Dep't of Social Services (Dep't of Homeless Services) v. Thomas

OATH Index No. 298/22 (Jan. 6, 2022), *adopted*, Comm'r Dec. (Jan. 30, 2023), **appended**, *aff'd*, NYC Civ. Serv. Comm'n Case No. 2023-0065 (Apr. 13, 2023), **appended**

Petitioner established that respondent demonstrated a persistent unwillingness to perform his job and was excessively absent, thus proving him to be incompetent. Petitioner further proved that respondent was insubordinate when he: failed to respond to e-mails sent by the managerial staff; refused to attend performance conferences; deliberately failed to attend required training that took place on August 17, 2021, and September 1, 2021; sent a discourteous e-mail to his supervisor; and was AWOL on October 22, 2019, and October 23, 2019. Petitioner failed to prove respondent was insubordinate when he: failed to attend two performance conferences scheduled on September 8, 2020, and October 28, 2020 and refused to sign the Task and Standards form. Petitioner also failed to establish that respondent was disruptive to the Department's operations on August 31, 2020. ALJ recommends that respondent be terminated from his employment.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SOCIAL SERVICES (DEPARTMENT OF HOMELESS SERVICES)
Petitioner
- against -
JOHN THOMAS
Respondent

REPORT AND RECOMMENDATION

ORLANDO RODRIGUEZ, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, the Department of Homeless Services ("the Department," "DHS," or "petitioner"), pursuant to section 75 of the Civil Service Law. Petitioner charges respondent, John Thomas, a level I Associate Fraud Investigator, with misconduct and incompetence. The petition, comprised of two sets of specifications, alleges that respondent: failed to complete more than 700 cases by their prescribed deadlines; failed to comply

with his supervisor's orders to attend conferences and training designed to improve his work performance; was discourteous to his supervisor; engaged in disruptive behavior; failed to show up for work without authorization; and from February 2019 to January 2020, was excessively absent from work for approximately 107 workdays. Respondent's conduct is alleged to violate Rules I through V of the Department's Code of Conduct (ALJ Ex. 2).

During a three-day trial, petitioner relied on documentary evidence and testimony from Vida Chavez-Downes, Senior Director of DHS PATH Family Intake; Andrew Williamson, respondent's former supervisor; Lennox George, respondent's supervisor following Mr. Williamson's departure from the unit; Claudine Sajous, Intake Unit Manage; Myrlene Poitevien-Clerge, Director of Fraud; and Assistant Commissioner Rosy Gelin. Respondent testified on his own behalf and offered documentary evidence.

For the reasons below, nearly all of the charges should be sustained, and respondent should be terminated from his employment with the Department.

ANALYSIS

The charges arise from respondent's conduct from February 2019 through October 2021. During this period, respondent was a level I associate fraud investigator in DHS's Prevention Assistance and Temporary Housing ("PATH") program, where he has worked for approximately 23 years (Tr. 313-14).

Respondent disputes all of the charges. He acknowledges that there were a significant number of cases he failed to complete, but he argues that he was working in a hostile environment with superiors that were intent on making it impossible for him to perform his duties (Tr. 344, 345, 359). In support of his argument, respondent claims that he was moved to a workspace that was inadequate to perform all of his work (Tr. 335, 343-44). Respondent does not deny all of the alleged conduct underlying the charges of insubordination. He argues that refusing to attend conferences and training with his supervisor does not constitute insubordination (Tr. 342). Similarly, he does not dispute that he engaged in a heated discussion with Mr. George on July 15, 2020, or that he sent a denigrating e-mail to Mr. George (Tr. 337, 338). He argues that his actions were justified because he was provoked and harassed (Tr. 344-45, 353).

Respondent also disputes that he was excessively absent from February 2019 through January 2020, and he contests the allegation that he was AWOL on October 22 and 23, 2019. He

claims that many of the days in question were approved or documented, and that some of the days include approved annual leave (Tr. 334).

In a disciplinary proceeding, petitioner bears the burden of proving the charges by a preponderance of the evidence. *Foran v. Murphy*, 73 Misc. 2d 486, 489 (Sup. Ct. N.Y. Co. 1973)*; 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). Preponderance has been defined as "the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence." Prince, Richardson on Evidence § 3-206 (Lexis 2008); s*ee also 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). Where witness credibility plays an essential role in making a determination on the charges, factors to be considered include witness demeanor, consistency of a witness's testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness' testimony comports with common sense and human experience. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2 (Feb 5, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998). I found all of petitioner's witnesses credible. They were consistent and their testimony was corroborated by extensive documentary evidence. I found respondent less credible. Although at times he was forthcoming about his performance and incidents of insubordination, he offered nothing more than unsubstantiated accusations and excuses meant to justify his behavior. According to respondent, management at DHS's PATH Unit have been creating conditions that make it impossible to perform his duties. The evidence suggests otherwise. Petitioner has sustained its burden on nearly all of the charges.

Incompetence – persistent unwillingness to perform as directed

To prove incompetence, petitioner must establish either that respondent lacked the ability to perform his job, or he demonstrated a persistent unwillingness or failure to do the work. *Law Dep't v. Stanley*, OATH Index No. 1540/05 at 4 (June 15, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-08-SA (Jan. 9, 2006). As distinct from misconduct, fault on the part of the employee is not necessarily required to establish incompetence. Petitioner need only prove that respondent is unable to meet the minimally acceptable threshold requirements of the duties of his title. *Employers Retirement System v. Myrick*, OATH Index No. 505/95 at 26 (Apr. 11, 1995); *see also Dep't of Education v. Sunda*, OATH Index No. 2403/17 (Oct. 26, 2017) (Incompetence

established where customer information representative repeatedly neglected her duties by being unable, unwilling, or intentionally failing to send hearing transcript to the correct hearing officers and parents, despite receiving adequate training); *Dep't of Finance v. Kateme*, OATH Index No. 728/17 (Feb. 2, 2017), *adopted*, Comm'r Dec. (Feb. 15, 2017) (incompetence demonstrated through respondent's persistent unwillingness to complete all of her assigned cases over a one-year period); *Financial Information Services Agency v. Leung*, OATH Index No. 2115/13 (April 9, 2014), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2014-0510 (Jan. 20, 2015) (a computer analyst that failed to timely complete tasks appropriate for her title was demoted from Level II to level I Computer Analyst). Notice to respondent that his performance is viewed as inadequate is a necessary part of an incompetence case, and it includes documentation of poor performance in memoranda given to the employee or in performance evaluations. *See Dep't of Transportation v. Saini*, OATH Index No. 841/90 (July 16, 1990), *aff'd*, 186 A.D.2d 436 (1st Dep't 1992). Incompetence is proven by particularized evidence of respondent's work responsibilities and the ways in which he has failed to satisfy them over a specified period of time, despite the requests of supervisors. *See Dep't of Housing Preservation and Development v. Wilson*, OATH Index No. 1368/99 (July 14, 1999) (employee's repeated and continued failure to meet deadlines, keep files in order, follow orders, respond to telephone calls, and process payments for at least the 18 months preceding the first set of disciplinary charges, accompanied by the notices to him of the failure, was sufficient to sustain the charges of incompetence). "[G]eneralized assessments of performance" are insufficient, standing alone, to sustain such charges. *Id*. at 12; *see Dep't of Housing Preservation and Development v. Burton*, OATH Index No. 330/8, at 34 (Dec. 23, 1983) (finding incompetence where, "the specific examples were numerous," and they "supported the reliability of the more general complaints").

Here, petitioner submitted substantial credible evidence proving numerous specific examples of respondent's failure to perform.

The process for temporary housing assistance begins when families submit applications at the PATH intake center. Applications are examined for sufficiency and given case numbers. The cases are assigned to team leaders and field investigators in the Programs Unit and an investigation is conducted (Tr. 17-18). Respondent is designated as a team leader. In that role, his main duties are to verify the information provided in the families' applications. Following document review and investigation, team leaders issue a recommendation to the Legal Department, which makes a

final determination (Tr. 314). Respondent and the members of his team were expected to handle a caseload of approximately 30 cases per week (Tr. 19, 116, 189, 315).

The review of an application and a team leader's recommendation should take no longer than ten days (Tr. 18, 88-89, 191, 315). In certain instances, application review exceeds ten days. For example, when a team leader requests additional documentation necessary to make an eligibility determination, the time that elapses between receipt of all the necessary documentation from an applicant and the time it takes to review the documentation, may extend the process beyond the ten-day deadline (Tr. 191-92, 315). In those instances, the application is placed on hold until the outstanding issues are resolved (Tr. 33, 89, 315). Some cases may be placed on hold indefinitely where an applicant is unreachable, or they fail to follow up with the required documentation (Tr. 324). There are also instances where cases are placed on hold indefinitely without reason or justification. Petitioner alleges that in those instances, the Department is hindered in rendering a timely decision, undermining its clients' well-being.

In the first set of charges, petitioner alleges that by unjustifiably placing cases on hold from February 2019 to January 2020, respondent demonstrated a persistent unwillingness to perform his duties as directed. Specifically, petitioner alleges that as of April 2, 2019 respondent failed to complete 32 hold cases he was ordered to work on via e-mails sent by his supervisor on February 12, 19, and March 13, 2019; as of May 14, 2019, respondent failed to timely complete 69 cases he was ordered to work on via e-mails sent by his supervisor on May 7, 8, 10, and 12, 2019; respondent failed to timely complete 13 cases that were assigned to him on June 13, 2019; respondent failed to complete eighteen cases within the ten-day time limit, nine of which were due on June 25, 2019, four on June 26, 2019, and five on June 30, 2019; failed to complete or update the status of 26 cases by their deadlines on or about July 7, 2019, through July 11, 2019; failed to complete eleven cases due on July 14, 2019; failed to complete five cases assigned to him on September 2 through September 4, 2019; failed to complete eleven hold cases assigned to him on September 8, 2019; failed to complete nine cases, which were due on December 11, 2019 and December 12, 2019; and failed to complete thirteen cases, which became due on December 3, 2019, December 4, 2019, December 9, 2019, and December 10, 2019 (ALJ Ex. 3, Specifications I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XIII, XIV, XV, XVI).

Petitioner also alleges that between April 4, 2020, and October 2, 2020, respondent unjustifiably failed to complete 601 application cases (ALJ Ex. 4, Specification I). In addition,

petitioner alleges that between June 13, 2021, and July 11, 2021, respondent was assigned a total of 43 application cases, and he allegedly completed only 18 of them; the remaining cases were completed by other staff working overtime (ALJ Ex. 4, Specification V). From August 6, 2021, and October 4, 2021, respondent was assigned approximately 200 cases, and, without justification, he allegedly completed only 51 of them; the remainder were completed by other staff working overtime (ALJ Ex. 4, Specifications VIII, IX, X, XI). In each case, respondent is alleged to have been present at work for the period leading up to the ten-day deadlines, he had ample time to review, investigate and make a final written recommendation, but he made no attempt to do so. Respondent's failure to properly handle the cases is alleged to have resulted in a delay in operations, and it is also alleged to have affected staff as well as the population served by Department's PATH unit.

Petitioner alleges that it made multiple attempts to assist respondent. The e-mails from his supervisor, containing his assignments, stated, "If you need additional help and support feel free to contact me . . . ." (Pet. Ex. 32 at 1, 7; Tr. 274). Nevertheless, respondent refused to attend conferences and training sessions. For example, respondent chose not to attend refresher training offered by Mr. George on August 17, 2021, and September 1, 2021. Respondent also failed to attend performance conferences (Pet. Ex. 28). Petitioner alleges that as a result, respondent's performance never improved.

Here, the credible evidence demonstrates that for over two years respondent was unwilling or intentionally failed to review and make a written recommendation on nearly all of the cases he was assigned. Credible witness testimony, corroborated by extensive documentary evidence, shows that respondent was told about his lack of performance, he was given opportunities to improve his performance, but he refused to take the prescribed steps toward improving.

In support of the charge, petitioner presented the testimony of Ms. Vida Chavez-Downes, Senior Director of DHS's PATH Family Intake. As director, Ms. Chavez-Downes oversees managers, senior team leaders, team leaders, and community coordinators (Tr. 15-16). She monitors reports that track the operations of the unit (Tr. 16). Ms. Chavez-Downes also monitors productivity reports on a monthly and yearly basis. One report she reviews daily is known as the status of the 10-day report ("10-day report") (Tr. 16-17). The 10-day report is generated daily, consisting of a list of temporary housing applications and their current status (Tr. 18-19). It contains the name of the client, the name of the PATH unit employee assigned to the case, the case

status, any comments related to the status of the case, and the number of days the application has been pending (Tr. 18; Pet. Ex. 1). In addition to reviewing reports, Ms. Chavez-Downes speaks directly to managers and supervisors regarding productivity. Occasionally, she makes inquiries on cases that are on hold. Where an employee is failing to meet the Department's standards, she consults with the manager and the senior team leader of the unit, and she advises managers and senior team leaders on the issuance of memoranda (Tr. 30).

According to Ms. Chavez-Downes, her review of respondent's cases, beginning in spring 2019, revealed that he was completing few to no cases assigned to him (Tr. 19; Pet. Ex. 8). Many of respondent's cases were regularly listed in 10-day reports. Ms. Chavez-Downes attempted to address respondent's performance and productivity by communicating with him directly (Tr. 30). In an e-mail she sent to respondent on May 10, 2019, Ms. Chavez-Downes inquired about the status of 20 specific cases that were on hold (Pet. Ex. 2). At the time the e-mail was written, some of the cases were pending for as long as 34 days (Pet. Ex. 2). According to Ms. Chavez-Downes, respondent never replied to her inquiry (Tr. 33). The cases were eventually reassigned to respondent's colleagues (Tr. 34).

Respondent's cases continued to be placed in hold status without explanation throughout 2019, and he was completing far fewer cases than his colleagues. Less than three months following the e-mail Ms. Chavez-Downes sent on May 10th, another set of respondent's cases had to be reassigned. Petitioner submitted an e-mail thread involving PATH Unit management and respondent's colleagues that detailed their progress while working on respondent's cases (Pet. Ex. 3). That particular batch of cases in hold status consisted of twelve cases (Pet. Ex. 3). Less than five months later, another set of respondent's cases were reassigned. A similar e-mail exchange between Ms. Chavez-Downes and her staff took place between December 16, 2019, and December 18, 2019 (Pet. Ex. 3). The e-mail thread contained a list of 30 cases that had to be reassigned (Pet. Ex. 3). According to Ms. Chavez-Downes, reassigning respondent's cases to his colleagues was ongoing (Tr. 40). In 2019, respondent averaged 8.85 cases per work week (Pet. Ex. 8). By comparison, his co-workers completed between 17.59 and 28.6 cases per week (Pet. Ex. 8).

In 2020, each of respondent's colleagues completed more cases in one week than he did the entire year. He completed only 14 cases; one colleague completed nearly 1400 (Pet. Ex. 8). According to Ms. Chavez-Downes, over 700 of respondent's cases had to be reassigned (Tr. 43, 45-46; Pet. Ex. 5). Petitioner submitted a report listing the total number of respondent's cases that

were reassigned between January 2020 and September 2020 (Pet. Ex. 5). The report lists 786 cases that were either reassigned and completed by other staff or were pending reassignment at the time the report was generated. Reassigning respondent's cases meant that respondent's colleagues were working overtime to complete his work (Tr. 38). Unit morale was negatively impacted (Tr. 72). It also meant that the Department's clients, those whose cases respondent was expected to review, did not receive timely services (Tr. 18, 73).

Petitioner submitted annual productivity reports as well as 16 samples of 10-day reports, spanning 2019 through October 2021 (Pet. Ex. 1, 8). They corroborate Ms. Chavez-Downes's testimony regarding respondent's productivity. Although the 10-day reports capture 16 days, not the entire period alleged in the petition, I found that the span of time they covered, and the volume of cases listed, sufficiently demonstrated respondent's ongoing failure to complete his work. They also show that respondent's performance deficiencies began in 2018, and they continued, further corroborating Ms. Chavez-Downes's testimony (Tr. 74). In total, the reports list 133 cases assigned to respondent between 2019 and 2021 where he offered no explanation as to why they had been placed in hold status. During his testimony, respondent offered no explanation for why his cases contained in the 10-day reports were missing information. Instead, he further buttressed Ms. Chavez-Downes's testimony. When asked about his lack of performance and productivity, he could not cite a specific number of cases that he recalled placing in hold status, acknowledging that "there were a lot of cases" he did not complete (Tr. 335).

In addition to e-mail inquiries from Ms. Chavez-Downes, respondent received multiple e-mails from his direct supervisors seeking explanations for his lack of performance. He also received invitations to attend conferences and training as far back as 2018. During the summer of 2018, Andrew Williamson, respondent's then supervisor, began tracking respondent's performance after observing that respondent regularly had many cases in hold status (Tr. 89). He created a chart noting respondent's productivity (Tr. 89; Pet. Ex. 10). Where respondent failed to complete his assigned cases, Mr. Williamson would meet with him informally and discuss the issue (Tr. 90). When he saw that respondent's performance did not improve, Mr. Williamson began sending him e-mails containing the chart noting his lack of productivity (Tr. 90; Pet. Ex. 10). Respondent never responded to Mr. Williamson's concerns regarding his performance (Tr. 93). Instead, he complained about his productivity being tracked (Tr. 90; Pet. Ex. 10). In respondent's reply to an e-mail Mr. Williamson sent on February 4, 2019, he argued that he was

being singled out, and he asked Mr. Williamson to stop sending e-mails containing a weekly summary of his performance (Pet. Ex. 10). Mr. Williamson and Lennox George, respondent's direct supervisor in 2019 and 2020, respectively, regularly sent e-mails to respondent seeking updates on his hold cases (Tr. 95-99, 206-209; Pet. Exs. 11, 12, 21). Respondent never replied to any of their e-mails.

Ms. Claudine Sajous, former manager at the Programs Unit, and Andrew Williamson's and Lennox George's supervisor in 2019, testified that she also sent numerous follow-up e-mails seeking updates on the cases he had in hold status (Tr. 117; Pet. Ex. 11). Those e-mails contained an order for respondent to focus on a select group of cases in hold status. (Tr. 119; Pet. Ex. 12). The remainder of his cases were reassigned (Tr. 119). She hoped that having respondent focus on a limited number of cases would assist him in completing his work before he was assigned new cases (Tr. 120-21). Ms. Sajous never received a response to her e-mails, and there was no improvement in respondent's performance (Tr. 121).

In addition to e-mails, Ms. Sajous held conferences where she and Lennox George discussed respondent's performance issues with him (Tr. 124; Pet. Ex. 13). During a conference that took place on April 2, 2019, Ms. Sajous and Mr. George addressed respondent's failure to respond to e-mails requesting updates on his cases in hold status (Tr. 125; Pet. Ex. 13). The conference was memorialized in a memorandum that was provided to, and signed by, respondent (Pet. Ex. 13). Two more conferences were held three months later, on July 4, 2019, and July 30, 2019 (Tr. 132-35; Pet. Exs. 15, 16). The conferences were conducted because Ms. Sajous identified four periods in June and July 2019, where respondent failed to complete his assigned cases (Pet. Ex. 15). During two periods in June, respondent was assigned a total of 26 cases, but he only completed two of them (Pet. Ex. 15). During two periods in July 2019, respondent was assigned 26 cases and he completed none of them (Pet. Ex. 16). In both memoranda served to respondent following the conferences, Ms. Sajous advised him that he is required to complete his assigned cases, and that he should seek a reasonable accommodation if his failure to perform was the result of a medical condition (Tr. 131-32; Pet. Ex. 15). The conferences and memoranda had no effect on respondent's performance or his failures to respond to e-mails from management (Tr. 126). Respondent never made a request for a reasonable accommodation (Tr. 140). He did, however, express that he was tired of receiving memoranda (Tr. 142). Ms. Sajous eventually sent

an e-mail to her superiors, Ms. Chavez-Downes and Rosy Gelin, regarding respondent's ongoing performance issues (Tr. 126; Pet. Ex. 14).

On July 30, 2019, Mr. George issued a performance evaluation to respondent (Pet. Ex. 24). The evaluation period covered July 1, 2018, to June 30, 2019. Respondent was supervised by Andrew Williamson during a portion of the evaluation period. Mr. George testified that he had conferred with Mr. Williamson regarding respondent's performance during the period he was respondent's supervisor (Tr. 103, 223). According to Mr. Williamson, the information he provided Mr. George during their discussion was incorporated in the evaluation; he testified that during the evaluation period, respondent's performance was "below par" (Tr. 90, 223). The evaluation shows that, respondent had difficulty maintaining the threshold standards consistently; displayed a disregard when e-mails were sent requesting updates on cases placed on hold; consistently failed to timely provide accurate reports and updates; and that his attendance had faltered, noting seven days of undocumented sick leave for which he received a Notice of Supervisory Conference on June 30, 2019 (Pet. Ex. 24). The evaluation was signed by respondent.

Mr. George also offered to provide refresher training. Mr. George explained that he initially attempted to address respondent's performance issues informally (Tr. 212). He attempted to engage respondent through informal conversations in his office, and he offered training on multiple occasions (Tr. 203, 219, 344). On August 17, 2021, and September 1, 2021, respondent was ordered to attend a training on case review (Tr. 343-44). He refused to attend (Tr. 344). Respondent testified that because the training was going to be conducted by Mr. George, his supervisor at the time, they were not mandatory (Tr. 344). During his testimony, respondent appeared insulted by the fact that he was being asked to attend a training since, according to him, he had been doing the job (Tr. 344). He also appeared to be offended by the fact that Mr. George was going to be the trainer, stating, "he doesn't have the experience of writing cases that I do . . . how's he going to train me . . . ." (Tr. 344).

Respondent acknowledged that there was a significant number of cases he did not complete between 2019 and 2021. He argued, however, that his performance woes were the result of a deliberate effort to sabotage his productivity (Tr. 324-25). According to respondent, his productivity suffered when his workspace was changed in April 2019 (Tr. 324). Respondent's workspace was changed from the sixth floor, where the legal department is located, to a cubicle on the third floor, where Mr. George was located (Tr. 79, 292). Respondent's new cubicle was

shared with another staff member (Tr. 327). The third floor also contained an area where applicants and their families were interviewed by DHS staff (Tr. 325). Respondent claims that he was routinely disturbed by staff seeking assistance from a supervisor or team leader (Tr. 325). He also argues that sharing his workspace with another colleague made it difficult to complete his cases. On Tuesday, Wednesday, and Thursday, respondent had to vacate the cubicle by 4:00 p.m., the end of his shift, so that another worker could use the workstation (Tr. 327). He also complained to his superiors that there was poor lighting in the area where his cubicle was located (Tr. 325). Respondent claimed that the poor lighting caused health issues that hindered his ability to be productive (Tr. 347, 351).

Given the voluminous, credible evidence showing that for the period between February 2019 and October 2021 respondent was made aware of his performance issues, that he was given opportunities to improve his performance, but failed to perform at the level expected for his position, I find that respondent demonstrated a continuous and distinct unwillingness to perform his tasks.

Respondent's claims in defense of this charge are unavailing. The evidence shows that respondent's lack of performance was a result of nothing more than his own personal unwillingness to perform the work he was assigned. Respondent does not dispute his performance deficiencies; he complains that his workspace conditions were poor, but he offered nothing more than self-serving statements in support of the claim. This tribunal has consistently found such evidence insufficient to establish a defense to the charge. *See, e.g., Triborough Bridge & Tunnel Auth. v. Beverley*, OATH Index No. 2238/15 at 8 (Nov. 30, 2015), *adopted*, Auth. Dec. (Dec. 28, 2015), *aff'd*, NYC Civ. Serv. Comm'n Item No. 2016-0060 (May 2, 2016) (respondent's "self-serving testimony" and conflicting accounts from doctors did not constitute "objective proof" of respondent's unfitness and that he could not report to work); *Health and Hospitals Corp*. (*Kings County Hospital Center*) *v. Justin*, OATH Index No. 1513/02 (Nov. 20, 2002) (unproven claims that absences were caused by depression did not establish a defense to misconduct). Respondent offered no objective proof that his workspace conditions had any effect on him. He submitted no photos of the space taken at the time he was using it. Nor did he offer any corroborating statements from the coworker that shared the cubicle or any other colleague that witnessed the conditions he complained about.

Respondent complained that the workspace conditions caused medical issues, but he offered no credible evidence to support that claim. He offered no documentation from a health professional to show that he suffered from a medical condition that prevented him from being a productive worker or that poor lighting at his workspace exacerbated that issue. Nor did he offer evidence that he ever sought treatment for health conditions associated with his workspace. The e-mails respondent received from his superiors contained a message advising him to provide medical documentation if the workspace was causing health issues. He submitted none. Respondent never sought professional treatment for his alleged affliction. Nor did he seek immediate relief by obtaining a medical professional's opinion about his alleged workplace-induced health issues.

Also unpersuasive is respondent's argument that, "reasonable accommodation is a trick they [management] use to circumvent the collective bargaining agreement" (Tr. 356). He offered no evidence in support of this accusation. There is no credible evidence that supports the belief that a request for a reasonable accommodation would have been used by management to transfer respondent to another unit. A reasonable accommodation is an action, or actions, taken which permit an employee with a disability to perform in a reasonable manner the activities involved in the job; provided, however, that such actions do not impose an undue hardship on the business from which the action is requested. Exec. Law § 292(21-e). The credible evidence suggests that the managerial staff was already working on ways to improve respondent's physical workspace despite never receiving any evidence to substantiate respondent's claim that he was suffering from a medical impairment: they moved his workstation a second time, and he was given an opportunity to work from home. Rather than serving as a pretext to transfer respondent to another unit, the credible evidence suggests that a reasonable accommodation request would have better informed the managerial staff's decision-making and advanced respondent's request to move.

Respondent also claims that this disciplinary action is retaliation for a complaint he made in November 2019 (Tr. 321-22; Resp. Ex. B). The complaint, an e-mail to the address: RespectfulWorkplace@dss.nyc.gov, alleged workplace abuse by Assistant Commissioner of Family Intake at PATH, Rosy Gelin (Resp. Ex. B). But the evidence suggests that respondent's e-mail complaint provided no motive for retaliation. Respondent offered no evidence of any follow-up from a human resources representative or EEO officer, and he never filed a formal EEO

complaint (Tr. 347). More importantly, Ms. Gelin testified credibly that she was unaware that a complaint had ever been filed (Tr. 305).

During closing statements, respondent argued that petitioner compiled a convenient "paper trail" (Tr. 360). However, the credible evidence suggests that petitioner's actions were an inconvenient series of ongoing managerial tasks that provided respondent with an opportunity to perform his job adequately. For more than two years, petitioner issued memoranda articulating respondent's gross failure to perform; managerial staff reduced respondent's caseload and assigned hundreds of his cases to other staff; his supervisors and managers were continuously required to carve out time in their schedule to hold performance conferences, schedule trainings, locate alternative workspaces, and endure respondent's resistance to improvement. Petitioner engaged in an onerous process undertaken in response to respondent's consistent unwillingness to perform his job. By contrast, I find respondent's evidence to be nothing more than self-serving statements intended to deflect blame for his incompetence.

Thus, specifications VIII, IX, X, XI, XIII, XIV, XV, XVI in the first set of charges, and specifications I, V, VIII, IX, X, XI of the second set of charges are sustained.

Incompetence - Excessive absenteeism

Petitioner's second incompetence claim arises from respondent's record of attendance during the period from February 20, 2019, to January 9, 2020. Petitioner alleges that respondent was absent for the equivalent of approximately 107 out of 223 potential workdays, which reflects a 47% absenteeism rate. It is further alleged that respondent's excessive absences rendered him incapable of effectively and efficiently performing his work duties (ALJ Ex. 3, Specification XVIII).

In support of the charge, petitioner submitted a record of respondent's Leave Requests Report (Pet. Ex. 18). The report lists respondent's requests for leave between February 20, 2019, and January 9, 2020. According to the report, respondent made 58 requests for leave during that period. 33 of the 58 requests were for sick leave. The remainder were a mixture of annual leave, comp-time leave, and two instances of leave without pay, which will be discussed later (Pet. Ex. 18). All of the requests were approved final. The report shows that respondent was absent on 107 workdays.

Ms. Sajous testified that respondent's absences caused all other staff to pick up the work that was assigned and designated to him (Tr. 72). She further explained that the time-sensitive nature of the work performed at PATH is impeded when staff is excessively absent (Tr. 72).

Respondent partly denied petitioner's allegations (Tr. 333-34). He claims that the real period of the problem took place between May and October. He testified that he had several medical issues causing him to request leave. As such, respondent argues that many of the days that petitioner included in their computation should not be counted. He especially takes issue with petitioner including requests for pre-approved annual leave (Tr. 334).

NYC Department of Homeless Services Code of Conduct, Chapter 5, Section 5.2 prohibits employees from being excessively absent or excessively late, warning that even if approved, excessive absence can be grounds for disciplinary action. Even where an employee's absences are caused by a physical disability, the employer may discipline and, if appropriate, terminate the employee for incompetence when the absences are excessive, and they have a burdensome effect upon the employer. *See e.g. Wallis v. Sandy Creek Central School Dist. Bd. Of Educ*.,79 A.D.3d 1813 (4th Dep't 2010) (finding that a bus driver with an absenteeism rate of 60% due to a work-related injury had a disruptive and burdensome effect on her employer because it was difficult to secure substitute drivers when she was absent); *see Cicero v. Triborough Bridge & Tunnel Auth.*, 264 A.D.2d 334, 336 (1st Dep't 1999) (whether respondent's absences were authorized deemed "irrelevant to the ultimate issue" of their "disruptive and burdensome effect" on the employer); *Dep't of Social Services (Human Resources Admin.) v. Gamoneda*, OATH Index No. 2029/21 at 6 (Oct. 25, 2021), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2021-0883 (Mar. 18, 2022) (excessive absenteeism charge upheld even if employee's absence were, in part, due to documented medical leave).

Petitioner's rules and regulations do not specifically define the amount of absenteeism that is deemed "excessive" for disciplinary purposes. Where an agency has no numeric definition of excessive absence constituting incompetence, this tribunal has looked at whether the absences are so extensive in number that they are excessive *per se*. *See Triborough Bridge & Tunnel Auth. v. Christiano*, OATH Index No. 493/12 at 12 (Mar. 21, 2012), *aff'd*, Comm'r Dec. (Apr. 11, 2012), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 12-34-SA (July 24, 2012); *Admin. for Children's Services v. Hoffman*, OATH Index No. 1616/02 at 9 (Dec. 20, 2002). In general, absences that amount to approximately 50% of workdays may constitute excessive absence. *See also*, *Dep't of*

Parks and Recreation v. Guerin, OATH Index No. 1711/99 (Aug. 3, 1999), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 00-97-SA (Nov. 14, 2000) (41 absences in a 13-month period found not excessive and no evidence of the effect of respondent's absences on his own job performance or on the operations of the agency).

Absences which are not so numerous to be deemed excessive *per se* but that have an adverse impact on office efficiency and operations, may give rise to sanctions. *Compare Triborough Bridge & Tunnel Auth. v. Frans-Nanton*, OATH Index No. 2624/18 (July 5, 2019), *adopted in part, rejected in part*, Pres. Dec. (Nov. 13, 2019) (finding an absenteeism rate of 34.5% constituted incompetence where respondent's absences had a negative financial and operational impact on a facility); *with Office of Payroll Admin. v. Hassan*, OATH Index No. 308/15 (Jan. 26, 2015), *adopted*, Agency Dec. (Apr. 28, 2015) (dismissing the charge where there was no proof that respondent's 30% absenteeism rate affected his ability to perform his job, or that his absences placed a burden on the agency or respondent's co-workers), and *Guerin*, OATH 1711/99 at 13 ("The failure to provide any evidence as to the consequences of respondent's absenteeism strongly suggests that the absences had little or no detrimental impact.").

While the previous incompetency charge involved respondent's unwillingness to perform his duties while present at work, the credible evidence submitted in support of this charge shows that respondent's absence also contributed to his inability to perform at the standard of someone in his title. The credible evidence also shows that respondent's absences had a significant adverse effect on the PATH unit's efficiency and operations. Respondent's inability to perform his work during the period between February 20, 2019 to January 9, 2020 is well documented in petitioner's summary of productivity report for 2019 (Pet. Ex. 8). The report shows that in 2019 respondent completed just 269 cases where his colleagues completed between three to five times as many cases. In 2019 alone, respondent was absent approximately 101 workdays (Pet. Ex. 18). As a result, respondent's work had to be completed by other staff, costing the Department financially in the form of paid overtime, negatively affecting unit morale, and impeding their ability to deliver critical services timely. Thus, this charge should be sustained.

Insubordination

Petitioner charged respondent with misconduct, alleging that he failed to follow directives contained in e-mails sent to him on February 12, 19, 2019; March 13, 2019; and May 7, 8, 10, 12,

2019; refused to attend performance conferences and mandatory training; refused to sign the Task and Standards form (ALJ Ex. 3, specifications I, II, III, IV, V, VI, VII, XII; ALJ Ex. 4, specifications I, II, IV, VI, VII, VIII). These specifications should be sustained, in part.

To establish misconduct here, petitioner must prove by a preponderance of the credible evidence that: a supervisor issued an order to respondent; the order was clear and unambiguous in its content; and, having heard the order, respondent willfully refused to obey. *See Transit Auth. v. Wong*, OATH Index No. 1866/08 at 16 (Aug. 28, 2008); *Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.*) *v. Muniz*, OATH Index No. 1666/05 at 8 (Oct. 17, 2005). A supervisor's directive need not be made in definitive language containing the word "order" so long as a clear and unambiguous request was issued. *Wong*, OATH 1866/08 at 16; *Dep't of Sanitation v. David*, OATH Index No. 766/07 at 5 (Jan. 25, 2007), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 07-101-M (Oct. 25, 2007). Likewise, respondent's refusal need not be expressed; it can be inferred from a deliberate, passive failure to comply. *See Health and Hospitals Corp. (Correctional Health Services) v. LaSane*, OATH Index No. 1165/02 at 6 (Aug. 8, 2002) (charge sustained where respondent failed to report for a fitness-for-duty examination to seek advice from union).

E-mail Updates

During his testimony, respondent acknowledged that he received the e-mails in question (Tr. 328-329). He spoke generally about his responses to similar e-mails. He typically did not respond to Mr. Williamson by e-mail. He testified that, "most of the time, it was verbal" (Tr. 328). I understood that to mean that he communicated orally rather than replying directly to the e-mail. When asked whether he ever responded to e-mails sent by Ms. Sajous, respondent testified similarly, saying, "I believe I did, but mostly verbally." (Tr. 329). Respondent admitted that he did not respond to the e-mails sent from Ms. Chavez-Downes or Mr. George. He testified that he "didn't bother reading" any of the e-mails sent from Ms. Chavez-Downes, explaining, "she wasn't in my chain of command" (Tr. 329). Regarding the e-mails sent by Mr. George, respondent testified that, "at that point, we weren't talking," suggesting that he didn't respond because their relationship had soured (Tr. 329).

The credible evidence shows that respondent failed to obey the orders contained in e-mails he received from his superiors on February 12, 19, 2019; May 7, 8, 10, 12, 2019. The e-mails in

question requested respondent to focus his efforts on the cases noted in the body of the e-mail and reply with an update. Respondent never commented as to whether he replied to the emails in question, and he admittedly did not respond to Ms. Chavez Downes and Mr. George at all. By contrast, Mr. Williamson, Mr. George, and Ms. Chavez-Downes testified credibly that they never received a response to the e-mails in question, adding that all the cases noted in the e-mail had to be reassigned to other staff (Tr. 33-34, 99, 209).

Petitioner failed to establish that respondent failed to obey orders contained in the e-mail sent from Ms. Sajous to respondent on March 13, 2019. Ms. Sajous never testified as to whether respondent communicated an update to the cases noted in the e-mail in question. During her testimony related to the e-mail sent on March 13, 2019, she spoke solely in general terms. She testified that she sent similar e-mails to respondent, and that he "would complete some, but not all" of the cases she brought to his attention (Tr. 122). The e-mail she sent respondent on March 13, 2019, did not require that he complete the cases listed. The message contained in the e-mail states, "John, Please concentrate on cases below tomorrow and provide update before your departure. Thank you." (Pet. Ex. 12). The order from Ms. Sajous was for respondent to concentrate on the cases. There is no evidence suggesting that concentrating on the cases also meant completing the cases. There is also no evidence suggesting that respondent failed to provide an update on the cases noted. Although a conference memorandum pertaining to this incident was signed by respondent (Pet. Ex. 13), it is in no way an admission to the facts alleged.

Thus, Specifications I, II, IV, V, VI, VII of the first set of charges are sustained. Specification III of the first set of charges is dismissed.

Performance Conference - July 15, 2020

A conference was scheduled on or about July 15, 2020, in which respondent and Mr. George were to meet and discuss respondent's failure to complete his assigned cases (Pet. Ex. 27). Respondent did not attend. The following day, Mr. George approached respondent to follow up and serve him a conference memorandum (Tr. 243-244). Ms. Poitevien-Clerge served as a witness to the service of the memo. At trial she testified that she and Mr. George were waiting for respondent in Mr. George's office (Tr. 176). Respondent never arrived. So, Mr. George and Ms. Poitevien-Clerge walked over to respondent's cubicle and asked him to participate in a conference at Mr. George's office. Respondent refused, stating that Mr. George has no right to serve him a

memorandum, that neither Ms. Poitevien-Clerge nor Mr. George are his boss, that they are "idiots" and "stupid," and that he would no longer accept any memoranda from Mr. George (Tr. 177, 244; Pet. Ex. 27). Ms. Poitevien-Clerge and Mr. George went back to their respective offices and documented the incident (Tr. 177).

According to respondent, he was having lunch at the time this conversation took place (Tr. 337). Mr. George insisted on having a conference and serving the memorandum. He recalled that the two of them, "had some words," but he couldn't recall what words he said (Tr. 337). When asked whether he called Mr. George an *idiot* or *stupid*, he said he did not recall using those words (Tr. 337).

Even if respondent was eating at his desk when he was approached by Mr. George, the refusal to participate in a conference was insubordinate because respondent was given a direct order and he refused to follow it. Thus, this portion of specification I in the second set of charges should be sustained.

Performance Conference - September 2, 2020

A performance conference was scheduled on or about September 2, 2020 (Tr. 254; Pet. Ex. 28 at 3). After receiving the invitation to participate in the conference, respondent sent an e-mail to Mr. George refusing to attend. In fact, respondent stated that he had, "no interest in discussing performance," with Mr. George, and that he should "bump this issue back to (Assistant Commissioner) Rosy Gelin," and that it was above Mr. George's "pay grade" (Pet. Ex. 28 at 2).

Respondent offered no evidence to rebut this allegation. As such, the credible evidence shows that respondent received an order to attend a conference on September 2, 2020, and he refused. Thus, this part of specification I of the second set of charges should also be sustained.

Performance Conferences – September 8, 2020; October 28, 2020

Petitioner failed to meet their burden with respect to the remaining allegations of insubordination contained in specification I. Although the evidence shows that two e-mails were sent inviting respondent to a conference on October 28, 2020, the evidence does not show that he saw the invitations and intentionally refused to attend (Pet. Ex. 29 at 23, 24). Petitioner also never questioned respondent regarding his knowledge of the e-mail invitations. This incident stands in contrast to the July 15, 2020, and September 2, 2020, incidents where there was either a witness to respondent's refusal, or a refusal sent from respondent's e-mail address. Similarly, the evidence

related to the September 8, 2020, conference fails to show that respondent received an order to attend the meeting invitation. Thus, this part of specification I of the second set of charges should be dismissed.

Training – August 17, 2021, and September 1, 2021

Specifications VI and VII in the second set of charges, allege that respondent failed to attend required training that took place on August 17, 2021, and September 1, 2021. At trial, petitioner submitted two e-mails from Mr. George to respondent inviting him to attend (Pet. Ex. 31). Respondent admittedly refused to attend the training. He explained that they were not mandatory because they were ordered by Mr. George (Tr. 343-44). Furthermore, he expressed incredulity at the fact that they were going to be conducted by Mr. George, who, according to respondent, does not have the requisite experience to conduct such training (Tr. 344).

There is no evidence supporting the premise that Mr. George lacked authority to order respondent to attend training. The petitioner's Code of Conduct requires all employees to obey directives of their supervisor (ALJ Ex. 2). By respondent's own admission, Mr. George was his supervisor (Tr. 317). Therefore, refusing to attend the trainings scheduled to take place on August 17, 2021, and September 1, 2021, was insubordinate because respondent was given a direct order to attend, and he refused. Thus, specifications VI and VII of the second set of charges should be sustained.

Task and Standards Form

Petitioner submitted a Task and Standard form dated July 30, 2019. The three-page document describes the duties of an employee with respondent's job title (Pet. Ex. 24 at 4; Tr. 226). At the bottom of the last page there are three spaces provided for the employee's signature, the supervisor's signature, and the signature of a third person. The petitioner alleges that respondent is required to sign the Task and Standard form because he received a "conditional" rating on the performance evaluation which was issued contemporaneously with the form.

The credible evidence does not establish that respondent was issued an order to sign the document and refused. Therefore, specification XII in the first set of charges is dismissed.

Discourtesy

Petitioner alleges that on or about February 16, 2020, respondent sent a discourteous e-mail to his supervisor (ALJ Ex. 4 Specification II; Pet. Ex. 25). The e-mail was a response to an e-mail sent from Mr. George regarding his attempt to serve respondent with a conference memo. Respondent's reply began with the following:

> Thanks for your rambling e-mail, which sounds like someone who's [*sic*] feelings were hurt and trying to blow off steam. I previously sent you the Webster's definition of INSUBORDINATION, but clearly you did not read or, perhaps, you just did not understand what it means.

In the second of three lengthy paragraphs, respondent stated:

> Secondly, my duties and job function are autonomous by nature. Which means "acting independently or having the freedom to do so. Having self-government, at least to a significant degree". I've put the meaning hear [*sic*] to save you the trouble of buying a dictionary.

He concluded the e-mail with the following:

> Lastly, you are an ASSOCIATE FRAUD INVESTIGATOR, which is my civil service title as well, notwithstanding levels I and level [II]. Therefore, you have the same power and authority as I, which is none. You, nor I are authorized to determine violations of the agency's code of conduct and or operating procedures. Your duties are simple, to observe and provide direction to document performance. So, it would be a great help to me and everyone else if you would just do YOUR job. Stay in your own pay grade.

(Pet. Ex. 25, emphasis in original). Respondent acknowledged sending the e-mail (Tr. 338). He claims that it was not insubordinate, and that it was sent in response to a condescending e-mail from Mr. George. When asked how he expected the e-mail to be received, he said he had not given it "that much thought;" Mr. George's e-mail made him, "very upset" (Tr. 338).

Petitioner's Code of Conduct requires employees to be, "courteous and professional in their contact with fellow employees," and not conduct themselves in a manner that is "prejudicial to good order and discipline" (ALJ. Ex. 2). Not every workplace disagreement is misconduct, "even when voices are raised and emotions are vented." *Health and Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Freeman*, OATH Index No. 1399/06 at 9 (July 20, 2006). Employees may disagree with supervisors within the bounds of decorum and discretion. *Health & Hospitals*

Corp. (Lincoln Medical & Mental Health Ctr.) v. Thomas, OATH Index No. 531/04 at 5 (May 4, 2004). Relevant factors include the dispute's context, substance, tone, and duration. *See Admin. for Children's Services v. Rucando*, OATH Index No. 633/05 at 8 (Apr. 29, 2005). These principles also apply to e-mails; disagreements are permitted but they must remain within the range of acceptable workplace behavior. *Compare Dep't of Buildings v. Lamitola*, OATH Index No. 871/12 at 9 (Mar. 5, 2012) (discourtesy proved where, in response to an e-mail ordering a medical exam, the employee replied, "[W]hat makes you think you're entitled to demand that I take a medical physical with a doctor of your choosing?" and that his medical condition was "none of your business"), *with Dep't of Correction v. Smith*, OATH Index No. 667/13 at 12 (July 19, 2013), *aff'd*, NYC Civ. Serv. Comm'n Case No. 35546 (May 6, 2014) (though refusal to perform a task is misconduct, expressing concern about out-of-title work and writing, "This is not my job," on a note attached to an e-mail was not misconduct); *see also Transit Auth. v. Felix*, OATH Index No. 1206/09 at 4 (June 16, 2009) (while the tone of an e-mail, including the comment, "I don't see why I have to do all this unnecessary work," could have been more accommodating, it was not rude or insubordinate).

Respondent's e-mail is an act of misconduct. It was sent with the intent to denigrate Mr. George. The opening paragraph seeks to undermine Mr. George's authority to send respondent an e-mail advising him against misconduct. It contains statements intended to insult Mr. George's intelligence. In the second paragraph, respondent makes another statement intended to insult Mr. George's intelligence when he states, "I've put the meaning hear [*sic*] to save you the trouble of buying a dictionary." The last paragraph of the message is entirely dedicated to invalidating Mr. George's authority as respondent's supervisor, ending with respondent ordering Mr. George to "do YOUR job" and "Stay in your pay grade." These statements are unmistakably disrespectful. Thus, this specification should be sustained.

Conduct Disruptive to the Department's Operations

Petitioner alleges that on or about August 31, 2020, at approximately 3:26 p.m., respondent was engaging with FJC Security Guard Martha Carter in a loud and disruptive manner, hindering productivity in the area. The Department's Code of Conduct prohibits employees from engaging in conduct that is prejudicial to good order and discipline, including engaging in conduct disruptive to the operations of the Department (ALJ Ex. 4 Specification III; ALJ Ex. 2 at 7).

Ms. Chavez-Downes testified that she received an e-mail from Chima Dimoriaku, a team leader in the PATH unit, complaining that respondent and other colleagues were being noisy, distracting him from his work (Tr. 62; Pet. Ex. 9). Shortly after receiving the e-mail, Ms. Chavez-Downes went to investigate the situation on the floor where respondent was alleged to have been (Tr. 63). Respondent was not in the area when she arrived, but she was able to speak to the security guard who confirmed that they had been conversing with respondent (Tr. 63). Ms. Chavez-Downes also spoke with Mr. Chima, the individual that e-mailed the complaint. He was unable to say how long the incident lasted (Tr. 64).

Respondent testified that he shared a funny anecdote with the security guard and colleagues, and that they all laughed as a result (Tr. 340). He claims the incident lasted 30 seconds.

Hearsay is admissible in this tribunal, and it may be the sole basis for establishing misconduct. *See generally* 48 RCNY § 1-46; *Ayala v. Ward*, 170 A.D.2d 235 (1st Dep't 1991) ("Hearsay is not only admissible in an administrative proceeding but may also constitute substantial evidence if it is sufficiently reliable and probative on the issues to be determined.") (citations and internal quotation marks omitted). Factors in assessing the reliability and probative value of hearsay include: the identity of the hearsay declarant, the availability of the declarant to testify, declarant's personal knowledge of the facts, the independence or bias of the declarant, the detail and range of the hearsay, the degree to which it is corroborated, the centrality of the hearsay evidence to the agency's case, and the magnitude of the administrative burden should the hearsay be excluded. *Fire Dep't v. Johns*on, OATH Index No. 1147/18 at 7-8 (May 3, 2018), *adopted*, Comm'r Dec. (June 13, 2018), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2018-0645 (Nov. 23, 2018).

Here, petitioner's evidence was too general, vague, and conclusory, lacking sufficient specificity and detail to meet its burden of proof. Petitioner offered nothing more than a vague and uncorroborated hearsay claim that respondent and other colleagues were making noise. No evidence was presented regarding the substance or duration of the alleged disruption. When Ms. Chavez-Downes asked Mr. Chima about the incident, he could not estimate how long it lasted; instead, he offered the following ambiguous description: "it was long enough to feel distracted and unable to concentrate." Furthermore, Mr. Chima failed to describe the substance and nature of the noise. His e-mail to Ms. Chavez-Downes lacks the level of specificity and detail necessary to establish with sufficient clarity whether respondent's participation in the incident rose to the level

of misconduct. As such, petitioner's evidence failed to prove misconduct, especially in light of respondent's credible testimony that he merely shared a joke (which he retold during his testimony) with co-workers. Therefore, this specification and the charge should be dismissed.

AWOL

Petitioner alleges that respondent was Absent Without Official Leave ("AWOL") from on or about October 22, 2019, through on or about October 23, 2019, for a total of fourteen hours (ALJ Ex. 3 Specification XVII).

NYC Department of Homeless Services Code of Conduct, Chapter 5, *Time and Leave*, Section 5.8, which states: "Employees shall not be absent from or leave assigned work locations without prior authorization from their supervisors, except in an emergency. If an emergency exists, they must contact their supervisor as soon as possible, but no later than the time at which they were scheduled to report, or the deadline set by their supervisor, whichever is earlier."

Respondent testified that he sent Ms. Sajous an e-mail in advance of the dates he intended to take off (Tr. 334; Pet. Ex. 19). The dates in question were requested because he was scheduled to obtain a vaccination, but he was unsure of the day (Tr. 334). He also stated that he expected he would need a day for recovery. So, he informed her that he needed two days: October 22 and 23, and Ms. Sajous approved the request on September 29, 2019 (Pet. Ex. 19 at 1).

Ms. Sajous acknowledged that she initially approved respondent's request. However, she explained that a request can be approved then disapproved if the employee's time and leave record reflects excessive time and leave absences (Tr. 150). Ms. Sajou's approval to respondent's requests for sick leave on October 22 and October 23 was changed because it was later determined that respondent had excessive absences. On October 17, 2019, five days prior to the dates in question, respondent was served with a conference memo placing him on Doctor's note restriction (Pet. Ex. 19). Being placed on Doctor's note restriction required respondent to submit medical documentation for any sick leave taken between July 2019 through December 2019 (Tr. 150; Pet. Ex. 19). It also advised respondent that, "all undocumented requests will be denied and result in loss of pay." The sick leave in question occurred during this period. When respondent failed to provide medical documentation for the dates in question, the requests for medical leave were changed from "approved" to "absence without leave" (Tr. 150; Pet. Ex. 18 at 1).

The credible evidence shows that respondent was absent without leave on October 22 and 23, 2019. Thus, this charge should be sustained.

FINDINGS AND CONCLUSIONS

1. Respondent demonstrated a persistent unwillingness to perform his tasks when, during the period from February 12, 2019 to January 9, 2020, he neglected to perform his duties, failing to complete 106 cases he was assigned as alleged in specifications VIII, IX, X, XI, XIII, XIV, XV, XVI in the original set of charges (ALJ Ex. 3); during the period from May 2019 to October 2021, he failed to complete more than 700 cases he was assigned as alleged in specifications I, V, VIII, IX, X, XI in the second set of charges (ALJ Ex. 4). Respondent was made aware of his performance issues, he was given opportunities to improve his performance, but failed to perform at the level expected for his position.

2. As alleged in specification XVIII in the original charges, from February 20, 2019 to January 9, 2020, respondent was absent the equivalent of approximately 107 out of 223 potential workdays, and his absences had a significant adverse effect on the PATH unit's efficiency and operations.

3. As alleged in Specifications I, II, IV, V, VI, VII of the first set of charges respondent was insubordinate when he failed to respond to the e-mails sent by the managerial staff. Petitioner failed to meet their burden with respect to specification III of the first set of charges.

4. As alleged in specification I in the second set of charges, on July 15, 2020, respondent was insubordinate when he refused to attend a performance conference, stating that he would no longer accept any memoranda from Mr. George, calling Mr. George and Ms. Poitevien-Clerge "idiots" and "stupid." Respondent's conduct in bypassing supervisory review was insubordinate and constituted neglectful and inefficient performance of his duties.

5. As alleged in specification I in the second set of charges, respondent was insubordinate when received an order to attend a conference on September 2, 2020, and he refused.

6. Petitioner failed to meet their burden with respect to the portion of specification I that alleges respondent was insubordinate

when he failed to attend two performance conferences scheduled on September 8, 2020 and October 28, 2020.

7. Respondent was insubordinate when he deliberately failed to attend required training that took place on August 17, 2021, and September 1, 2021, as alleged in specifications VI, VII in the second set of charges.

8. Petitioner failed to meet its burden with respect to specification XII in the first set of charges which alleges that respondent was insubordinate when he refused to sign the Task and Standards form.

9. As alleged in specification II in the second set of charges, on February 16, 2020, respondent sent a discourteous e-mail to his supervisor.

10. As alleged in specification XVII in the first set of charges, respondent was AWOL on October 22, 2019, and October 23, 2019, for a total of fourteen hours when respondent did not report to work on the days in question, and he never produced the necessary documentation.

11. Petitioner failed to establish that respondent was disruptive to the Department's operations on August 31, 2020, as alleged in specification III in the first set of charges.

RECOMMENDATION

Upon sustaining the charges, I obtained and reviewed a summary of respondent's personnel history. Respondent has been employed with the Department since February 1999, and this is his first disciplinary charge. Petitioner now seeks termination of respondent's employment. For the reasons set forth below, petitioner's request is appropriate.

An extensive record of numerous performance reports, e-mails, and conference memoranda shows that beginning in 2018, respondent's work performance deteriorated. Respondent received a "conditional" work performance evaluation for the period from July 2018 to January 2019 after completing just 50% of his assigned caseload. Between 2018 and 2021, he received numerous supervisory conference memoranda from his manager and two supervisors. All of the supervisory conferences centered around respondent's absenteeism and continual failure to complete his assigned cases. Despite the numerous supervisory warnings from 2018 through 2021, respondent has no prior formal record of discipline.

Where an employee has demonstrated a prolonged and persistent pattern of incompetence and misconduct, this tribunal has recommended termination of employment. *See Kateme*, OATH Index No. 728/17 (termination recommended for respondent's persistent unwillingness to complete all of her assigned cases over a one-year period); *Human Resources Admin. v. Bryant*, OATH Index No. 1721/16 at 18-19 (July 5, 2016), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2016-0699 (Nov. 17, 2016) (termination of employment imposed where employee was excessively late and engaged in multiple instances of discourteous and disruptive conduct)*; Dep't of Consumer Affairs v. Yampolsky*, OATH Index No. 2269/10 (Aug. 12, 2010) (termination recommended for clerical associate who not only improperly or inefficiently performed her duties on 13 occasions, but was persistent in her refusal to do the job as directed).

A recommendation of termination is not to be taken lightly. This tribunal has recognized that, "employees should have the benefit of progressive discipline wherever appropriate," particularly on the first occasion of misconduct. *Office of the Comptroller v. Hogans*, OATH Index No. 203/21 at 25 (Jan. 5, 2022), *adopted*, Comptroller's Dec. (Jan. 24, 2022), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2022-0113 (Aug. 12, 2022). A fair penalty must consider the particular circumstances and any mitigating factors, as appropriate. A respondent's tenure and lack of prior disciplinary record may constitute mitigating factors. *See Id.*; *Dep't of Correction v. Passe*, OATH Index No. 1917/02 at 11 (Jun. 4, 2003), *modified on penalty*, Comm'r Dec. (Sept. 23, 2003) (respondent's 13-year tenure and clean record are mitigating factors which must be taken into account in assessing penalty).

However, there are instances where, "the principles of progressive discipline do not preclude termination for a first instance of misconduct." *Sunda*, OATH 2403/17 at 12; *see also Keith v. NYS Thruway Auth.*, 132 A.D.2d 785, 786 (3d Dep't 1987) (a single incident may be so egregious as to justify dismissal). In some cases, despite the presence of mitigating factors, "the well is poisoned" by an employee's conduct, and termination is appropriate. *Dep't of Environmental Protection v. Reynolds*, OATH Index No. 851/21 (Oct. 15, 2021), *adopted*, Comm'r Dec. (Nov. 19, 2021). This tribunal has found termination appropriate where respondent demonstrated a persistent unwillingness to perform assigned tasks, committed multiple acts of misconduct, and demonstrated an unwillingness to change. *See 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) (despite no prior record of discipline, termination of 13-year employee recommended

where the credible evidence showed a pattern of misconduct); *Reynolds*, OATH 851/21 (termination appropriate where respondent, an employee for 17 years with no disciplinary history, engaged in a year-long pattern of hostile behavior towards supervisors and coworkers); *Sunda*, OATH 2403/17 (despite respondent's lack of any formal discipline and her 10-year tenure, termination recommended due to her unwillingness to be trained in and to perform the work assigned); *Fire Dep't v. Buttaro*, OATH Index No. 2430/14 (Jan. 13, 2015) (17-year employee with no prior record terminated for repeated insubordination and creating a hostile work environment, and demonstrating no willingness to change).

DHS Family Service's mission is to assist families experiencing homelessness and in need of shelter. To fulfill that mission, the agency needs reliable employees that can perform work timely and interact with their colleagues professionally. In this proceeding, the credible evidence showed that over the span of more than two and one-half years, respondent demonstrated a persistent refusal to meet the standards of his professional title and accept Mr. George's authority. The evidence showed that he had been insubordinate on several occasions, refusing to follow directives issued by supervisors and upper management. The evidence also showed that respondent sought to undermine Mr. George's authority by repeatedly insulting him. Respondent was excessively absent over a twelve-month period, and he also failed to properly comply with time and leave procedures on two occasions. I was not persuaded that he was being unfairly singled out by supervisors or that he was the victim of a workplace "conspiracy" or retaliation for his complaints about the managerial staff.

Respondent has consistently demonstrated in the past few years an unwillingness to conform his behavior and his work performance to supervisory expectations and directions despite repeated formal and informal attempts by his supervisors to effect some change. Respondent has an important position in which persistent unwillingness to perform his duties and insubordination can have a significant negative impact on families in need of housing assistance. Despite respondent's lack of a prior formal disciplinary record and his twenty-two-year tenure with petitioner, "the well has been poisoned" by his conduct, and a significant penalty is warranted. Moreover, Mr. George testified that at the time of the trial, respondent's performance had not improved (Tr. 275). That means more families unnecessarily waiting for relief. The penalty in this matter must proportionately reflect respondent's conduct.

Considering all of the relevant penalty factors, including the persistent nature of the misconduct committed and its impact on the public, I recommend that respondent be terminated from employment.

Orlando Rodriguez
Administrative Law Judge

Jan. 6, 2023

SUBMITTED TO:

GARY P. JENKINS
Commissioner

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CONFIDENTIAL

IN PERSON SERVICE

John Thomas
[redacted]

Re: ODA Case Tracking Nos. 0462392-01 and 0462393-02

Dear John Thomas:

Administrator/Commissioner Gary Jenkins carefully reviewed the Report and Recommendation of the Administrative Law Judge Orlando Rodriguez and the record of the Section 75 Disciplinary three-day trial which ended on January 6, 2023, on charges heretofore preferred against you for ODA Case Tracking Nos. 0462392-01 and 0462392-02 and OATH Index No. 298/22. Administrator/Commissioner Gary Jenkins adopted all the findings of fact of the Administrative Law Judge and found you guilty of misconduct. Therefore, he decided that you shall be terminated from your position as an Associate Fraud Investigator Level I, effective at the close of business today.

Under the provisions of Section 76 of the Civil Service Law, you are entitled to appeal this determination by application either to the Civil Service Commission, 1 Centre Street, Room 2300, New York, New York 10007 or to the Supreme Court of the State of New York in accordance with the provisions of Article 78 of the Civil Practice Law and Rules. If you elect to appeal to the Commission, such appeal must be filed in writing within twenty (20) days of service of the Agency decision (with an additional three (3) days allowed for mailing).

If you have any questions concerning this matter, please contact your union representative.

Sincerely,

[redacted]

Mark George
Assistant Director
Office of Disciplinary Affairs

Enclosure

cc: Karen Hamilton
Assistant Supervisor
Office of Administrative Trials & Hearing
40 Rector Street, 6th Floor
New York, New York 10006

Jill Mendelberg, Esq.
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75 Maiden Lane, Suite 603
New York, New York 10038

MB/mg

THE CITY OF NEW YORK
CIVIL SERVICE COMMISSION

In the Matter of the Appeal of

JOHN THOMAS

Appellant

-against-

DEPARTMENT OF SOCIAL SERVICES (DEPARTMENT OF HOMELESS SERVICES)

Respondent

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

CSC Index No: 2023-0065

DECISION

JOHN THOMAS ("Appellant") appealed from a determination of the Department of Homeless Services ("DHS") finding Appellant guilty of incompetency and/or misconduct and imposing a penalty of termination following disciplinary proceedings conducted pursuant to Civil Service Law Section 75.

The Civil Service Commission ("Commission") requested written arguments from the parties on February 24, 2023. Appellant's brief was received on March 10, 2023. DHS's brief was received on March 24, 2023.

The Commission has reviewed the record below, which we incorporate by reference into this decision, as well as arguments submitted on appeal, and finds 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: April 13, 2023