may believe that a period of probation related to emergency and sick leave is also warranted.

Respondent should realize any future violation of emergency and sick leave rules may result in termination of his employment.

Christine Stecura
Administrative Law Judge

December 16, 2022

SUBMITTED TO:

JESSICA S. TISCH
Commissioner

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