

## ***Human Resources Admin. v. Levitant***

OATH Index No. 129/07 (Feb. 2, 2007), app dism, NYC Civ. Serv. Comm'n Item  
No.CD07-84-D (Aug. 14, 2007), **appended**

ALJ found employee guilty of a continuous long-term AWOL, a shorter period of AWOL, numerous instances of insubordination and threats to his supervisors, engaging in non-work activities during work hours while producing minimal amounts of work, and disclosing confidential client information. ALJ recommended termination.

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

*In the Matter of*  
**HUMAN RESOURCES ADMINISTRATION**  
*Petitioner*  
*- against -*  
**ZINOVIIY LEVITANT**  
*Respondent*

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### **REPORT AND RECOMMENDATION**

**TYNIA D. RICHARD**, *Administrative Law Judge*

This employee disciplinary proceeding was referred by petitioner Human Resources Administration ("HRA") pursuant to section 75 of the Civil Service Law. Respondent Zinoviyy Levitant is employed by petitioner as a caseworker. He is charged with numerous acts of misconduct, including unauthorized use of the timekeeping system, being absent without leave, insubordination, threatening and intimidating behavior toward superiors, being absent from his work location, engaging in non-work activities during work hours, failure to complete work assignments, removing confidential documents from the agency, and being continuously absent without leave since November 21, 2005. Respondent did not appear to defend himself against the charges.

The hearing was conducted before me on October 30, and 31, 2006. At trial, petitioner presented the testimony of nine witnesses. Respondent appeared briefly but

soon departed; thus, upon a showing of adequate service of the notice of hearing, he was held in default and the hearing proceeded as an inquest.

Based upon the record of the proceeding, I find that petitioner established many of the charges, as set forth below. I recommend a penalty of termination.

### **PRELIMINARY ISSUES**

An attorney made a limited appearance at the hearing on respondent's behalf for purposes of making an adjournment request. Upon denial of the request, counsel sought and was granted permission to withdraw from the proceeding.

#### *Service*

Petitioner presented documents establishing proper service of the charges and notice of hearing. According to petitioner's proof, Mr. Levitant's last known address was 8794 15<sup>th</sup> Avenue, apartment 4C, Brooklyn, New York 11228, until September 12, 2006, when Mr. Levitant completed a change of address form that reported his new address as 7701 Bay Parkway, apartment 6G, Brooklyn, New York 11214 (Pet. Ex. 4).

On or about July 26, 2006, petitioner served respondent with the charges and notice of hearing at both addresses, by certified mail. Both envelopes were returned to the Agency unopened and unclaimed (Pet. Exs. 2 & 3). "Nail and mail" service was effected with service of the notices being sent to both addresses by first class mail in August 2006 (Pet. Ex. 6). Personal service could not be effected at the work site because Mr. Levitant was absent without leave for an extended period.

I find that petitioner's service was proper as it was reasonably calculated to give actual notice of the charges and date of hearing. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657 (1950) (service of the charges and notice of hearing by first class and certified mail was service "reasonably calculated" to apprise respondent of the nature and pendency of the proceeding and comports with due process); *Milliken v. Meyer*, 311 U.S. 457, 61 S. Ct. 339 (1940) (proper service arises not from actual notice but from the Department's use of a means of service reasonably calculated to give actual notice of the charges); *Admin. for Children's Services v. Palaez*, OATH Index No. 876/04 (May 19, 2004); *see also* 48 RCNY 1-23(b); Personnel Rules and Regulations of the City of New York, Rule 6.4.2(b), published in 55 RCNY, Appendix A.

*Adjournment Request*

The matter of respondent's failure to appear at the hearing requires some elaboration and, although detailed in the transcript of this proceeding at pages four through eleven, it will be summarized here.

The trial of this matter was scheduled to commence at 9:30 a.m. on October 30, 2006, and to continue on October 31 and November 1. Two pretrial conferences were scheduled for July 11 and 25, 2006, at which respondent failed to appear. Vincent Davis, Esq. appeared on respondent's behalf at the second scheduled conference and indicated that he had been unable to reach respondent for purposes of being retained. In the days prior to trial, the tribunal became aware of petitioner's futile attempts to contact respondent by way of his union and by way of counsel, who still had not been retained (*see* letters to ALJ Richard from HRA, dated October 20, and 25, 2006).

On October 30, the tribunal sought to commence the proceeding at approximately 10:15 a.m., by which time respondent had not appeared and it was believed that he would not appear. Mr. Davis, who appeared that morning to represent respondent in case he appeared, indicated that, despite his efforts to reach respondent by phone and by mail, he had not reached Mr. Levitant and was not retained to represent him.

Shortly thereafter, a phone call was received at OATH from Mitchell Craner, an attorney who stated on a speakerphone placed in the courtroom for purposes of taking his phone call, that he represented Mr. Levitant, though not in the present proceeding, and that, although he had not spoken with respondent, he had received second hand information that respondent was unaware of the day's proceedings. He suggested that the tribunal call respondent on his cell phone. To say that this request was unusual would be the height of understatement. Opting not to call respondent on his cell phone, I suggested the attorney have Mr. Levitant call the tribunal as soon as possible to communicate his interest in participating in the proceedings.

Several minutes later, Mr. Levitant appeared at the door of the courtroom. I say "at the door" because he refused to step inside the courtroom; instead, he beckoned Mr. Davis who was seated at counsel's table and had a conversation with him in the hallway. Before doing so, he answered a few questions that I pressed upon him regarding his identity and purpose for standing at the door. He denied receiving service of the notice of

hearing and said that he would not participate in the proceeding because of a matter being held simultaneously at the Office of Collective Bargaining (“OCB”), which is located in the same building as OATH. Mr. Levitant also stated that he was totally disabled, receiving medication, and had been out of work for an extended period of time. I noted that his physical bearing appeared to be that of an able-bodied person and that, despite whatever disability he claimed, he apparently was able to participate in the hearing at OCB.

After returning to the courtroom, Mr. Davis made a request to adjourn the proceeding. His authority appeared to be limited to requesting the adjournment. He was unable to declare that he was retained for purposes of representing Mr. Levitant or whether he would be in the future. Mr. Davis made his request for adjournment based upon respondent’s representation that he “was improperly served” or “had not received service” of the notice of hearing, and that respondent was not physically able to participate (Tr. 4). Moreover, Mr. Davis stated that he would not be prepared to go forward as he had only just met Mr. Levitant. It should be noted that it is not OATH’s policy to grant adjournment requests made by attorneys who are not retained counsel. Under the rules of this tribunal, an attorney or representative may not file a notice of appearance on behalf of a party unless he or she has been retained by that party to represent the party before this tribunal. “Absent extraordinary circumstances, no application shall be made or argued by any attorney or other representative who has not filed a notice of appearance.” 48 RCNY § 1-11(c), (d). Doing so would undermine the administrative efficiency of these proceedings.

I denied the adjournment request, finding an absence of good cause to grant it for the following reasons. *See* 48 RCNY § 1-32(b) (“Applications for adjournments . . . shall be granted only for good cause.”). Having reviewed petitioner’s service records by that time, I was aware that respondent was properly served with notice of the hearing three months before the scheduled hearing (see discussion above). In addition, the Agency and counsel hired by the union to represent him had made numerous attempts to reach Mr. Levitant at his place of residence and through his union, to ascertain his interest in participating in the hearing, to no avail. Moreover, despite his actual knowledge and appearance on the trial date, respondent made no request for continuance or seek any

other assistance to allow him to proceed in this matter. He left before I ruled on his lawyer's request. Also, as noted above, despite his claim of disability, respondent appeared to have no physical reason for being unable to participate in his hearing. Thus, I concluded that respondent's failure to appear, or to remain and defend himself, was a matter of choice. The first class mail service of the trial notice, which was not returned to the Agency, proved respondent's prior receipt of notice.

In addition, I considered the lengthy set of charges in this case which caused petitioner to schedule three successive trial dates and to summon six witnesses to testify on the first trial day, all of whom were waiting to testify. As a rule, adjournment requests made on the day of trial are disadvantaged by the delay, precisely because of the inconvenience and cost to the parties who are prepared to proceed and the witnesses who have reordered their schedules to appear and give testimony. *See* 48 RCNY § 1-32(b) ("Delay in seeking an adjournment shall militate against grant of the request"); *see, e.g., Dep't of Sanitation v. DeSantis*, OATH Index No. 1494/05 (Oct. 31, 2005) (adjournment of second trial day denied where respondent made belated request and would be AWOL during the period requested); *Dep't of Correction v. Jones*, OATH Index No. 1400/02 (July 10, 2002) (adjournment denied where tribunal delayed the start of hearing for three hours to give counsel time to locate respondent and respondent the opportunity to appear).

While it is difficult to place the mysterious phone call from Mr. Craner in context, it did seem calculated to notify OATH of respondent's ignorance of the proceedings even though, it is my belief, respondent was in fact aware of them. The swiftness in which respondent appeared at OATH supported my belief and indicated that he was in contact with Mr. Craner, if only indirectly. Ultimately, I concluded that respondent had sought to evade service by refusing to accept the mailed notices and sought to delay the trial in a cynical attempt to subvert the process.

In all, Mr. Levitant failed to provide good cause to grant an adjournment.

In denying the adjournment request, I offered Mr. Davis the ability to seek a continuance of the trial to enable him time to prepare, and I invited him to make any other request for relief that would assist respondent's participation in the proceeding (Tr. 9). Opting not to take advantage of my offer, Mr. Davis withdrew from the proceeding. I

note that this tribunal has received no communication since that date from respondent or his counsel.<sup>1</sup>

Thus, the proceeding commenced as an inquest shortly after 12:00 noon.

### **ANALYSIS**

Respondent is a caseworker, or supervisor I, in HRA's Long Term Home Health Program, whose work involves making home visits to clients who receive personal care services at home such as physical therapy, occupational therapy, or rehabilitation with the goal of preventing elderly clients from having to enter nursing homes (Tr. 50).

Petitioner submits six sets of charges alleging various acts of misconduct committed by Mr. Levitant in the years 2003, 2004, 2005, and 2006.

#### ***Unauthorized Use of Autotime System, AWOL, Insubordinate Refusal to Attend Conferences, Inappropriate Language, and Threatening a Supervisor -- #2189-04***

##### **AWOL**

Respondent is charged with being absent without leave or authorization from September 10, 2003, to October 3, 2003.

Barry Simmons, a senior supervisor in Adult Protective Services, was Mr. Levitant's supervisor in 2002 and 2003 (Tr. 23). As such, he reviewed and approved respondent's weekly timekeeping records. Those records showed that respondent failed to swipe in or out from September 10 to October 3, 2003 (Pet. Ex. 9). Mr. Simmons testified that he was not aware of respondent requesting leave or receiving approval for his absences (Tr. 25-27).

I find that petitioner established the charge by proving that respondent was absent without leave or authorization from September 10 to October 3, 2003.

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<sup>1</sup> By letter dated October 31, 2006, Stephen McQuade, at the Office of Collective Bargaining, wrote the tribunal to advise that respondent appeared in a scheduled hearing on October 30, 2006, which was held from 10:00 a.m. to 3:30 p.m. While I do not consider Mr. McQuade to be a representative of respondent, I note his communication in the interest of full disclosure.

### Unauthorized Use of Autotime

Respondent is charged with unauthorized use of the Autotime system for improperly giving his password to someone in the Agency who put three leave requests in the system on his behalf on days when respondent was not at work.

Charles Waxman, director of personnel for the Medical Insurance and Community Services Administration, is respondent's personnel officer (Tr. 82). He testified that the Agency was planning to serve him with disciplinary charges on September 10, 2003, the day that respondent was due to return to work from a period of leave, but respondent did not return as scheduled. When he did return, approximately three weeks later, he said he had been ill. But while he was out for that period, no one knew why he was out (Tr. 84-85). He never submitted an official request for leave, so he was being carried as AWOL when the Agency later discovered three leave requests that were put into the Autotime system improperly.

Darryl Sims, who worked as a database administrator for the Autotime system in 2003, researched the Autotime database and found that three leave requests had been entered using Mr. Levitant's id and password for the periods September 10 through 12, September 15 through 19, and September 29 through October 3 (Tr. 28-33). The requests had all been entered on days that Mr. Levitant was not at work (Pet. Ex. 11). These requests were improper because respondent's id and password were used to input them, but he was not in the office to do so. Thus, the Agency deduced that he gave his id and password to someone else to input into the system for him, which Mr. Waxman said violated procedure.

When Mr. Waxman questioned him about it, respondent denied submitting the leave requests himself (Tr. 85). Mr. Waxman testified that respondent at one point indicated that he had asked his supervisor to do it for him, and at another point, he said he had given his id to a co-worker. In the end, however, respondent denied giving his id and password to anyone else. Mr. Waxman said it was possible for his supervisor to input a leave request for a subordinate, but the procedure required supervisors to use a supervisory id to do so. Mr. Waxman did not indicate whether he asked respondent's supervisor, Mr. Simmons, if he had input the requests.

While he conceded that his investigation was inconclusive about who submitted the requests, Mr. Waxman ultimately concluded that respondent gave his Autotime password to a co-worker, which violates the code of conduct requirement that all passwords remain secure (Tr. 86-87).

I was unable to find respondent guilty of this charge by a preponderance of the evidence. While it might be appropriate under the circumstances to infer from the evidence that respondent gave his id and password to a co-worker, I could not in the absence of any testimony on the matter from his supervisor, Mr. Simmons. That is, there was no evidence that Mr. Simmons had not put the requests into Autotime, since he was not asked about it at trial and Mr. Waxman had not questioned him about it. If respondent had asked his supervisor to perform this task, he could not be held responsible for his supervisor's failure to use proper procedure. I therefore recommend dismissal of the charge.

Refusing to discuss return from AWOL on October 20, refusing a notice for a supervisory conference, and refusing to attend conference on October 27

On October 20, 2003, respondent returned to work after a suspension (Tr. 86, 89-91; Pet. Ex. 20). Mr. Waxman said that he attempted to meet with him to discuss his work assignment and time and leave issues. A 2:00 p.m. meeting was scheduled, but he had difficulty conducting the meeting because of respondent's constant disruption and repeated requests to call his lawyer. Mr. Waxman described respondent as angry and insubordinate toward him and Mr. Marin. He said that respondent issued an implied threat by saying that he would call his lawyer and let him "take care of it."

Mr. Waxman documented the meeting in a memo, which notes respondent's interruptions to call his lawyer at 2:15 and 2:30 (Pet. Ex. 20). The meeting ended at 2:45 p.m. During the meeting, Mr. Waxman attempted to serve respondent with a conference notice to discuss the Autotime entries and with a notice for a hearing to be held on November 13, but respondent refused them both (Pet. Ex. 20).

On October 27, 2003, Mr. Waxman tried to deliver to respondent a memo informing him of a supervisory conference scheduled for November 3 to discuss the Autotime entries (Pet. Ex. 21). Mr. Waxman said that respondent refused to accept the

memo from him (Tr. 92). He documented these occurrences in a memo to Michael Falzarano, dated October 28, which also recommended that disciplinary charges be filed (Pet. Ex. 21). According to Mr. Waxman, there was never a “cohesive” discussion about the Autotime entries due to respondent’s evasive behavior.

The evidence shows that respondent was directed to attend a meeting on October 20<sup>th</sup> and he did attend that meeting. Petitioner contends that he failed to adequately participate in the meeting and that he evaded discussion by creating constant interruptions to call his attorney. To the contrary, the evidence of his statements to Mr. Waxman (discussed above) show that respondent answered enough questions for Mr. Waxman to represent that he denied giving his password to a co-worker, that he claimed to have asked his supervisor to do it, and that he subsequently contradicted both statements. Despite the annoying interruptions to call his lawyer, the evidence is that respondent participated in the meeting. I therefore find no misconduct.

Petitioner also alleges that, on October 20, respondent refused to accept a notice of a supervisory conference to discuss the Autotime entries (Pet. Ex. 20). I do not find it to be misconduct simply to refuse to accept a notice for a conference or meeting, as is alleged here. I could find no case where such a charge was sustained. Such conduct is minimally offensive and, where the employee actually appears at the conference, it is not harmful. Here, there is no evidence of when the conference was to be held, whether it was held, or whether respondent failed to attend. I find that the record does not support a finding of misconduct.

Last, petitioner alleges that, on October 27, respondent refused Mr. Waxman’s directive to attend a supervisory conference. The memo that respondent refused states that the conference was to be held on November 3 (Pet. Ex. 21). That memo and another memo documenting his refusal, dated October 28 are contained in Petitioner’s Exhibit 21. Irrespective of whether respondent accepted the notice, there was no indication that Mr. Waxman told him to attend a conference on November 3. Nor was there any evidence that the conference was commenced and that respondent failed to appear. Although an intentional refusal to attend a conference ordered by your supervisor clearly is misconduct, the evidence established only that he refused to take the written notice for the conference, and I do not find that to constitute sanctionable misconduct.

Accordingly, I find that petitioner failed to establish misconduct by these specifications, and they should be dismissed.

#### Language

Richard Marin testified that he encountered respondent on October 27, 2003, when he came to his office to talk to him about his assignment (Tr. 70-72). He was returning from a medical leave and he wanted to be reassigned to the Adult Protective Services Program, where he had worked previously. Mr. Marin told him that the personnel office would make that decision. Respondent then stated to him, "If you're going to fuck with me, I'm going to fuck with you." He said he would have them all fired. Mr. Marin described respondent as "agitated" possibly because he knew he would not be returned to that unit. He wrote a memo describing the incident (Pet. Ex. 16).

Mr. Marin said that Mr. Levitant was always a bit "overbearing and intimidating" and seems to have believed that he could "get over on staff." He is a "big guy" who "can be intimidating when he raises his voice, and he did that on a number of occasions" (Tr. 72).

Respondent's inappropriate language and intimidating demeanor constitute misconduct.

#### Threats to supervisor

Debora Daniel-Preudhomme is the Director of the Casa Field Office, which is part of the Home Care Services Program (Tr. 37). In 2003, she was Director of the Lombardi Program in the Long Term Managed Care Program, and she supervised Mr. Levitant.

On December 4, 2003, Mr. Levitant entered Ms. Daniel-Preudhomme's office and, in a loud threatening tone, complained about his supervisor, Martin Bruin (Tr. 38). Ms. Daniel-Preudhomme said that respondent "wanted to select" his own supervisor. Earlier that day, respondent had been in a shouting match with Mr. Bruin. He told Ms. Daniel-Preudhomme that he had political connections and connections in the union and with HRA personnel, and, if she "did not abide by his rules," she would be in trouble. He did not explain what kind of trouble. She told respondent that she did not make agreements with staff about who their supervisors would be (Tr. 39-40). He was angry

(“he was angry most of the time”), and, standing six to eight inches away from her, he stated that she would be “sorry” for her decision. Then he left. Ms. Daniel-Preudhomme described respondent’s demeanor:

Mr. Levitant would menace you when he was speaking to you, because he would stand very close to you, he would lean down to you and he would almost make it seem as if you both were in agreement with what he was saying. And in a matter of a second, he would attempt to intimidate you by saying, “you will be sorry.” You know, in I guess a Bela Lugosi-type of voice.

(Tr. 39). Before leaving, respondent told her he would sue her personally if she did not assign him a new supervisor (Tr. 41).

Ms. Daniel-Preudhomme said that in most conversations respondent would enter one’s personal space in this way (Tr. 39-40). She had not encountered another subordinate who spoke to her in this manner. She said respondent might start a conversation across the desk from her, but eventually “he [would] lean across the desk and get as close to you as possible, or he [would] stand as close to you as possible to further enhance his intimidation” (Tr. 40). She felt threatened and intimidated by his behavior most of the time and would speak to him in someone else’s presence whenever possible. She wrote an email memorializing this incident (Pet. Ex. 12).

Respondent’s menacing behavior, as established by the record, was insubordinate, threatening and disrespectful to his supervisor. I find that petitioner has sustained the specification.

***Insubordination -- #2189-05***

**Failure to attend meeting to discuss time and leave**

After a general staff meeting reviewing time and leave procedures, Ms. Daniel-Preudhomme decided that respondent needed more training so she instructed him to attend a meeting with her and other supervisors (Tr. 44-46). She said that whenever time and leave issues arose at general staff meetings, Mr. Levitant would raise numerous questions and create disruption. She was not sure if he understood the rules or not, and she wanted to ensure that the rules were clear, so she scheduled the meeting for March 3,

2004. Mr. Levitant refused to attend the meeting stating that he wanted union representation, even though Ms. Daniel-Preudhomme had invited a number of union members who were in attendance. Respondent never appeared.

Respondent's unexcused failure to attend the meeting is insubordination and constitutes misconduct. This charge is sustained.

Refusal to report absences to his immediate supervisor

Despite being instructed to do so, Mr. Levitant refused to contact his immediate supervisor, Janet Lugo, when he was absent (Tr. 46-47). Instead, he would call Alan Block, the Supervisor III who was a level above his supervisor. However, if Mr. Block was in a meeting, no one would know that Mr. Levitant would not be coming to work, and anyone might assume that he was performing his fieldwork. A general directive on the subject was issued on March 15, 2004, and on March 16, respondent again failed to contact his supervisor and instead contacted Mr. Block. Particularly since respondent's work involved conducting home visits with clients who received personal care services, his conduct was disruptive and had the effect of delaying time sensitive home visits because his supervisor could not timely reassign his cases (Tr. 48-49).

This specification was proved by a preponderance of the evidence. Respondent's refusal to report absences to his direct supervisor despite a clear directive to do so is misconduct.

***Engagement in Non-work Activities During Work Hours – #2189-06***

Nathan Weiner is a level II Supervisor who was respondent's immediate supervisor from January 2004 to May 2005 (Tr. 51). In October 2004, Mr. Weiner was directed by his supervisor, Margaret Quinn, the Director of the Long Term Home Health Program, to begin monitoring respondent's non-work activities, including his time spent on the telephone, on smoking breaks, or otherwise away from his work tasks. Ms. Quinn testified that she observed that respondent was frequently away from his desk (10 to 12 times a day), going outside to smoke, and going to the men's restroom on another floor, which was a waste of time (Tr. 21-22). He also could be seen on telephone calls that she believed were personal because he spoke in Russian and because his duties did not call

for him to be on the phone. Ms. Quinn was disturbed by what she observed to be a “pattern of . . . not working” (Tr. 22), which was bad for morale in the office, and she wanted it stopped (Tr. 57).

The theory was that respondent was not productive at work at least in part due to his time spent engaged in non-work activities. To accomplish his task, Mr. Weiner, who sat approximately 15 feet away from respondent’s desk, began to keep a contemporaneous log of respondent’s activities (Tr. 52). That log was introduced in evidence as Petitioner’s Exhibit 13. I should note that Mr. Weiner provided straightforward testimony without a hint of embellishment. I considered his testimony and his observations as recorded in the log to be credible and trustworthy.

Mr. Weiner made notations in the log that summarized respondent’s work activity for the period October 25 through November 19, 2004 (Tr. 55-57). During this period, respondent’s work assignment was to generate “denial” notices, which were sent to clients to inform them of the reasons why certain services had been denied by the Agency. When Mr. Weiner processed denials himself, he would complete an average of 20 in a day. He believed it was standard to generate seven to 15 denials in a day. The log indicates that respondent generated at most three denials in a day; some days he produced none at all (Pet. Ex. 13).

Mr. Weiner maintained the daily log by inserting the date and time that respondent started a non-work activity, its description and duration, and any other pertinent information (Tr. 53-54). While he did not note in the log what time respondent reported to work each day, he noted that “almost without exception” respondent reported for work at 8:30 a.m. and left at 4:30 p.m. (Tr. 58). Telephone calls were presumptively personal ones because respondent did not have a caseload of contract vendors who he might be expected to contact. In addition, respondent was from the Ukraine and he usually spoke in another language during these calls, Russian or Ukrainian, which also suggested they were personal.

The log indicates that on some days, respondent was not observed on any personal phone calls, but on other days he spent a substantial amount of time on the phone (Pet. Ex. 13). On November 3, respondent spent 166 minutes on telephone calls. Mr. Weiner noted that respondent told him that his brother’s hospitalization was the reason for his

lengthy calls that day. Respondent generated no work that day. The next day, November 4, respondent spent 29 minutes on personal calls, and he generated three denial notices. On November 5, respondent spent 107 minutes on the phone and generated two denial notices. On November 9, respondent spent 54 minutes on the phone and generated three denial notices.

Respondent took several smoking breaks each day. Even though the union contract did not provide for smoking breaks, Mr. Weiner advised respondent that he was entitled to two breaks each day which were provided by management “as a courtesy”: one in the morning and one in the afternoon (Pet. Ex. 14). Nevertheless, respondent did not comply with this directive and took numerous smoking breaks on most days (Tr. 55). The log indicates that respondent took the following smoking breaks in excess of the two allowed each day:

four on October 26 for a total of 19 minutes,  
three on October 27 for a total of 17 minutes,  
five on October 29 for a total of 27 minutes,  
three on November 3 for a total of 15 minutes,  
four on November 4 for a total of 23 minutes,  
four on November 5 for a total of 35 minutes,  
five on November 9 for approximately 20 minutes,  
six on November 10 for a total of 30 minutes,  
three on November 12 for a total of 15 minutes,  
six on November 15 for a total of 30 minutes,  
four on November 16 for a total of 20 minutes,  
four on November 17 for a total of 41 minutes,  
five on November 18 for approximately 20 minutes, and  
five on November 19 for a total of 34 minutes.

(Pet. Ex. 13).

October 25 was a day that was notable for the amount of time respondent spent engaged in non-work activities. That day, he went out to buy breakfast from 8:25 to 8:40; he ate at his desk from 8:40 to 8:53; he had a smoking break from 8:53 to 9:00; then he was away from his desk for another 23 minutes; he was on a personal call from 9:23 to 9:43; he read the newspaper for the next three minutes, then spent five minutes away from his desk, and then five minutes engaged in some “unknown activity”; from 9:52 he spent 10 minutes away from his desk; then he worked at his desk for 28 minutes; at 10:40 he spent 10 minutes away from his desk; then he spent 27 minutes “doing nothing” at his

desk; he left his desk for two minutes and sat at his desk doing nothing for three minutes; he was away from his desk for a minute, then at his desk for five minutes, then away from his desk for three minutes, then at his desk for three minutes, then away from his desk for six minutes, and finally at his desk at 11:51. He had lunch at 12:00 noon for an hour. Then he spent an hour at his desk “doing nothing.” One additional five-minute smoking break is noted at 2:10.

With only 28 minutes employed doing assigned tasks from 8:30 a.m. to 2:00 p.m., it is not surprising that respondent generated only one denial that day.

According to the evidence documented in the log, respondent spent the following amounts of time engaged in non-work or otherwise unproductive activity:

Date	Time spent on Non-work activity (in minutes)	Activities observed	Denial notices completed
Oct. 25	218	Smoking, telephone, breakfast, away from desk, doing nothing at his desk	1
Oct. 26	93	Smoking, telephone, breakfast	1
Oct. 27	47	Smoking breaks, breakfast	2
Oct. 28	38	Smoking breaks, breakfast	3
Oct. 29	65	Smoking breaks, breakfast, late from lunch	1
Nov. 1	20	Breakfast, smoking break	0
Nov. 2		Holiday	
Nov. 3	196	Smoking breaks, telephone, breakfast	0
Nov. 4	67	Smoking breaks, telephone, breakfast	3
Nov. 5	162	Smoking breaks, telephone, breakfast	2
Nov. 8	5	Smoking break (unable to observe)	3
Nov. 9	97	Smoking, telephone, breakfast, newspaper	3
Nov. 10	65	Smoking, telephone, breakfast	3
Nov. 11		Holiday	
Nov. 12	81	Smoking, telephone, away from desk	3
Nov. 15	30	Smoking breaks	3
Nov. 16	39	Smoking breaks, away from desk	3

Nov. 17	56	Smoking breaks, telephone	3
Nov. 18	25	Smoking breaks, newspaper	3
Nov. 19	34	Smoking breaks	2

Of course, it is not misconduct simply to be seen reading a newspaper at your desk or to make a lengthy personal phone call on a particular day. I find, however, that petitioner has documented a quantum of unproductive time that is excessive and that continued despite the entreaties of his supervisors, which demonstrates a disregard for the authority of his supervisors and for his professional obligations to the Agency.

Based upon the record adduced, I find that respondent committed misconduct by spending an excessive amount of time engaged in non-work activities during work hours for the period October 25 to November 19, 2004, which included personal phone calls and unauthorized smoking breaks, among other things, despite his supervisors' directives to do his work.

#### Refusal to Obey Directive of Deputy Director

Janet Lugo was the Deputy Director for the Long Term Home Health Program from approximately April 2004 until October 2005 (Tr. 73-77). On or about October 10, 2004, she was participating in a training of staff that involved the installation of two new computer applications on the case management system. Two trainers were present, and she and the trainers were visiting each employee at their desk to ensure that the two applications had been installed on each computer. When she approached Mr. Levitant at his desk, he was working on his computer. She asked him to minimize the screen that he was working on so she could look on his desktop to see if the new programs were there. He refused to minimize his screen and further stated that he did not have to listen to Ms. Lugo. She repeated her request asking as his Deputy Director, but he again refused. She said he was very obnoxious, curt and aggressive in demeanor. The trainers present were "amazed" at his behavior, she said. Respondent stated that he would not comply unless ordered by his direct supervisor. Ms. Lugo explained that she was his supervisor's supervisor and that her order would supercede his, but respondent insisted.

Shortly, they saw Mr. Weiner nearby, and respondent called out to him asking that he give him an order to minimize his screen. Mr. Weiner told him to do what Ms. Lugo said to do. Respondent refused insisting that Mr. Weiner give him a direct order. For the sake of getting the work done, Ms. Lugo asked Mr. Weiner to “please let him know that he is to minimize the screen.” Mr. Weiner did so, and respondent minimized the screen. Ms. Lugo said that she had not encountered anything like that from another employee. She memorialized the incident in writing (Pet. Ex. 17). She said that respondent’s tone of voice was loud, abrupt, and disruptive (Tr. 78).

The notion that respondent needed the permission of his first line supervisor while being issued an order by the Deputy Director is so irrational as to be absurd. Respondent’s conduct was insubordinate and clearly calculated to demean Ms. Lugo’s authority. It therefore constituted misconduct, and this specification should be sustained.

#### Making personal phone calls

On November 10, 2004, Ms. Lugo was passing respondent’s cubicle and noticed him on a personal phone call discussing a bank issue with a Chase bank statement in his hand (Tr. 78-80). She stopped and asked him to conduct his personal business on his personal time and to get back to work. Respondent hung up the telephone, turned around very angrily and accosted her. As he stood over her, he stated that he did not have to listen to what she had to say. She said that she was his Deputy Director and he needed to get back to work. He was “very angry” at that point, and he spoke very loudly and aggressively telling her that only his direct supervisor could tell him what to do. She thought he was trying to intimidate her because “he got louder and aggressive, . . . very indignant,” and he threatened to file a grievance against her. She told him to do what he had to do, but he had to get back to work. She did not recall whether he got back to work after that. She stated that she felt intimidated by respondent standing so close to her. She remarked that he was always loud and aggressive and probably thought that, if he threatened her with a grievance, she would back down. She wrote a memo describing the incident (Pet. Ex. 18).

What is remarkable about respondent’s conduct is its consistent pattern of palpable anger, insubordination and unbridled disdain for the authority of his supervisors.

When given a directive that he disagrees with, Mr. Levitant resists it but he also feels free to intimidate the authority figure who delivers the directive. Such conduct is disruptive and unmanageable and should not be tolerated in any work environment. I find that Mr. Levitant's conduct toward Deputy Director Lugo was blatantly insubordinate and constitutes misconduct under the Civil Service Law. Thus, petitioner's specification is sustained.

Petitioner further alleges that respondent was observed making personal phone calls on three occasions on December 3, 2004. The record does not contain evidence of this specification, therefore it should be dismissed.

***Threat to supervisor, failure to complete assignment, talking on the phone -- #2189-07***

Mr. Weiner testified that, early on February 25, 2005,<sup>2</sup> he gave respondent 75 case files and asked him to arrange them in chronological order by start-of-care date (Tr. 58-59). Mr. Weiner believed the assignment should have taken two hours to complete (Pet. Ex. 15). Respondent spent most of that day on the telephone. By the morning of February 28, when the assignment still had not been completed, Mr. Weiner approached respondent and asked about his progress (Tr. 59-60). Respondent complained that Mr. Weiner had asked five times already, and he admitted that he had not done it. As he watched respondent pick up the telephone, Mr. Weiner told him that he should not be on the phone; respondent complained that Mr. Weiner had spent an entire day recently on the telephone with his own mother. Mr. Weiner walked away.

Mr. Weiner testified that, as far as he could tell, none of the work had been done, but his memorandum of the incident stated that a third of it had been completed at the end of the day (Pet. Ex. 15). I find the latter representation, written in a memo contemporaneous with the incident, more credible.

Respondent, who was at that time agitated, followed Mr. Weiner and asked what his problem was. He described respondent's demeanor as "insubordinate, fairly hostile, fairly aggressive" as it usually was (Tr. 60).

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<sup>2</sup> The charge states that this conduct occurred on February 5, 2005. In light of the evidence, which included a contemporaneous memo which dated the conduct as occurring on February 25, it is appropriate to conform the specification to the proof, and I will do so here.

Respondent also told Mr. Weiner that he had been given a number of cases to screen (Tr. 63). When asked how many, respondent told him to go to his cubicle and count them. When Mr. Weiner asked a second time, respondent said he did not know and that Mr. Weiner should go to his cubicle and count. Mr. Weiner did not describe this part of the conversation in any more detail.

Mr. Weiner later saw respondent talking to Ms. Quinn. When Mr. Weiner met with Ms. Quinn himself, she counseled him to resolve the matter with respondent. Ms. Quinn testified that, in a conversation with her, Mr. Levitant asked for another supervisor because Mr. Weiner was “riding” him and was out to get him (Tr. 21-22). Ms. Quinn refused and explained to him that Mr. Weiner was doing what he had to do to get him to do his work.

Later, Mr. Weiner met with respondent in a conference room and told him that they had to work together because he would continue to be his supervisor. Mr. Levitant told him that, if he testified against him in connection with the allegations in his log, “he would see to it that his lawyer would disgrace me and I would lose my job,” and that “the only reason” he had not done so already was because Mr. Weiner “had a wife and two children.” He said respondent was threatening but very “matter-of-fact” (Tr. 61).

Respondent’s statements that he would cause Mr. Weiner to be disgraced and to lose his job, with reference to his wife and children, were threats intended to undermine the authority of his supervisor.

The evidence also proved that respondent had completed only a third of his work assignment by the end of the day and that he was conducting personal phone calls for most of that day. In light of Mr. Weiner’s credible claim that this was a two-hour assignment, I find respondent’s engagement in personal calls for most of the day and failure to complete two-thirds of his assignment to be misconduct.

I find that petitioner met its burden of proving the alleged misconduct, with one exception. I did not find that the testimony with respect to respondent’s request that his supervisor go count how many cases he had been assigned to screen, as oblique as it was, was sufficient to establish misconduct.

***Disclosure of Confidential Client Information -- #2189-08***

Ms. Quinn testified that she attended an arbitration hearing at the Office of Labor Relations at which Mr. Levitant presented his grievance for out-of-title work (Tr. 15). At the hearing, in defense of his claim, respondent put in evidence documents that contained confidential client information, and he did so without the permission or authority of the Agency. She said that documents submitted in blank, or redacted, would have accomplished Mr. Levitant's purposes (Tr. 18).

Ms. Quinn produced the documents, which contain clients' personal health information and confidential identifying information such as address and Medicaid numbers (Pet. Ex. 7). Under HRA's confidentiality rules, she explained, employees were precluded from exposing these details to anyone who does not have "an absolute need" to know them (Tr. 16-17). Besides HRA's confidentiality rules, Ms. Quinn said he also violated HIPAA, the federal Health Insurance Portability and Accountability Act. Ms. Quinn wrote a memo describing this occurrence (Pet. Ex. 8). She said that all employees had been instructed about the importance of upholding the confidentiality of client records and were given training on the new HIPAA law in 2002 (Tr. 20).

Petitioner sustained its charge that respondent committed misconduct by disclosing confidential client information without permission or authority and without an absolute need to do so.

***Long-Term AWOL from November 21, 2005 to present – #2189-09***

Ms. Quinn, the Director of the Long Term Home Health Program, testified that Mr. Levitant is assigned to her unit and was absent from work for more than a year preceding the trial (Tr. 14).

Mr. Waxman testified that respondent was presently absent without leave ("AWOL") and had been since October 5, 2005 (Tr. 93-94). Mr. Waxman testified that respondent had been ordered to return to work on October 5 after an independent medical examination conducted pursuant to a workers compensation claim showed that he was fit to work (Tr. 95). Respondent had not reported to work since then (Tr. 98).

There was, however, some contact with respondent. Respondent made a telephone call to Mr. Waxman around September 6, 2006, indicating that he had been

cleared by his doctor and was ready to return to work (Tr. 94-95). Mr. Waxman told him to make an appointment for his return to work and to bring a doctor's note clearing him to return. On his appointment date, September 11, 2006, respondent appeared and brought a note that indicated that he needed certain restrictions, which he tried to accommodate. Mr. Waxman said that one restriction was no fieldwork, which the Agency was prepared to provide. The second restriction, no travel for more than 40 minutes, he could not accommodate because he had no vacant position in respondent's title in a non-field job. When he told respondent that the Agency could not accommodate his request, respondent went out sick again and ever since has been submitting doctor's notes that state that he cannot return to work because of his worker's compensation claim. Mr. Waxman did not bring these notes with him, and the Agency chose to place none of them in evidence. Mr. Waxman did testify about a note recently received for the period September 12 through October 30, 2006 (Tr. 97). That submission was being reviewed by the Agency.

The Agency advocate indicated that respondent's medical notes were not being reviewed because respondent failed to follow procedure by submitting a formal request for medical leave, and he continued to claim entitlement to worker's compensation (Tr. 100-01).<sup>3</sup> Other than faxing medical notes to the Agency, respondent did not articulate a basis for his failure to return to work, as he failed to submit a request for medical leave until October 30, 2006.

Petitioner submitted the affidavit of Dorothy Royal, an employee of HRA's Office of Staff Resources, who reviewed Mr. Levitant's personnel files and stated that respondent was notified by mail sent to his last known address that he was to return to work by November 21, 2005 (Pet. Ex. 22). Attached to the affidavit was a letter dated November 3, 2005, which advised respondent that, pursuant to a medical examination conducted by Alan Zimmerman, M.D., he was deemed able to perform the duties of his position "with no restrictions and no further need of treatment," thus an appointment with the personnel officer was scheduled for his return to work on November 21, 2005

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<sup>3</sup> Post-trial, counsel for petitioner submitted a copy of the decision in the referenced workers compensation proceeding, which found that respondent was "not disabled from work," that respondent appeared able to travel to doctor's appointments and hearings, and that there was "no further causally related disability after [September 12, 2005]." Reserved Decision, State of New York Workers' Compensation Board, *In regard to Zinovi Levitant*, WCB Case # 0022 4112 (Nov. 15, 2006).

(Attachment to Pet. Ex. 22). A failure to appear for that appointment would be considered absence without authorization.

These letters were all addressed to respondent's address of record, 8794 15<sup>th</sup> Avenue, apartment 4C, Brooklyn, New York (*see* Pet. Ex. 22, ¶10).

According to the evidence, respondent was AWOL from November 21, 2005, when he was notified to return to work, to September 11, 2006, when respondent did return to work and brought with him medical documentation restricting his duties. There is no question that respondent had no authorization to be absent for that period.

Further, on September 11, respondent requested an accommodation that petitioner denied, but respondent did not appear here to establish a basis for his claim of illness or to defend his need for the accommodation. In addition, it was established that respondent did not make an application for an approved leave until the first day of trial and that petitioner never approved a leave for him. Therefore, I find that the evidence established that respondent was absent without leave continuously from November 21, 2005.

### **FINDINGS AND CONCLUSIONS**

1. Respondent was absent without leave or authorization from September 10, 2003, to October 3, 2003, as set forth in charge # 2189-04.
2. Petitioner did not prove that respondent made unauthorized use of the Autotime system by improperly giving his id and password to a co-worker who put three leave requests in the system on his behalf on days when respondent was not at work, as set forth in charge # 2189-04.
3. Petitioner failed to prove that respondent committed misconduct by refusing to accept notices to attend conferences and by disrupting a meeting with calls to his attorney, as set forth in charge # 2189-04.
4. Respondent was insubordinate and engaged in conduct disrespectful of his supervisor when he said to him, "if you're going to fuck with me, I'm going to fuck with you" and that he would have them all fired, as set forth in charge # 2189-04.

5. Respondent engaged in threatening behavior when, after she refused his demand for a new supervisor, he angrily told a superior that he had political connections and connections in the union and with HRA personnel, and, if she “did not abide by his rules,” she would be in trouble and she would be “sorry” for her decision, and if she did not assign him a new supervisor, he would sue her personally, as set forth in charge # 2189-04.
6. Respondent committed misconduct by his failure to attend a meeting ordered by his supervisor and his refusal to report absences to his direct supervisor despite a clear directive to do so, as set forth in charge # 2189-05.
7. For the period October 25 to November 19, 2004, respondent engaged in excessive non-work activities during work hours, including personal telephone calls, smoking breaks, and other unproductive behaviors, while also producing minimal amounts of assigned work, as set forth in charge # 2189-06.
8. Respondent engaged in conduct insubordinate and disrespectful to his Deputy Director when he refused her instruction to minimize his computer screen so she could view his programs, insisting that only his immediate supervisor (her subordinate) could give him such an order, as set forth in charge # 2189-06.
9. Respondent engaged in conduct insubordinate and disrespectful to his Deputy Director when he loudly told her that he did not have to listen to her, after being told to end a personal telephone call and do his work, and by threatening to file a grievance against her, as set forth in charge # 2189-06.
10. Petitioner failed to establish that respondent was observed making personal phone calls on three occasions on December 3, 2004, as set forth in charge # 2189-06.
11. Respondent committed misconduct by threatening his supervisor stating that “he would see to it that

his lawyer would disgrace” him, he would lose his job, and “the only reason” respondent had not done so already was because his supervisor had a wife and children, as set forth in charge # 2189-07.

12. Respondent committed misconduct by his failure to complete in two days a work assignment that should have taken two hours, while also engaging in excessive personal phone calls that day, as set forth in charge # 2189-07.
13. Petitioner failed to establish that respondent’s request that his supervisor count how many cases he had been assigned was misconduct, as set forth in charge # 2189-07.
14. Respondent committed misconduct by disclosing confidential client information without permission or authority and without an absolute need to do so, as set forth in charge # 2189-08.
15. Respondent was AWOL continuously from November 21, 2005, as set forth in charge # 2189-09.

### **RECOMMENDATION**

Upon making the above findings and conclusions, I obtained and reviewed an abstract of respondent's personnel record provided to me by HRA. Mr. Levitant was appointed to his position at HRA as a caseworker on February 25, 2002. He commenced city employment in 1993. After a hearing at OATH in 2004, respondent received a 20-day penalty for insubordinate conduct and leaving his work location without approval and without notifying his supervisors. *Human Resources Admin. v. Levitant*, OATH Index No. 397/04 (Sept. 7, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD06-59SA (May 2, 2006) (imposing 15-day suspension for single threat to one supervisor plus five days for other misconduct). He also received a 10-day suspension in 2003 for intimidating behavior. Under the principle of progressive discipline, petitioner is entitled to seek a penalty higher than the last, particularly because this case involves the same kind of misconduct. In this case, petitioner asks for a recommendation of termination.

Here, respondent has been found guilty of six separate instances of insubordinate and/or threatening behavior toward his supervisors, in addition to excessive engagement in non-work activities while producing minimal amounts of work, in derogation of the warnings and directives of his supervisors and complaints about his low productivity, disclosing confidential client information, and for two separate periods of absence without leave, one of which has lasted more than a year. Respondent's misconduct is serious, indeed. The overarching theme captured in the record of this proceeding is respondent's hostility toward supervision.

The record demonstrates that Mr. Levitant is volatile, contentious and completely unmanageable as an employee. His supervisors' testimony painted him as a man who feels free either to disregard their directives or to threaten and intimidate them with anger-filled outbursts and physical confrontation. His supervisors credibly testified that they felt intimidated by him, which was not an unreasonable response to the encounters they described and documented in a multitude of memoranda. The record demonstrated a pattern of abusing his supervisors, and respondent seemed not to discriminate: the six instances of insubordination involved four different supervisors. Also notable is the extended period of time over which respondent engaged in this conduct, from 2003 to 2006. His unchecked volatility in the workplace is disruptive to those around him as well as those who supervise him. For evidence of the irrationality of Mr. Levitant's behavior, consider his refusal to accept a directive from Deputy Director Lugo and insistence that he would only accept a directive from Mr. Weiner, his immediate supervisor, to minimize his computer application. Months earlier Mr. Levitant was accusing Mr. Weiner of harassing him and demanding that he be given a new supervisor. I imagine that, over the years, his supervisors endured an insufferable existence knowing that, at any moment, they might be upbraided or accosted by him.

If there is a secondary theme, it would be respondent's indifference to his work as demonstrated by his failure to complete assignments and the excessive amount of time he spent engaged in frivolous, non-work pursuits during the work day. Not only does the log show his lack of productivity but it also evidences the reduced productivity of others who are laden with the responsibility of monitoring and documenting his misbehavior. The productivity of the Agency is further undermined by respondent's unauthorized

absences. At the time of trial, respondent had not been to work in over a year during which time he had submitted no application for leave; the worker's compensation board decision denying his claim demonstrates that he had no excuse for not reporting to work.

In addition, I consider Mr. Levitant's failure to appear and defend himself at trial, and his failure to make any attempt to communicate with this tribunal after the first trial day (to seek a continuance or to vacate the default and reopen the record) further evidence that he has no interest in maintaining his employment with the Agency.

The strongest of penalties have accompanied cases where employees have been found guilty of serious insubordination coupled with a failure to perform duties. *See Dep't of Transportation v. Mendez*, OATH Index No. 384/05 (Jan. 19, 2005) (40-day penalty for employee with no prior disciplinary history who was guilty of using vulgar language toward a supervisor, disobeying a supervisor's order, and being AWOL for eight months). Termination has been found to be the only appropriate penalty in cases similar to this, where the insubordination is persistent. *See, e.g., Admin. for Children's Services v. Lin*, OATH Index No. 1812/01 (Nov. 9, 2001) (termination appropriate for respondent's stubborn defiance of multiple supervisory directives to do his work, after prior 20-day penalty and demotion for similar misconduct); *Dep't of Transportation v. Deloach*, OATH Index No. 2287/00 (Oct. 18, 2000) (termination for employee guilty of repeated instances of insubordination and failure to perform duties who also failed to appear to defend against charges); *Dep't of Housing Preservation and Development v. Ray*, OATH Index No. 1460/00 & 2135/00 (Sept. 14, 2000), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD01-84-SA (Dec. 28, 2001) (finding that a penalty short of termination would not change respondent's behavior; therefore, eight-year employee with no significant disciplinary history was terminated for repeated insubordination); *Dep't of Housing Preservation and Development v. Wilson*, OATH Index No. 1368/99 (July 14, 1999) (termination only appropriate remedy due to extent of misconduct proven, which included insubordination, incompetence, and excessive lateness, and where ALJ found employee's belligerent attitude would not change); *Dep't of Buildings v. Almodovar*, OATH Index No. 833/91 (July 18, 1991), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 92-11 (Jan. 31, 1992) (even ignoring the incompetence and rudeness charges also

sustained, nine-year employee with no disciplinary history deserved termination for insubordination because nothing short of termination was likely to end it).

My conclusion about respondent might be summed up as Judge Kramer did in *Employers Retirement System v. Myrick*:

the misconduct proven here . . . is so fundamental, “the well so poisoned,” and the underlying problems so rooted in intangibles such as personality and attitude, that little is likely to change if respondent remains on the job, even in a less demanding position.

*Employers Retirement System v. Myrick*, OATH Index No. 505/95, at 65-66 (Apr. 11, 1995).

Respondent no longer has a viable working relationship with his supervisors, and his persistent failure to accept supervision is a fundamental problem that is likely to persist no matter who his supervisor is. *See Dep’t of Housing Preservation and Development v. Ray*, OATH 1460/00, at 31. The fact that the conduct for which he was found guilty in a prior OATH hearing was similar to that sustained here adds to my conclusion that he is unwilling to change his conduct to comport with reasonable rules of the workplace. As such, the record demonstrates that the only appropriate remedy is termination, and I so recommend.

Tynia D. Richard  
Administrative Law Judge

February 2, 2007

SUBMITTED TO:

**ROBERT DOAR**  
*Commissioner*

APPEARANCES:

**HILIT KROMAN, ESQ.**  
*Attorney for Petitioner*

*No appearance by Respondent*

***The City Civil Service Commission's Decision, Item No. CD07-84-D,  
August 14, 2007***

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

*In the Matter of the Appeal of*

**ZINOVIIY LEVITANT**  
*Appellant*

*- Against -*

**NYC HUMAN RESOURCES ADMINISTRATION**  
*Respondent*

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

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**SIMON P. GOURDINE**, *Commissioner/Chairman*

**DECISION**

**ZINOVIIY LEVITANT** appeals from a determination of the New York Human Resources Administration (HRA) finding him guilty of misconduct and imposing a penalty of dismissal following disciplinary proceedings conducted pursuant to Civil Service Law Section 75.

Appellant was dismissed from employment on March 6, 2007. He then filed an appeal to this Commission, through his attorney, by letter dated March 26, 2007. The Civil Service Commission has held that no appeal can be taken from a default. *Appeal of Harry Cashaw*, Item No. CD94-16, decided March 4, 1994.

In a decision dated May 17, 2007, appellant was granted 30 days in which to move to vacate his default, showing excusable neglect for his non-appearance and a meritorious defense to the underlying charges. By letter dated June 27, 2007 his attorney made a request asking for an additional ten (10) days in which to move to reopen the default. HRA responded by letter dated July 2, 2007 making a request that the Commission deny respondent's request for additional time.

The Commission has reviewed the record and considered the arguments concerning the motion to dismiss. This review leads us to concur with HRA and dismiss the appeal.

**SIMON P. GOURDINE**, *Commissioner/Chairman*, Civil Service Commission

**NICHOLAS A. LAPORTE**, *Commissioner*, Civil Service Commission

**RUDY WASHINGTON**, *Commissioner*, Civil Service Commission