

Dep't of Social Services
(Human Resources Admin.) v. Gates

OATH Index No. 883/24 (Oct. 31, 2025)

Petitioner proved that respondent committed misconduct by failing to report to her assigned work location from December 4, 2023, through April 1, 2024; being absent without authorization on August 19, 2022; ignoring supervisory directives; and acting aggressively and discourteously. Petitioner did not prove that respondent sent a threatening e-mail on August 23, 2022; that she was insubordinate on June 14, 2022; or that her September 21, 2022, encounter amounted to misconduct. For the reasons discussed in this Report and Recommendation, I recommend termination of respondent's employment.

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

In the Matter of
**DEPARTMENT OF SOCIAL SERVICES
(HUMAN RESOURCES ADMINISTRATION)**
Petitioner
- against -
NICOLE GATES
Respondent

REPORT AND RECOMMENDATION

ORLANDO RODRIGUEZ, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, the Human Resources Administration ("HRA"), pursuant to section 75 of the Civil Service Law. Petitioner charges respondent, Nicole Gates, a level II Eligibility Specialist in HRA's Medical Assistance Program, with misconduct. The petition, comprised of three sets of specifications, alleges that respondent was absent from her work location without authorization on August 19, 2022; exhibited intimidating, aggressive, and taunting conduct towards Lisa Bryant, a level III Principal Administrative Associate in HRA's Medicaid Renewal Unit, on August 26, 2022; exhibited aggressive, threatening, and unprofessional conduct toward Roberto Sanchez, a fellow level II Eligibility Specialist, on September 21, 2022; acted aggressively and belligerently toward HRA Police on September 23, 2022; acted in disrespectful and aggressive manner toward Marina

Markovic, a Principal Administrative Associate I, and Director Monica Longo in June 2022; and was continuously absent from November 8, 2023 to April 10, 2024. Respondent's conduct is alleged to violate Rules I through VI, VIII through XVI of the agency's Code of Conduct (ALJ Ex. 1; Pet. Ex. 58).¹

During an eight-day trial, petitioner relied on documentary evidence and testimony from Lisa Bryant, Principal Administrative III and team manager for the Office of Mail Renewal ("OMR"); Nancy Rosa, Deputy Director of the Office of Medicaid Renewal and Lisa Bryant's supervisor during the period in question; Roberto Sanchez; Bernadette Brown, Executive Director of Eligibility Operations; Shawna Chatman, Leave Consultant in the Leave of Absence Unit; Marina Markovic; Monica Longo, Director of the Surplus Unit in HRA's Medical Assistance Program; Deputy Commissioner Denise DePrima, Office of Labor Relations ("OLR"); Deputy Commissioner Athina McBean, Office of Equity and Inclusion and Equal Employment Opportunity; and Mark George, Director of the Office of Integrity and Performance.

Respondent disputes all of the charges. She contends that they are the product of a broader campaign of bullying and harassment by managerial staff. In support of her claims, respondent presented documentary evidence and testimony of Sandra Toppin, Principal Administrative Associate I in June 2022; Melonei Bland, Eligibility Specialist in the Medical Assistance Program's Surplus Unit; Telicia Childress and Jacquenette Casey, Eligibility Specialists in HRA's Medicaid Renewal Unit; Jaycelyn Bastien, Principal Administrative Associate I in HRA's Office of Disciplinary Affairs ("ODA"); and Lyvette Belser, Executive Director of Eligibility in HRA's Medical Assistance Program. Respondent elected not to testify.

ANALYSIS

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). A 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); *see also Dep't of Sanitation v.*

¹ Petitioner's petition, consisting of three sets of charges (Tracking Nos. 1354392-03, 1354392-04, 1354392-05) are entered in evidence as ALJ Ex. 1).

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).

For the reasons below, petitioner proved nearly all of the charges, and respondent should be terminated from her employment with HRA.

Tracking No. 1354392-05

November 2023 – AWOL

Specification 1 of charge 5 alleges that on November 8, 2023, respondent was directed to return to her assigned work location but failed to do so, and that she continued to be absent without authorization from that date through April 10, 2024. Respondent expressed concerns about reporting to her assigned site, claiming that she had been bullied and harassed by managerial staff. Nevertheless, respondent was told that if she did not report, she would have to use leave time. On November 17, 2023, the Agency's Office of Labor Relations informed respondent that her complaint had been reviewed and found unsubstantiated and directed her to report to her assignment on November 20, warning that failure to do so would be treated as unauthorized.

Petitioner further alleges that on December 18, 2023, ODA issued a Notice of Unauthorized Absence, later reissued on January 4, 2024. On January 10, 2024, ODA issued another notice, reiterating that respondent had been directed to return to work in November, and that although she provided documentation covering her absences of November 27 and 28, 2023, she had provided none thereafter. That notice deemed her Absent Without Leave ("AWOL") effective December 4, 2023, and warned that her absence would continue to be considered unauthorized if she failed to return.

Petitioner alleges that on January 16 and January 22, 2024, the Office of Labor Relations again sent correspondence advising respondent that her absence was unauthorized and directed her to return to work. It is further alleged that respondent did not comply.

These actions are alleged to violate Executive Order 748, Section III, No. B-3 (Performance of Duties), Section IV, No. A-1 (Time and Leave Responsibilities), and Employee Time and Leave Procedure No. 22-01, Section V-G (Absence Without Official Leave).

Ms. Brown testified that respondent was directed to return to her assigned work location on November 8, 2023 (Tr. 132, 136). According to Ms. Brown, respondent objected to the directive, but was advised that if she failed to report, she would have to use her own time (Tr. 134).

On the day respondent was scheduled to return, she sent an e-mail to her supervisor, Melanie Harris, stating that she was not going to report to work (Tr. 132).

On November 8, 2023, Respondent also sent an e-mail to Denise DePrima, Deputy Commissioner of the OLR (Tr. 553-54; Pet. Ex. 39). In her role as Deputy Commissioner of OLR, Ms. DePrima oversees the operations of OLR, which includes overseeing the grievance department, ODA, and the Office of Conflict Resolution (“OCR”) (Tr. 552). In her e-mail, respondent alleged “ongoing abuse, harassment, and assault from colleagues” (Pet. Ex. 39 at 2). Respondent expressed extreme discomfort and fear at the prospect of returning to work unless she was transferred to another unit (*Id.*).

Ms. DePrima first became aware of respondent’s matters when her office was contacted by DC37, respondent’s union, seeking to have her released from HRA so that she could begin working for the union (Tr. 553). The request was granted initially but was rescinded by DC37 after Ms. DePrima informed the union that respondent had pending disciplinary matters (*Id.*). Respondent’s e-mail to Ms. DePrima on November 8, 2023, was sent after respondent received word that DC37 rescinded their request (*Id.*). In her reply to respondent’s e-mail, Ms. DePrima advised respondent to formally file her grievance claim. Ms. DePrima requested documentation related to respondent’s request for a transfer and also informed respondent that if she failed to report to work, she would have to use her leave time (Pet. Ex. 39). During her testimony, Ms. DePrima explained that she requested documentation from respondent showing that a request for a transfer had been formally made so that she could bring the request to the attention of the EEO office, the Office of Conflict Resolution, and ODA (Tr. 557). Shortly after Ms. DePrima’s reply e-mail, respondent sent 11 documents to Ms. DePrima, including e-mails to Human Resources personnel and incident reports related to the incident with Mr. Sanchez on September 21, 2022 (Pet. Ex. 49).

Ms. DePrima testified that HRA has an employee transfer unit that handles general requests for a transfer made by employees, and the EEO handles all other requests (Tr. 554). As a general rule, an employee’s request for a transfer is not granted if they are facing disciplinary charges (*Id.*).

According to Ms. DePrima, the agency investigated respondent’s claims of bullying and harassment. On November 17, 2023, Ms. DePrima sent respondent an e-mail explaining that the agency was unable to substantiate respondent’s claims. The e-mail also directed respondent to report to her work assignment on November 20, 2023, with the warning that failure to do so would result in her absence being considered unauthorized (Tr. 561, 563-64; Pet Ex. 40). Respondent

replied to Ms. DePrima's e-mail around noon the same day. In her e-mail she thanked Ms. DePrima for the update and wished her a "pleasant weekend" (Tr. 565; Pet. Ex. 41).

The e-mail exchange on November 17 was part of a thread that began three days earlier when respondent sent an e-mail to Ms. Harris advising that she was not going to return to work until she had been "transferred to another location or returned to the position I was dismissed from" (Pet. Ex. 45 at 3). Ms. Harris did not reply to the e-mail. Instead, Ms. DePrima replied to respondent's e-mail, correcting respondent's assertion that she had been "dismissed" from her position. Ms. DePrima explained that respondent was assigned to the position she previously held prior to the union's request to rescind respondent's release from HRA (*Id.* at 2).

Respondent did not report to work following the e-mail exchange with Ms. DePrima on November 17, 2023. On January 11, 2024, respondent sent another e-mail to Ms. Harris, informing her that she would not return to work "[u]ntil we can address these concerns and reach a resolution" (Pet. Ex. 45 at 1). Respondent explained that the issue of harassment and bullying had continued, affecting her well-being (*Id.*). She remained absent from work thereafter. On January 16, 2024, Ms. DePrima sent an e-mail to respondent reiterating the agency's findings regarding respondent's complaints and restating her earlier directive requiring respondent to report to work on November 20, 2023 (Pet. Ex. 45 at 1). The last line of the e-mail advises respondent to contact the leave of absence unit if her absence was the result of a medical condition. An e-mail address for the unit was included (*Id.*).

Respondent sent two follow-up e-mails to Ms. DePrima. The first, sent an hour and a half after Ms. DePrima's e-mail on January 16, reasserted respondent's claim that she has been subjected to bullying and harassment by management in her unit (Pet. Ex. 46 at 2). The second e-mail, sent the following day, reflects a change in tone; respondent expressed "deep concern" and frustration as a result of her denied transfer request. She also sought "clarity on the decision-making process for the transfer" and requested the identity of the decisionmaker (Pet. Ex. 46 at 1).

Ms. DePrima replied to respondent by e-mail on January 22, 2024, offering the agency's rationale behind the decision to deny respondent's request. She explained that because respondent's request for a transfer was based on her claims of harassment and bullying, "which have been determined to be unsubstantiated," respondent's request was denied (Tr. 569; Pet. Ex. 46 at 1). Ms. DePrima then reasserted that respondent's absence from work was unauthorized (Pet. Ex. 46 at 1). Respondent continued to be absent from work. Two more e-mails were sent by

respondent in March. The content mirrored the e-mails sent in January, as did Ms. DePrima's replies (Pet. Ex. 48). According to Ms. DePrima, respondent's unauthorized absence from work continued (Tr. 575).

Mark George, Director of the Office of Integrity and Performance, oversaw the disciplinary process related to respondent's AWOL charges (Tr. 667). As Director, he supervises two units—the intake unit, which reviews disciplinary requests submitted by program areas, and the implementation unit, which enforces penalties and processes AWOL cases (*Id.*).

Mr. George offered a general overview of the disciplinary process. When a request for disciplinary action is received, a case folder is opened and assigned to a coordinator who reviews the documentation provided by the program area (Tr. 668). The coordinator may seek additional documentation if necessary and drafts an acceptance memorandum (*Id.*). Mr. George reviews the memorandum and underlying records to determine whether there is sufficient evidence to move forward (Tr. 668-69). If the case is accepted, a hearing officer drafts charges, which are reviewed by the agency's legal department before being served at an informal conference (Tr. 669). At such conferences, employees may appear with union representation, respond to the charges, and present documents in their defense (*Id.*). Afterward, the hearing officer recommends a penalty, which the employee may accept or grieve through either Civil Service Law section 75 procedures or the Office of Labor Relations, depending on their status (Tr. 669-70).

Mr. George further explained the agency's handling of AWOL cases. When an employee is absent for five or more days without authorization, his office issues an AWOL letter directing the employee to apply for medical leave, return to work, or resign (Tr. 673-74). If the employee does not respond within ten business days, the Payroll Management System ("PMS") is updated to reflect unauthorized leave, which results in termination of health benefits (Tr. 674). AWOL letters are drafted by implementation officers (*Id.*).

Turning to respondent, Mr. George testified that she had a disciplinary history, including referrals for misconduct, threatening behavior, insubordination, and time and leave violations (Tr. 674-75). Between September 23, 2022, and November 8, 2023, however, no incidents of misconduct were referred for charges, though she was referred for AWOL (Tr. 675). An AWOL letter dated December 18, 2023, was sent to respondent by implementation officer Katherine Clarke (Pet. Ex. 42; Tr. 676). A revised letter correcting a typographical error was sent soon after (Pet. Ex. 43; Tr. 679). A further revised AWOL letter was sent on January 10, 2024. It explained

that there was a delay in implementing her AWOL status as a result of respondent's complaint of bullying and harassment submitted to the Office of Labor Relations (Pet. Ex. 44; Tr. 682). The letter notes respondent's medical documentation, excusing her absence from work on November 27 and 28, 2023 (Pet. Ex. 44). The second paragraph concludes by advising respondent that her continued absence from work will be deemed unauthorized (*Id.*).

Mr. George testified that respondent was initially considered AWOL effective November 8, 2023, though subsequent correspondence reflected December 4, 2023, as the official effective date because her harassment complaint was under review (Tr. 682). He stated that respondent submitted documents to Labor Relations alleging workplace bullying (Tr. 683). These were forwarded to him and to agency counsel and were determined to relate to a prior disciplinary case, identified as "case 3" (Tr. 683-85). In addition to respondent's documents, supporting documents from program areas, including a security incident report, were also reviewed (Tr. 684-85). Following a review of all relevant documents, Mr. George found sufficient support for the issuance of the AWOL charge against respondent (Tr. 685-86).

Regarding respondent's return to work after the January 2024 AWOL letter, Mr. George was uncertain, though he recalled that she was later accepted for medical leave, which would have been processed by the Office of Employee Benefits (Tr. 688).

Shawna Chatman, leave consultant in the Office of Benefits Administration, Leave of Absence Unit, testified that she was assigned as respondent's leave consultant (Tr. 363-64). One of the responsibilities of a leave consultant is processing an employee's request for long-term leave (Tr. 363). When a leave request is submitted, the unit sends a pending letter to the employee, both by mail and e-mail, requesting supporting documentation, such as a physician's FMLA certification form, and provides a deadline for submission (Tr. 364-65)² In respondent's case, Ms. Chatman mailed and e-mailed the pending letter and forms on December 6, 2023 (Pet. Ex. 30; Tr. 364-65). The letter indicates that respondent requested leave beginning "December 1, 2023, through November 30, 2024," and gave a deadline of December 20, 2023, for submission of the required documentation (Pet. Ex. 30; Tr. 366-67).

Ms. Chatman stated that respondent did not provide the requested documentation by the deadline (Tr. 367). As a result, a disapproval letter was sent by mail and e-mail on January 19, 2024 (Pet. Ex. 31; Tr. 368). At that time, ODA was notified by a referral prepared by Ms. Chatman

² Ms. Chatman explained that employee addresses are verified using the NYCAP system (Tr. 364).

(Pet. Ex. 32; Tr. 369-70). Respondent's failure to provide documentation resulted in her being placed in AWOL status, effective December 1, 2023 (Tr. 371).

Before referring the matter to ODA, Ms. Chatman reviewed respondent's CityTime records, which confirmed that respondent had not returned to work (*Id.*). Ms. Chatman testified that she later exchanged e-mails with respondent between January 19 and March 18, 2024 (Pet. Ex. 33; Tr. 372). In that correspondence, respondent requested new FMLA forms, which Ms. Chatman provided, instructing her to submit a new leave request (Pet. Ex. 33; Tr. 373).

Additional e-mail correspondence between January 19 and April 3, 2024, shows that respondent submitted a doctor's note by e-mail on April 3, 2024 (Pet. Exs. 34, 35; Tr. 376). Based on this documentation, Ms. Chatman testified that respondent was approved for a leave of absence from April 2 through April 23, 2024, the period certified by her doctor (Tr. 376-77). Notification of the approval was sent by email to respondent on April 10, 2024 (Pet. Ex. 36; Tr. 377). Respondent was required to provide medical clearance to return to work, which she did by submitting a medical clearance note on April 24, 2024 (Pet. Ex. 37; Tr. 378-79). The note cleared her to return without restrictions (Tr. 380).

Ms. Chatman characterized respondent's status as AWOL from December 1, 2023, through April 1, 2024 (Tr. 379-81). She confirmed that in AWOL status, employees typically may not use accrued leave time, though she was not directly responsible for respondent's timekeeping records (Tr. 381-82). Ms. Chatman explained that the leave was approved beginning April 2, 2024, rather than March, because April 2, 2024, was the first documented doctor's visit date in the records respondent submitted (Tr. 382).

In their closing brief, respondent claims that her absence should be excused because the agency's denial of her "allegations of harassment and bullying" posed "an imminent threat to health or safety" (Resp. Br. at 13). Under the principle of "work now, grieve later," employees have an obligation to obey the order and rely on the formal grievance machinery available. See *Ferreri v. New York State Thruway Auth.*, 62 N.Y.2d 855, 856-57 (1984). There are, however, exceptions to the principle of "work now, grieve later." See *Transit Auth. v. Wagh*, OATH Index No. 517/02 at 13 (July 11, 2002), *modified on penalty*, Comm'r Dec. (Aug. 8, 2002). An employee need not obey an unlawful order, an order that is beyond the scope of a supervisor's authority, or an order that poses an imminent threat to health or safety. *Id.* at 13-14; see *Reisig v. Kirby*, 62 Misc. 2d 632 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008 (2d Dep't 1969). Those

exceptions to “obey now, grieve later,” are affirmative defenses that the respondent must prove by a preponderance of the credible evidence. *Human Resources Admin. v. Minima*, OATH Index No. 1532/01, at 13-18 (May 16, 2002). None of the exceptions apply here.

In support of her position, respondent points only to her own prior complaints of bullying and harassment made to staff. Such references, without more, are insufficient to substantiate the contention that reporting to work posed an imminent threat to her health or safety. Respondent did not testify on this point, nor did she present any corroborating evidence of ongoing mistreatment by managerial staff. The only materials offered were e-mail correspondence between respondent, Ms. DePrima, and an EEO officer regarding the incident with Mr. Sanchez, along with the resulting incident report (Pet. Exs. 39, 51, 53). The EEO investigation was limited in scope and did not include statements from any witnesses who purportedly observed discriminatory or harassing conduct. Even taken together and viewed most favorably to respondent, the correspondence and the incomplete investigative report do not meet the burden necessary to establish that reporting to duty posed an imminent threat to her health or safety.

Petitioner’s evidence establishes that respondent failed to report to work on December 4, 2023, and she continued to be absent without authorization through April 1, 2024. Ms. DePrima’s credible testimony, corroborated by documentary evidence, established that respondent was advised by Ms. DePrima on November 17, 2023, to return to work on November 20, 2023 (Pet. Exs. 40, 41). Ms. Kathrine Clarke issued AWOL letters on December 18, 2023, and January 19, 2024, notifying respondent of her unauthorized absences and directing her to return to work (Pet. Exs. 43, 44). Mr. George’s testimony established that respondent’s harassment complaints were investigated and found unsubstantiated, resulting in an order for respondent to return to work. Respondent applied to the Office of Employee Benefits for long-term leave but failed to provide timely medical documentation to support her absence. It was not until April 3, 2024, when respondent submitted the documentation Ms. Chatman requested. As a result, her absence from December 4, 2023, the date set by HRA’s Office of Integrity and Performance, to April 1, 2024, was properly treated as AWOL.

Tracking No. 1354392-03

Specification I - August 19, 2022, AWOL and follow-up e-mail

Petitioner alleges that respondent was absent without authorization on August 19, 2022, despite having been informed months earlier that her leave request for that date was denied. According to the petition, on or about May 16, 2022, respondent received notification from Monica Longo, Director of the Surplus Unit, that her requested leave for August 19, 2022, was disapproved. However, on August 19, 2022, respondent was absent from her work location for 2 hours and 15 minutes without authorization and was deemed AWOL (ALJ Ex. 1). Additionally, petitioner alleges that respondent failed to inform management in accordance with agency time and leave policy that she required time off on August 19, 2022 (*Id.*). Petitioner also alleges that respondent sent a threatening, inappropriate e-mail to managerial staff wherein she wrote, “I just want to be clear [if] there is any issue with my time and it effects my paycheck again there will be some legal action. It is ILLEGAL and IMMORAL to mess with people time that they trade for PAY. And pay not from any of you but the CITY of NEW YORK...” (*Id.*).

In support of the allegation, petitioner presented the testimonies of Bernadette Brown and Monica Longo. In 2022, Ms. Brown directed respondent’s division (Tr. 18-19). According to Ms. Brown, respondent’s work schedule in August 2022 was Monday to Friday, with flexibility to work 9:00 a.m. to 5:00 p.m. or 8:00 a.m. to 4:00 p.m. (Tr. 21-22). Ms. Brown also testified that respondent was provided with all of the necessary information pertaining to the agency’s time and leave policy and procedure (Tr. 30; Pet. Ex. 59).

Ms. Brown testified that employees’ requests for annual leave must be submitted five days in advance through CityTime, an electronic timekeeping system (Tr. 27). Additionally, an employee should inform their supervisor of the request. Any changes to the request should also be brought to the supervisor’s attention (*Id.*). Ms. Brown explained that changes to leave requests or an unexpected need for leave should be made in advance so that the managerial staff can make appropriate adjustments to personnel and work assignments (*Id.*).

According to Ms. Brown, employees should note their request for partial leave in the request for leave form or by communicating the need for partial time off to their supervisor orally or by e-mail (Tr. 153-55; Pet. Ex. 1). When asked how an employee would know to make a partial leave request on the request for leave form, Ms. Brown explained, “I would have asked my supervisor, I would have went to my manager and then asked the question, and then it would have

been advised as to what they need to do” (Tr. 157). When asked whether there was a memo prescribing the method for requesting partial leave, Ms. Brown cited to a time and leave memo issued to employees (Tr. 30, 172-73).

The memo contains a section titled *Partial Day Leave*, which prescribes several rules for employees seeking to take partial time off during a workday (Pet. Ex. 59). Among those rules is the procedure for requesting partial time off and leave for personal business. The memo advises employees that “[t]he use of annual leave or compensatory time requires prior supervisory approval,” and that the “minimum amount of time that can be requested for annual leave and compensatory time is 15 minutes” (Pet. Ex. 59 at 7). The memo also advises employees to “discuss all leave requests with their supervisor and/or manager prior to taking leave” (*Id.*). As to leave for personal business, the memo states, “[e]mployees requesting annual leave for personal business must notify their supervisor at least 24 hours in advance, except in emergency situations” (*Id.* at 9). Like annual and compensatory leave, the minimum amount of time that can be requested for personal business is 15 minutes (*Id.*).

Ms. Longo testified that she approved respondent’s time sheets while Ms. Markovic, respondent’s supervisor was out on leave. According to Ms. Longo, respondent did not have authorization to leave early on August 19, 2022 (Tr. 454). Ms. Longo testified that vacation requests are submitted in April for the June–September period and are approved or denied based on seniority (Tr. 448-50). Employees are notified in writing whether their requests are approved or denied (Tr. 449-50). On May 16, 2022, respondent received a vacation-request memo notifying her that her request for August 19, 2022, was denied (Pet. Ex. 1; Tr. 26-27, 450).

Ms. Markovic was not in the office on August 19, 2022; Mr. Zambrano was respondent’s direct supervisor for the day. Attendance for respondent’s unit that day was conducted by Mr. Zambrano. He submitted a memorandum of the day’s attendance to Mr. Sanchez (Pet. Ex. 3; Tr. 35-36). According to Mr. Zambrano’s memo, respondent was not expected to take leave (Tr. 36). A memorandum of the expected attendance for respondent’s unit and other units on August 19, 2022, was disseminated by Mr. Sanchez (Pet. Ex. 4). There is no note indicating that respondent was expected to be out on leave or partial leave that day. Ms. Longo testified that respondent made no leave request to management (Tr. 452–54). According to Ms. Brown, if the memorandum needed to be revised for any reason, such as including respondent’s partial leave for the day, she

would have been notified (Tr. 42). Mr. Sanchez did not notify Ms. Brown of any amendments needed to be made to the attendance memorandum (*Id.*).

Ms. Brown also testified that respondent never received permission to take leave on August 19, 2022 (Tr. 46). Respondent did not resubmit a request for leave before August 19 or after the May 16 memorandum she received informing her that her request for leave had been denied. According to petitioner's records, respondent resubmitted a request for leave via CityTime on August 22, 2022, three days after she took leave (Tr. 51-52; Pet. Ex. 5). Respondent's request was denied and cancelled by Ms. Longo on August 23, 2022 (Tr. 52, 457-58; Pet. Ex. 5). Employees who fail to report to their work location without leave approval are marked AWOL (Tr. 454-55). According to the attendance record respondent was marked AWOL on August 19, 2022 (Pet. Ex. 5; Tr. 457-58).

Upon receiving notice of Ms. Longo's denial on August 23, 2022, respondent sent an e-mail to Ms. Longo, Ms. Brown, and Ms. Markovic advising them that legal action would be taken if her paycheck did not accurately reflect her time at work, as she believed it to be (Pet. Ex. 6). The e-mail reads, in relevant part, "I just want to be clear it [sic] there is any issue with my time and it effects [sic] my paycheck again there will be some legal action. It is ILLEGAL and IMMORAL to mess with people time that they trade for PAY" (*Id.*).

Ms. Longo replied to respondent's e-mail with a memorandum outlining the reasons for the denial of respondent's August 19 leave request, the basis for her AWOL designation, and the proper procedure for requesting unplanned leave (Pet. Ex. 6). Ms. Longo also addressed respondent's e-mail. She characterized the message as threatening and advised respondent never to send similar communication to managerial staff and colleagues (*Id.*). Ms. Longo pointed to respondent's statement, "if there is any issue with my time and it affects my paycheck, again, there will be some legal action," as the intimidating language (Tr. 513). Ms. Longo admitted she was not in fear for her physical safety and acknowledged the e-mail also sought clarification about policy and concluded with thanks, but she still viewed it as intimidation (Tr. 515-19).

Respondent subsequently advised Ms. Longo that she was going to leave early and would be arriving late the following day so that she can attend physical therapy (Pet. Ex. 7). Respondent asserted that Ms. Longo's "ridiculous" e-mail caused her to experience "anxiety and a migraine headache" for which respondent took medication (*Id.*). Respondent further alleged that she is being "continuously harassed and bullied" (*Id.*).

Ms. Brown testified that respondent's August 23 e-mail was not an isolated occurrence. She described prior incidents where the respondent had failed to follow the chain of command, refused to comply with supervisory instructions, and undermined managerial authority. She explained that respondent "accuses people of not giving her clear information..." and that she routinely fails to follow the chain of command (Tr. 21).

Petitioner has shown, through credible evidence, that respondent was AWOL on August 19, 2022, when she left her workstation at 2:01 pm without authorization approximately two hours prior to the end of her shift. Petitioner's Code of Conduct requires employees to "comply with all Departmental time and leave regulations" (Pet. Ex. 58 at 4). It also prohibits employees from being absent from or leaving their assigned work locations without appropriate authorization (*Id.*). As noted, the Time and Leave memo advises that employees should discuss all leave requests with their supervisor prior to taking the leave (Pet. Ex. 59 at 7). When the leave requested is for personal business, employees are required to "notify their supervisor at least 24 hours in advance, except in emergency situations" (*Id.* at 9). The credible evidence establishes that respondent failed to notify her supervisor at least 24 hours in advance of her leave at 2:01 p.m. on August 19, 2022. Accordingly, respondent left her work location on that date without prior authorization.

The portion of charge 3, specification 1 alleging that respondent sent a threatening email should be dismissed. Petitioner's Code of Conduct at the time of the alleged conduct required employees to be, "courteous and considerate in their contact with fellow employees at all times" (Pet. Ex. 58 at 1). Not every workplace disagreement or harsh word, however, constitutes misconduct, "even when voices are raised and emotions are vented." *Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Freeman*, OATH Index No. 1399/06 at 9 (July 20, 2006). "The substance of the disagreement, the tone of voice, demeanor, and the words used to express an opinion must all be evaluated to determine whether or not the disagreement amounts to misconduct." *Dep't of Social Services (Human Resources Admin.) v. Walcott*, OATH Index No. 1457/20 at 9 (Dec. 4, 2020); *see also Human Resources Admin. v. Wong*, OATH Index No. 316/15 at 11 (Dec. 1, 2014), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2015-0836 (Nov. 4, 2015) ("Factors to consider in determining whether a disagreement rises to the level of misconduct include: the use of threats, insolence, or profanity; office disruption caused by the argument; and whether it was in front of co-workers and/or the public.").

The same considerations are applied to e-mails. Disagreements in e-mails are permitted if they 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) (expressing concern about out-of-title work and writing, “This is not my job,” on a note attached to an email was not misconduct); *see also Transit Auth. v. Felix*, OATH Index No. 1206/09 at 4 (June 16, 2009) (while the tone of an email, 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).

Additionally, an objective standard is employed to determine whether an employee engaged in threatening or intimidating behavior. *Compare Dep't of Citywide Admin. Services v. Phillip*, OATH Index No. 114/10 at 10 (Sept. 10, 2009) (finding that “respondent’s words were not menacing, but rather vague, and not obviously intended as a threat to do physical harm”), *with Health & Hospitals Corp. (Kings County Hospital Ctr.) v. Bobbitt*, OATH Index No. 850/07 at 3-4 (Feb. 2, 2007) (finding that respondent intimidated her supervisor when she remained in her supervisor’s doorway pointing and yelling at the supervisor, despite requests she leave).

Although Ms. Longo may have subjectively perceived respondent’s e-mail as threatening, respondent’s e-mail does not rise to the level of intimidation. The proper inquiry is whether an objectively reasonable reader would have found the message threatening or intimidating. *See Human Resources Admin. v. Cameron*, OATH Index No. 2340/16 at 7-8 (Oct. 20, 2016), *aff'd*, NYC Civ. Serv. Comm’n Case No. 2017-0319 (June 21, 2017) (where an e-mail in which respondent told his supervisor to “stay away from my work area . . . [t]here is no need for you to touch anything of mine” was found not to be threatening or intimidating, despite the supervisor’s testimony to the contrary); *Admin. for Children’s Services v. Hallman*, OATH Index No. 1269/05 at 3-4 (Mar. 16, 2005) (supervisor’s statement that she felt intimidated by an employee’s statement that her husband did not know why the supervisor was bothering the employee, did not like it, and wanted to know what the supervisor’s problem was, is insufficient to show intimidation).

While respondent's concerns related to her pay "could have been more tactful, . . . they did not amount to misconduct;" *Health & Hospitals Corp. (Harlem Hospital Ctr.) v. Stephens*, OATH Index No. 2053/20 at 12-13 (Apr. 21, 2021), *adopted*, CEO Dec. (May 18, 2021) (respondent's emails to supervisors which denied wrongdoing, questioned supervisors, and commenced with "Please note" were not discourteous). Unlike previous cases where respondents' e-mails have been found discourteous, the e-mail here is in no way threatening, denigrating, undermining of the recipients' authority, or an attack on the recipients' character. See *Dep't of Social Services (Dep't of Homeless Services) v. Thomas*, OATH Index No. 298/22 at 20-21 (Jan. 6, 2022) (finding respondent's e-mail was sent with the intent to denigrate his supervisor by insulting his intelligence and undermining his authority); *Dep't of Correction v. Smith*, OATH Index No. 667/13 at 41-42 (July 19, 2013), *aff'd*, NYC Civ. Serv. Comm'n Case No. 35546 (May 6, 2014) (a statement is disrespectful if it is intended to demean or belittle a supervisor or to disparage her integrity, credibility, or authority). Respondent's e-mail was instead an assertion of her perceived rights regarding pay. Although her language lacked tact, it does not amount to misconduct.

Specification II – The Incident with Lisa Bryant

Petitioner alleges that on numerous occasions from June through August 26, 2022, respondent exhibited intimidating, aggressive, and taunting conduct towards Lisa Bryant, a supervisor in the Office of Mail Renewal, a unit within HRA's Medicaid Access Program (Tr. 333). Specifically, petitioner alleges that in June 2022, respondent retorted with profanity after she was ordered not to enter the OMR area to visit coworkers outside of scheduled break periods. After agreeing to comply with the directive, respondent allegedly walked away while saying, "I don't know why these motherfuckers can tell me what to do" (ALJ Ex. 1). Furthermore, petitioner alleges that respondent violated the order to abstain from visiting the OMR area during work hours on July 13, 14, and August 14, 26, 2022 (*Id.*).

Additionally, petitioner alleges that during the morning work hours on August 26, 2022, respondent visited the OMR work area during work hours in violation of the directive given two months earlier. Later that day, at approximately 4:00 p.m., respondent allegedly returned to the OMR area, stopped by Ms. Bryant's desk, and, in what petitioner characterizes as a taunting manner, stated, "Is [it] okay if I say have a good weekend, because I don't want to get no one in trouble" (ALJ Ex. 1). Petitioner further alleges that while Ms. Bryant was discussing her

interactions with respondent with Deputy Director Nancy Rosa, respondent approached the two women, and in a raised voice, called Ms. Bryant a “liar” (*Id.*).

In support of the allegations, petitioner presented the testimony of Lisa Bryant and Nancy Rosa. The OMR and Surplus units were located on the same floor in June 2022. During this period, respondent frequently visited coworkers, Ms. Casey and Ms. Childress, in OMR during work hours (Tr. 334-35). According to Ms. Bryant, these visits disrupted the office environment and made it difficult for staff to perform their duties. (Tr. 336). As a result, Ms. Bryant requested that respondent limit her visits to the lunch break or other scheduled break times throughout the day (Tr. 333-34). According to Ms. Bryant, respondent indicated that she would follow her request, but as respondent walked away, she said, “I don’t understand why these motherfuckers in here can tell me what to do” (Tr. 334). Ms. Bryant further testified that respondent complied with Ms. Bryant’s request for a short period of time (Tr. 335).

According to Ms. Bryant, respondent eventually resumed visiting OMR outside of scheduled break time (Tr. 335). Ms. Bryant testified that on July 13, 14, and again on August 8, 2022, respondent entered the OMR area to visit coworkers during work hours three to four times each day (*Id.*). Her visits would last from two to 15 minutes and did not involve respondent’s, Ms. Casey’s, or Ms. Childress’s job duties (*Id.* at 335-36). On August 26, 2022, Ms. Bryant decided to take a different approach; she asked Ms. Casey to advise respondent to limit her visits to scheduled break times (Tr. 337). According to Ms. Bryant, Ms. Casey responded positively to Ms. Bryant’s request and delivered the message at some point during the day (*Id.*). Ms. Casey testified that she delivered the message (Tr. 765).

According to Ms. Casey, some time after she delivered the message, respondent proceeded to Ms. Bryant’s desk (Tr. 766). Standing at a close distance, respondent asked Ms. Bryant, “Would it be okay if I go over and say, ‘Have a good weekend’ to my friends? Because I don’t want them to get in trouble” (Tr. 337). Ms. Bryant testified that respondent’s tone was arrogant and conveyed “attitude” (*Id.*). She further described respondent’s body language as animated, stating that respondent was “talking with her hands up” and “kept on moving her head” (*Id.*). The interaction made Ms. Bryant feel uncomfortable, so she walked over to Nancy Rosa, her supervisor, and reported the incident (Tr. 338). As Ms. Bryant told Ms. Rosa what had occurred, respondent appeared and disrupted the discussion (*Id.*). According to Ms. Bryant, respondent called her a liar;

she spoke with a raised voice but was not yelling (*Id.*). Ms. Bryant further testified that respondent's actions prevented her from continuing her discussion with Ms. Rosa (*Id.*).

Ms. Rosa's recollection of the incident was similar to that of Ms. Bryant. Ms. Rosa testified that respondent "interrupted" the discussion she was having with Ms. Bryant (Tr. 317). However, Ms. Rosa did not characterize respondent as arrogant or acting with attitude. She noted that both women raised their voices while speaking to each other, and that she had to ask Ms. Bryant to "separate herself from the situation" (Tr. 314). Despite observing the interaction between Ms. Bryant and respondent "escalating," Ms. Rosa characterized both women as non-threatening (Tr. 315-17). When Ms. Rosa was asked about respondent's tone and body language during her interaction with Ms. Bryant, she testified that she observed respondent with "her hands on top of the cabinets, just listening" (Tr. 316). Ms. Rosa added that respondent "wanted to get her point across. It was like, I'm here to let you know, you know, what happened. Her side of the story" (*Id.*).

The following Monday morning, Ms. Brown received an e-mail from Tamica Paul, Executive Director of the Office of Mail Renewal (Pet. Ex. 9). Ms. Paul wrote to inform Ms. Brown about the incident that had occurred three days earlier, as well as about the ongoing issues involving respondent and OMR supervisory staff (*Id.*). In the e-mail, Ms. Paul explained that respondent regularly visited the OMR area, where staff performed call center duties, and that her visits were disruptive (*Id.*). Ms. Paul noted that respondent had been asked to visit only during scheduled break or lunch periods to avoid interruptions, but that she had failed to comply with this request (*Id.*). The e-mail also included a brief account of the August 26, 2022, incident between Ms. Bryant and respondent. It concluded by advising that a formal report would follow.

Later that morning, and apparently unaware of Ms. Paul's e-mail to Ms. Brown, respondent sent an e-mail to Ms. Brown and OMR management summarizing her recent interactions with Ms. Bryant (Pet. Ex. 13). In that e-mail, respondent acknowledged Ms. Bryant's request that she limit social visits to OMR to break and lunch periods. However, respondent offered a markedly different account of the interaction's tone, describing Ms. Bryant's demeanor as rude, intimidating, and threatening. Respondent further alleged that Ms. Bryant regularly behaves aggressively toward her when she enters OMR and stated that she felt bullied by Ms. Bryant (*Id.*).

Ms. Brown replied to respondent's e-mail, informing her that she had contacted management in OMR and that a meeting would be scheduled to address respondent's concerns

and the incident involving Ms. Bryant (Pet. Ex. 13 at 1; Tr. 71). In her reply, respondent requested a separate meeting to address ongoing issues she has been experiencing with management within her own unit. She also inquired about the status of her requested transfer and a change of her supervisor (Pet. Ex. 13 at 1).

No meeting was held between Ms. Brown and OMR's supervisory staff. Instead, a recitation of the events that took place on August 26, 2022, was sent to Ms. Brown in an e-mail from Ms. Bryant and Ms. Rosa (Pet. Ex. 9 at 1-2).

On or about August 29, 2022, at approximately 9:15 a.m., respondent visited Ms. Bland, a co-worker in respondent's unit, near the OMR area (Tr. 339-40, 711-12). According to Ms. Bland, she and respondent were sharing breakfast together and discussing their work assignments (Tr. 711). Both Ms. Bland and Ms. Childress testified that as respondent was leaving Ms. Bland's desk, Ms. Childress, who is referred to by coworkers as Lisa, said hello to respondent, and respondent returned the greeting, saying, "Hi, Lisa" (Tr. 712, 720.). Believing the greeting was meant for her, Ms. Bryant turned toward respondent and told respondent that she is to be referred to as Ms. Bryant (Tr. 340, 712). Ms. Bland testified that she overheard respondent inform Ms. Bryant that the greeting was meant for Ms. Childress before walking away (Tr. 712).

Three days later, respondent submitted an intake form to the Office of Diversity and Equity and Equal Employment Opportunity ("EEO") (Pet. Ex. 53). In the narrative section of the form, respondent claims that on August 26, 2022, Ms. Bryant jumped out of her seat and stood in front of respondent, cutting her off. Respondent wrote that Ms. Bryant's actions caused her to feel harassed and bullied. Respondent indicated that she wanted to make a formal complaint of bullying and harassment against Ms. Bryant (*Id.*).

According to Athina McBean, Deputy Commissioner of Equity and Inclusion and agency EEO officer, the EEO office investigates claims of discrimination based on the protected categories such as race, age, gender, religion, and sexual orientation. They also facilitate the reasonable accommodation process for staff and temporary staff applicants for employment and contractor staff (Tr. 635). As Deputy Commissioner, Ms. McBean oversees the daily operations of the office and provides supervisory support for staff conducting investigations into complaints of discrimination (*Id.*).

Ms. McBean testified that when a complaint of discrimination is filed with EEO, the complaint is reviewed to determine whether it falls within the legally protected categories, and, if

so, it is assigned to an investigator for further inquiry (Tr. 635). They interview the complainant, witnesses, the respondent, review any documentation related to the complaint and then determine based on the evidence, whether it's substantiated or unsubstantiated (Tr. 635). If the complaint is substantiated, the investigator's determination is forwarded to the Office of Legal Affairs for disciplinary action (Tr. 639). In certain circumstances, Ms. McBean will recommend a staff transfer or a change in supervision. If the investigator determines that the claim is unsubstantiated, both the claimant and the respondent receive notification of the determination, and the case is closed (Tr. 636). When the investigation is complete, Ms. McBean reviews the memorandum generated by the EEO investigator and forwards it to the commissioner for final sign-off (Pet. Ex. 51; Tr. 636).

According to Ms. McBean, EEO referred respondent to the Office of Conflict Resolution because respondent did not "identify any of the protected categories as the basis for the harassment" (Tr. 647).

Regarding petitioner's claim that respondent violated Ms. Bryant's order to limit her visits to OMR staff to scheduled break time, petitioner has met its burden. To establish insubordination, 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 does not have to 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 does not have to be expressed; it can be inferred from a deliberate, passive failure to comply. *See Health & Hospitals Corp. (Correctional Health Services) v. LaSane*, OATH Index No. 1165/02 at 4, 6 (Aug. 8, 2002) (charge sustained where respondent failed to report for a fitness-for-duty examination and, instead, went to seek advice from union).

The credible evidence established that respondent received an order from Ms. Bryant, a supervisor in the OMR unit, and she violated that order on July 13, 14, August 8, 26, 2022 (Tr. 335, 337). Therefore, this portion of charge 3, specification II should be sustained.

Regarding petitioner's claim that respondent used profanity in response to Ms. Bryant's order to limit her visits to OMR in June 2022, petitioner met its burden. As previously noted, petitioner's Code of Conduct requires employees to be "courteous and considerate in their contact with fellow employees at all times" (Pet. Ex. 58).

The credible evidence shows that respondent used profanity after receiving the order, the statement was directly related to the order, and it was loud enough to be heard by Ms. Bryant. Ms. Bryant credibly testified that respondent made the statement while walking away, after she had agreed to comply with the directive. Although there is no evidence to show that the comment was audible by any other employees in the surrounding area, it was audible for the intended audience, Ms. Bryant (Tr. 334). Using profanity has been held as per se discourtesy, and the circumstances surrounding the statement alleged here suggest that the statement was directed and intended to be heard by Ms. Bryant, and therefore, rises to the level of misconduct. *Cf. Health & Hospitals Corp. (Jacobi Medical Ctr.) v. Paciullo*, OATH Index No. 1963/24 at 27-28 (July 24, 2025), *adopted*, CEO Dec. (Aug. 29, 2025) (charge sustained where respondent cursed at and directed profanities to his employees under his supervision); *Dep't of Sanitation v. Anonymous*, OATH Index No. 525/24 at 33-34 (Sept. 9, 2024), *adopted*, Comm'r Dec. (Oct. 4, 2024), *appeal dismissed*, NYC Civ. Serv. Comm'n Case No. 2024-0677 (May 23, 2025) (respondent found to have directed profanity and racial slurs to police officers and his supervisor).

Regarding petitioner's claim that respondent taunted Ms. Bryant on the morning of August 29, 2022, petitioner has failed to meet its burden. The credible evidence shows that respondent was greeting Ms. Childress, also known by her coworkers as Auntie Lisa, when she walked pass Ms. Bryant's workstation that morning (Tr. 711-12, 720). Where a determination of witness credibility is required, this tribunal has considered factors such as: "witness demeanor, consistency of a witness' 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). Both Ms. Childress and Ms. Bland credibly testified that respondent was greeting Ms. Childress, not Ms. Bryant, as she passed Ms. Bryant's workstation on August 29, 2022. By Ms. Bryant's own account, she was not looking in respondent's direction when respondent greeted Ms. Childress. The evidence, therefore, shows that Ms. Bryant was mistaken in her belief that respondent referred to her as "Lisa" when she

walked pass her workstation. Thus, this portion of specification II contained in charge 3 should be dismissed.

Specification III - The incident with Roberto Sanchez

Petitioner alleges that on or about September 21, 2022, respondent behaved in an aggressive, threatening, and unprofessional manner, approached Eligibility Specialist II Roberto Sanchez, after respondent was not included in an e-mail containing the names of employees allowed to work overtime. Petitioner further claims that Mr. Sanchez politely and calmly informed respondent that Director Bernadette Brown was on a phone call and unavailable and suggested that respondent should return to discuss the matter with Director Brown at a later time. It is further alleged that respondent refused to leave despite multiple requests from Mr. Sanchez. Instead, respondent allegedly removed a chair from Mr. Sanchez's work area, placed it in the middle of the floor, and sat down, causing a loud thud. The sound is alleged to have caused a disruption on the floor. While seated in the chair, respondent is alleged to have berated Mr. Sanchez. An exchange of words between respondent and Mr. Sanchez is alleged to have led Ms. Brown to end her phone call and address respondent. Mr. Sanchez was asked to remove himself. As Mr. Sanchez was walking away from the area, respondent is alleged to continue berating him.

HRA police were called, and an incident report containing witness statements was drafted. Petitioner alleges that on or about September 23, 2022, respondent aggressively and belligerently demanded that HRA Police change the incident report because it was not in her favor. It is further alleged that HRA Police informed Ms. Brown that, due to the unfavorable report, respondent called NYPD and filed a complaint of harassment against Mr. Sanchez. It is petitioner's position that at no time was Mr. Sanchez observed threatening or intimidating or engaging in any conduct amounting to harassment.

According to Ms. Brown and Mr. Sanchez, the incident involving respondent and Mr. Sanchez on September 21, 2022, arose from Ms. Brown's decision to exclude respondent from the list of individuals eligible to work overtime on that day. At the time, Mr. Sanchez was responsible for fielding overtime requests from staff and communicating the requests to management (Tr. 290). On that day, respondent and several colleagues requested overtime. That afternoon Mr. Sanchez e-mailed Ms. Brown's supervisory staff a list of employees who requested overtime (*Id.*). Respondent's request was not granted. Ms. Brown testified that factors such as specific projects,

the employee's productivity, and performance are factors considered in determining whether an employee is eligible for overtime (Tr. 86).

Mr. Sanchez testified that after the lunch hour on September 21, 2022, respondent approached him in his cubicle, requesting to speak with Ms. Brown (Tr. 285). Ms. Brown and Mr. Sanchez share a workstation, so she was within earshot of the interaction (Tr. 85-86). According to Mr. Sanchez, Ms. Brown asked respondent to wait because she was in a meeting on the phone (Tr. 285). Mr. Sanchez testified that respondent then grabbed a chair near Ms. Brown's desk and "slammed it" next to him at the entrance to his cubicle (*Id.*). While seated, respondent requested that Mr. Sanchez open up the Microsoft Teams application on his computer so that she can review a message that was relevant to the discussion (*Id.*). Mr. Sanchez refused, advising respondent that she should wait to speak to Ms. Brown (Tr. 286). According to Mr. Sanchez, respondent then moved the chair from the cubicle entrance slamming it in an aisle approximately three feet away from Mr. Sanchez's workspace (*Id.*). While sitting in the aisle, respondent continued to question Mr. Sanchez (*Id.*). Mr. Sanchez testified that he asked respondent to wait for Ms. Brown so that he could return to his work (*Id.*). He then asked respondent to move from the aisle (*Id.*). After respondent ignored several requests to move from the aisle, Ms. Brown ended her phone call and engaged respondent (*Id.*). According to Mr. Sanchez, upon Ms. Brown's arrival, he walked away from the area (Tr. 286-87). He then called security and filled out an incident report (Tr. 287).

Ms. Brown's testimony largely echoed Mr. Sanchez's testimony. Similar to Mr. Sanchez's narrative, Ms. Brown stated that she was within earshot of their interaction but was on the phone at the time and did not intervene (Tr. 86). While on the call, she claimed to have overheard Mr. Sanchez tell respondent that he lacked authority to decide overtime matters and direct respondent to leave his workspace until she was available (*Id.*). She further testified that she observed respondent step into Mr. Sanchez's cubicle and demand an immediate response to her overtime request (Tr. 86-87). According to Ms. Brown, respondent eventually exited the cubicle after several requests that she leave, but at one point stood "face to face" with Mr. Sanchez, speaking in a "loud" voice and appearing "upset" and "insistent" (Tr. 87-89). She added that she saw respondent grab a nearby chair and slam it onto the floor in the aisle by their shared workstation before sitting down to wait (Tr. 87). Ms. Brown testified that once her phone call ended, she asked Mr. Sanchez to leave the area and then began speaking with respondent (*Id.*).

HRA police arrived and prepared a report of the incident between respondent and Mr. Sanchez (Tr. 93-94; Pet. Ex. 15). The five-page report contains statements given to HRA police officers by Ms. Longo, Mr. Sanchez, respondent, and Ms. Jacquenette Casey, a witness to the incident. Ms. Longo's statement and the handwritten statement attributed to Mr. Sanchez, mirror Ms. Brown's account.

The substance of the handwritten statements attributed to respondent and Ms. Casey stand in stark contrast in facts and findings made by the managerial staff. According to respondent's statement, she arrived at Mr. Sanchez's desk to ask him about a Microsoft Teams message he sent to the unit (Pet. Ex. 15 at 5). Respondent reasoned that because Mr. Sanchez has been performing secretarial tasks for the unit, he would be able to answer the question (*Id.*). According to respondent's statement, Mr. Sanchez spoke to her in a "hostile manner," he "yell[ed] loudly," and "became irate" (*Id.*). Mr. Sanchez's conduct caused respondent to feel "threatened" (*Id.*).

Ms. Casey testified that while at her workspace, located about four or five rows from Mr. Sanchez, she heard Mr. Sanchez screaming (Tr. 767, 771, 776). She reported witnessing Mr. Sanchez yelling at respondent in her handwritten statement (Pet. Ex. 15 at 3). Ms. Casey testified that she heard a disturbance, and when she looked over in the area of the disturbance, she saw Mr. Sanchez standing over respondent in an aggressive manner (Tr. 767). She testified that he was speaking loudly, although she could not make out what was being said (*Id.*). Ms. Casey also testified that she observed Ms. Brown seated near respondent (*Id.*). In her opinion, the two women appeared surprised by Mr. Sanchez's behavior (*Id.*). In her statement to the police, Ms. Casey reported that she did not witness respondent say anything to Mr. Sanchez before he walked away from his cubicle (Pet. Ex. 15 at 3).

Two days after the incident, HRA police and officers from the New York City Police Department ("NYPD") met with Mr. Sanchez, Ms. Longo, and Ms. Brown. The NYPD officers informed them that respondent had called NYPD to report harassment perpetrated by Mr. Sanchez (Pet. Ex. 18 at 3).

On September 23, 2022, Ms. Brown sent an e-mail to senior management in HRA's Medical Assistance Program, detailing the encounter between the respondent and Mr. Sanchez (Tr. 94-95; Pet. Ex. 18). Similar to her testimony, Ms. Brown reported that respondent "berated" Mr. Sanchez (Pet. Ex. 18 at 3). With respect to Mr. Sanchez's conduct, Ms. Brown reported that "[h]e got offended and defensive" (*Id.*). Ms. Brown also noted that "there [were] some additional words

exchanged” between respondent and Mr. Sanchez as he left his workspace (*Id.*). Over the course of several days following Ms. Brown’s e-mail, senior management discussed options for handling relations between Mr. Sanchez and respondent and NYPD’s recommendation to keep them from having any contact with each other (*Id.* at 1-2; Tr. 103, 107). Transferring respondent to a unit on the first or fourth floor was proposed (Pet. Ex. 18 at 1-2; Tr. 103-04). It was eventually decided that respondent would not be transferred, and disciplinary charges were filed against her for the incident (Pet. Ex. 18 at 1-2; Tr. 104). Respondent and Mr. Sanchez have had no further direct contact with each other (Tr. 106).

On September 28, 2022, respondent submitted a complaint to EEO, alleging age discrimination (Pet. Ex. 50). According to the complaint, Mr. Sanchez made derogatory comments about respondent’s age during the incident on September 21, 2022. EEO investigator, Eric Smalls, submitted a memorandum summarizing his investigation of the complaint to Ms. McBean on January 27, 2023 (Pet. Ex. 51). The memorandum contains statements made by respondent during an interview with EEO counselor Patty Baez on October 13, 2022. Respondent’s statements are a summary of the incident that took place between herself and Mr. Sanchez on September 21, 2022, including statements Mr. Sanchez allegedly made about respondent’s age during the interaction. The memorandum also includes a “plan of action,” which identified written statements the investigator intended to review and witnesses he intended to interview during the course of his investigation (*Id.*).

On January 27, 2023, EEO investigator Smalls concluded that Ms. Gates’s complaint was unsubstantiated (*Id.* at 3). Mr. Smalls relied heavily on the statements made by Ms. Brown and Mr. Sanchez during their interviews in January 2023. There is no mention of Ms. Casey or the HRA police incident report in Mr. Smalls’s memorandum. On March 20, 2023, Ms. McBean sent respondent a letter informing her that the EEO office determined that the allegations against Mr. Sanchez were unsubstantiated, and the matter was closed (Pet. Ex. 52).

Credibility plays a crucial role in resolving this specification. Where a determination of witness credibility is required, this tribunal considers factors such as demeanor, consistency of testimony, corroborating evidence, witness motivation, bias or prejudice, and whether 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 find Mr. Sanchez's testimony unreliable. His account was marked by embellishments and omissions that appeared self-serving. For example, he claimed that respondent slammed a chair "right next to me within my cubicle" (Tr. 285). Yet Ms. Brown, who was seated immediately next to him, did not corroborate this allegation. Instead, she testified that respondent slammed a chair in the aisle after Mr. Sanchez had already left the cubicle at Ms. Brown's direction (Tr. 213). No other employees provided written statements or testimony confirming Mr. Sanchez's description of the incident.

Ms. Brown's testimony presented a mixed picture. On direct examination, she described respondent as "loud" and "insistent," but on cross-examination she retreated from that characterization, conceding that respondent was "insistent" rather than loud or angry (Tr. 89, 213). She further acknowledged that respondent complied with Mr. Sanchez's request to leave the cubicle (Tr. 217).

Her account also suggests that the incident was not one-sided. She testified that "voices were raised" (Tr. 215), which undercuts Mr. Sanchez's portrayal of respondent as the sole aggressor. Ms. Brown further testified that respondent accepted her explanation of the overtime assignment process and then returned to her workstation without protest (Tr. 213). Notably, when she finished her phone call, she instructed Mr. Sanchez to leave the area, yet he omitted this fact in his testimony. These omissions and inconsistencies reduce the reliability of his account while reinforcing the conclusion that the altercation was, at worst, a minor workplace dispute. See *Freeman*, OATH. 1399/06 at 9 (July 20, 2006).

In contrast, Ms. Casey's testimony was coherent, forthright, and corroborated by Ms. Brown. Having observed her demeanor, I find that she did not fabricate or misinterpret her observations. She testified that she was first drawn to the incident by Mr. Sanchez's raised voice, a detail consistent with Ms. Brown's acknowledgment that "voices were raised," though it places the escalation on Mr. Sanchez rather than respondent (Tr. 215). Ms. Casey's account was reinforced by her contemporaneous written incident report, and her recollection has remained consistent since September 21, 2022.

Significantly, Ms. Casey limited her testimony to what she personally observed and avoided embellishment. Although Ms. Casey is regarded as respondent's friend, unlike Mr. Sanchez, she had no direct stake in the outcome of the dispute. See *Taxi & Limousine Comm'n v. El Boutari*, OATH Index No. 2729/18 at 9-10 (July 9, 2018) (crediting testimony where opposing

witnesses were motivated to color their accounts). Her version is also logical: it is more plausible that a bystander would be disturbed by raised voices than by the uncorroborated claim of chair-slamming, which no other witness reported to HRA police.

In sum, petitioner's principal witnesses, Mr. Sanchez and Ms. Brown, gave testimony that was inconsistent and, in Mr. Sanchez's case, implausible. By contrast, Ms. Casey presented a consistent, corroborated, and credible account. Accordingly, I discredit Mr. Sanchez's testimony, give partial weight to Ms. Brown's testimony, and credit the testimony of Ms. Casey.

The credible evidence establishes that respondent's conduct, while persistent and perhaps coarse, did not rise to the level of misconduct. Thus, this specification should be dismissed.

Tracking No. 1354392-04

Specification I - The incident with Marina Markovic

Petitioner alleges that on June 13, 2022, respondent shouted at her supervisor, Marina Markovic, accused her of interfering with her pay, and waved her phone in a threatening manner during a workplace confrontation. According to the petition, on June 13, 2022, at approximately 12:15 p.m. respondent stood up at her desk and shouted for ten minutes before Ms. Markovic, arrived and asked respondent to calm down and explain the issue. Respondent allegedly confronted Ms. Markovic in an aggressive manner regarding the approval of her time while she had been absent. The charge asserts that respondent loudly accused Ms. Markovic of not doing her job, lying, and preventing her from receiving her paycheck. Respondent allegedly waived her phone in Markovic's face in a threatening manner while causing Ms. Markovic to fear for her safety. In defiance of Ms. Markovic's requests to stop, respondent allegedly continued shouting. The conduct described in this charge was alleged to be insubordinate, disruptive, and in violation of multiple provisions of HRA's Code of Conduct.

Ms. Markovic testified that she has worked for HRA for over twelve years (Tr. 390). At the time of the incidents, she was serving as a Principal Administrative Associate I (PAA 1) in the Medicaid Assistance Program, having held that title since 2018 before her promotion to PAA II in 2023 (Tr. 390–91). She supervised four to five Eligibility Specialists II, including respondent, and her responsibilities included monitoring time and leave, reviewing staff work, and approving assignments (Tr. 391–92).

Ms. Markovic explained that in 2022 supervisors were required to notify management of daily attendance by 10:00 a.m. and of anticipated absences for the following day by noon (Tr. 392–93, 397–98). Employees were expected to provide advance notice so assignments prepared the prior day could be adjusted (Tr. 391). Ms. Markovic stated that she reminded staff of this procedure verbally and through emails (*Id.*). As an example, petitioner submitted a July 28, 2022, reminder e-mail sent to respondent and other subordinates (Pet. Ex. 2).

On May 27, 2022, Ms. Markovic notified management that respondent was absent and had claimed a car accident as the reason (Tr. 398-99; Pet. Ex. 19). Ms. Markovic explained to Ms. Brown that she asked respondent to provide medical documentation, but respondent failed to do so (Pet. Ex. 20). In a June 1, 2022, e-mail to Ms. Brown and other management, Ms. Markovic included a screen shot of a discussion she had with respondent about the outstanding medical documentation via text messages (Pet. Ex. 20; Tr. 403). According to the messages, when asked for the documents while respondent was present at work, respondent claimed to have left them at home; and when Ms. Markovic reminded respondent to submit the documents while respondent was at home serving a suspension, respondent claimed they were in her workspace in the office (Tr. 399-400; Pet. Ex. 20).

According to Ms. Markovic, respondent initially had difficulty logging into her computer when she returned from suspension on June 13, 2022 (Tr. 394). By noon respondent had gained access and began reviewing her emails. Ms. Markovic testified that respondent became visibly upset and began commenting loudly then shouting about issues with her time sheet. According to Ms. Markovic, the incident concluded with respondent approaching Ms. Markovic at her workstation (Tr. 394). Ms. Markovic testified that she feared being physically assaulted by respondent in that moment (*Id.*).

Ms. Markovic testified that respondent left her cubicle, approached Ms. Markovic's workstation, and held her phone toward Ms. Markovic's face in a manner that made her fear being struck (Tr. 405). She stated that she stood up to protect herself, asked respondent to calm down, and warned respondent that she would summon security if the behavior continued (Tr. 405-06). According to Ms. Markovic, respondent replied that if she felt threatened it was "[her] problem" (Tr. 406). Respondent then remarked that Ms. Markovic was a "pitbull no more" (Tr. 406), told her that she was not respondent's mother and could not tell her what to do, and stated that she would call security on Ms. Markovic before leaving the floor (Tr. 406–07).

Ms. Markovic testified that she immediately reported the incident to management and wrote a memorandum describing the events (Tr. 395; Pet. Ex. 21). According to the memorandum, which is consistent with Ms. Markovic's testimony, respondent approached Ms. Markovic to inquire about a delay in the approval of her timesheet (Pet. Ex. 21). Ms. Markovic explained that the delay was due to missing medical documentation she had previously requested (*Id.*). The memorandum states that respondent became loud and disruptive during the exchange, accusing Ms. Markovic of neglecting her managerial responsibilities and deliberately interfering with respondent's pay (*Id.*).

According to the memorandum, respondent then entered Ms. Markovic's workspace and aggressively waved her phone in close proximity to Ms. Markovic's face (*Id.*). When Ms. Markovic instructed respondent to return to her workstation, respondent replied, Ms. Markovic is "not [my] mother to tell [me] what to do" (*Id.*). Ms. Markovic then threatened to contact security (*Id.*). Security was not called in this instance, but a disciplinary conference was held two days later where respondent was provided with the memorandum (Tr. 126).

The memorandum advises respondent that the matter "will be referred to the Office of Disciplinary Affairs" and cites petitioner's rules contained in the Code of Conduct (Pet. Ex. 21). In the memorandum, Ms. Markovic identified respondent's conduct as violating the HRA Code of Conduct, specifically provisions prohibiting conduct "prejudicial to good order" and "conduct detrimental to the Agency" (Pet. Ex. 21 at 2).

Ms. Markovic acknowledged that respondent never stated that she would hit her and did not make a physical motion to strike her. However, Ms. Markovic maintained that Gates's aggressive body language, shouting, and pointing her phone into Ms. Markovic's face caused her to feel physically threatened (Tr. 428-29). She testified that the confrontation lasted approximately 10 to 15 minutes and was disruptive to the workplace (Tr. 408, 410).

Ms. Markovic stated that other employees were present at the time of the incident, including coworkers named Sandra and Joanna, as well as supervisor Mr. Zambrano, although she could not confirm which employees witnessed the entire interaction (Tr. 417-18, 431). She noted that Mr. Zambrano had previously supervised respondent and declined to corroborate Ms. Markovic's account (Tr. 431).

Ms. Markovic also testified about the CityTime approval process. She explained that employees entered their time into the system, which then appeared in the supervisor's queue for

review and approval. Documentation was required for sick leave lasting longer than three days, and in some cases, a second-level review was needed (Tr. 415). Automated reminders were routinely sent to employees until documentation was provided, and approvals were completed (Tr. 396).

Petitioner proved this specification. The un rebutted, credible evidence establishes that on June 13, 2022, the first day respondent returned to her workplace after serving a suspension, she became irate and engaged in discourteous conduct towards her supervisor, Ms. Markovic. I found Ms. Markovic to be credible. Her testimony was clear, consistent, and “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). Therefore, this specification should be sustained.

Specification II - Incident with Ms. Longo on June 14, 2022

Specification 2 of Charge 4 alleges that on June 14, 2022, at approximately 9:38 a.m., Ms. Longo sought to assign work to respondent. Ms. Longo found respondent at another supervisor’s desk and attempted to give her the assignment. Respondent reportedly disrupted Ms. Longo and disobeyed orders to listen to instructions. Ms. Longo eventually requested that Ms. Markovic explain the assignment to respondent. Petitioner argues that respondent’s conduct constitutes insubordination.

According to Ms. Longo, on June 14, 2022, she was scheduled to conduct a hiring-related task and was informed by Ms. Brown that respondent needed an assignment (Tr. 465, 521). She approached respondent, who was standing at the desk of another supervisor, Ms. Toppin, and told her she needed to speak with her (Tr. 465, 521). Respondent, however, continued speaking with Ms. Toppin and ignored the directive (Tr. 465, 521). When Ms. Longo repeated that she needed to speak with respondent “now,” respondent went to her desk located diagonally from Ms. Toppin’s desk (Tr. 521). Ms. Longo then informed respondent that she had an assignment for respondent to complete. Ms. Longo ordered respondent to log on to her computer (Tr. 466). Respondent reported that she did not have access to WMS and Edits, software that is used by eligibility specialists to process Medicaid renewals and request applications (Tr. 467). Ms. Longo informed respondent that respondent had access to One Viewer, software that could be used to complete other Surplus Unit tasks (Tr. 466). According to Ms. Longo, respondent disrupted any

attempt by Ms. Longo to explain the assignment (Tr. 466-67, 527). Ms. Longo testified she then pulled Ms. Markovic out of a training program she was attending so that she could explain how to perform the assignment to respondent (Tr. 467, 528). Ms. Brown also arrived, and Ms. Longo left to attend to other responsibilities (Tr. 467). Ms. Longo documented this incident in a memorandum (Tr. 465; Pet. Ex. 22).

The memorandum, dated June 15, 2022, is a detailed account of the incident and consistent with Ms. Longo's testimony. It also portrays respondent's behavior as part of an ongoing pattern of misconduct (Pet. Ex. 22). Ms. Longo conceded that she could not recall her exact words to respondent during the interaction and did not know whether respondent had first attempted to log into her systems before she arrived (Tr. 523-24, 527). She also acknowledged she could not remember whether she explained that the alternate assignment could be completed using One Viewer before respondent began objecting (Tr. 527).

Respondent presented the testimony of Sandra Toppin, a retired PA I who supervised staff at HRA for many years (Tr. 700-01). Ms. Toppin testified that on the date in question she was seated diagonally across from respondent, and the two were having a casual conversation when Ms. Longo approached (Tr. 701-02). According to Ms. Toppin, Ms. Longo "just came and started talking" to respondent, and Ms. Toppin immediately apologized, telling Ms. Longo it was her fault for speaking with respondent (Tr. 701-02). Ms. Toppin did not recall the substance of the exchange between Ms. Longo and respondent, other than that it was about work (Tr. 707-08). She further testified that she was not aware of any HRA policy forbidding employees in different units from speaking to each other (Tr. 702-03). Finally, she stated that she did not know respondent to be a "roaming" worker and that respondent generally remained at her desk except when on break or at lunch (Tr. 703-04).

The evidence as to specification 2 in charge 4 fails to clearly establish the nature of respondent's conduct. Ms. Longo consistently testified that respondent interrupted her and refused to listen when she attempted to assign auditing work, and her account is partially supported by her memorandum, generated the following day (Pet. Ex. 22). However, her characterizations of respondent as obstructive are undermined by her inability to recall respondent's exact words during the exchange. Moreover, Ms. Longo was unable to recall important details like whether respondent had attempted to log into her systems before the exchange (Tr. 527).

Ms. Toppin's testimony, while supportive of the fact that a conversation took place between respondent and Ms. Longo, did not corroborate Ms. Longo's account of respondent's interruptions or tone during the interaction. She also testified that she was not aware of any rule prohibiting inter-unit conversations and described respondent as generally remaining at her desk, tending to undermine any suggestion that respondent was habitually disruptive (Tr. 703-04).

Taken together, the record establishes that a verbal exchange occurred between respondent and Ms. Longo on June 14, 2022, when Ms. Longo attempted to assign respondent work. The precise nature of respondent's words and tone, however, is unclear. While Ms. Longo's memorandum provides some support for petitioner's allegation of insubordination and discourtesy, the limitations of Ms. Longo's recollection at trial and the absence of corroboration from Ms. Toppin, who was present during the incident, undermine petitioner's proof.

The credible evidence suggests that respondent believed she lacked access to the necessary software to complete her work, and she communicated that to Ms. Longo in a manner that could be characterized as blunt and uncompromising, not misconduct. Additionally, neither Ms. Longo nor Ms. Markovic testified that respondent ever completed, or failed to complete, the assignment at issue. Ms. Longo's testimony focused on respondent's interruptions when she attempted to assign the work (Tr. 465, 542-43; Pet. Ex. 22), and Ms. Markovic's testimony was limited to being asked to explain the assignment after Ms. Longo was unable to do so. The record therefore establishes that the assignment was given, but there is no evidence as to whether respondent ultimately carried out or neglected the task. *See Wong*, 1866/08 at 16. As such, petitioner has failed to meet its burden and specification 2 of charge 4 should be dismissed.

FINDINGS AND CONCLUSIONS

1. As alleged in specification I of charge 5, respondent was absent without authorization beginning December 4, 2023, and continuing through April 1, 2024, despite repeated directives and formal notices to return to work.
2. As alleged in specification I of charge 3, respondent was absent without authorization on August 19, 2022, when she left her workstation prior to the end of her shift.
3. As alleged in specification I of charge 3, the portion of the charge alleging that respondent sent a threatening e-mail to her supervisor should be dismissed.

4. As alleged in specification II of charge 3, respondent was insubordinate when she violated her supervisor's directive not to visit the Office of Mail Renewal during work hours on July 13, 14, August 8, and August 26, 2022.
5. As alleged in specification II of charge 3, the portion of the charge alleging that respondent committed misconduct when she used profanity in June 2022 after receiving the directive is sustained.
6. As alleged in specification II of charge 3, the portion of the charge alleging that respondent taunted her supervisor on August 29, 2022, is not sustained.
7. Petitioner failed to prove that respondent's conduct during her interaction with Roberto Sanchez on September 21, 2022, constituted misconduct.
8. As alleged in specification I of charge 4, on June 13, 2022, respondent acted in a loud, disruptive, and discourteous manner toward her supervisor, Marina Markovic, including waving her phone in Ms. Markovic's face, and this conduct constituted misconduct.
9. Petitioner failed to prove that on June 14, 2022, respondent communicated with Ms. Longo in a way that rose to the level of misconduct.

RECOMMENDATION

Upon sustaining the charges, I reviewed a summary of respondent's personnel record. Respondent has been employed with the Department since April 2, 2018, and this is her second disciplinary matter. In 2022, she served a 28-day suspension without pay stemming from three specifications involving discourtesy toward Department staff and security, as well as conducting personal business during work hours. Petitioner now seeks termination of respondent's employment. In light of the findings and for the reasons discussed below, petitioner's request is warranted.

A recommendation of termination is not made lightly. This tribunal has long recognized that "employees should have the benefit of progressive discipline wherever appropriate." *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) (quoting *Dep't of Transportation v. Jackson*, OATH Index No. 299/90 at 12 (Feb. 6, 1990), *adopted*, Comm'r Dec. (Mar. 20, 1990)). A fair penalty considers the totality of the circumstances and any mitigating factors. An employee's tenure and lack of disciplinary history may serve as mitigating considerations. *See id.*; *Dep't of Correction v. Passe*, OATH Index No. 1917/02 at 10 (June 4, 2003), *modified on penalty*, Comm'r Dec. (Sept. 23, 2003) (recognizing 13-year tenure and clean record as mitigating in assessing penalty). Nevertheless, there are circumstances, including those presented in this matter, where "the principles of progressive discipline do not preclude termination..." *Dep't of Education v. Sunda*, OATH Index No. 2403/17 at 12 (Oct. 26, 2017); *see also Keith v. New York State Thruway Auth.*, 132 A.D.2d 785, 786 (3d Dep't 1987) (recognizing that a single incident may be so egregious as to warrant dismissal). In such cases, even where mitigating factors exist, "the well is poisoned" by the employee's conduct, and termination may be appropriate. *Dep't of Environmental Protection v. Reynolds*, OATH Index No. 851/21 at 28 (Oct. 15, 2021), *adopted*, Comm'r Dec. (Nov. 19, 2021) (quoting *Employers Retirement System v. Myrick*, OATH Index No. 505/95 at 54-55 (Apr. 11, 1995)).

The misconduct at issue here consists of repeated episodes of discourtesy and insubordination toward managerial staff over a two-year period beginning in June 2022, culminating in respondent's four-month absence from work commencing in December 2023. While the discourtesy and insubordination alone might not compel termination in this case, when considered in conjunction with respondent's extended and unjustified absence from duty, termination is an appropriate and proportionate penalty.

A prolonged unauthorized absence, alone, may constitute the basis for termination of employment, even when employees have returned to work. *See, e.g., Dep't of Social Services (Dep't of Homeless Services/Human Resources Admin.) v. Anonymous*, OATH Index No. 2055/19 at 13 (Jan. 7, 2020), *adopted*, Comm'r Dec. (Feb. 20, 2020) (terminating employment where approximately eight months of unauthorized absence alone would support termination for employee who had returned to work, even without other proven violations); *Dep't of Sanitation v. Moore*, OATH Index No. 1035/10 at 7-8 (Feb. 2, 2010), *adopted*, Comm'r Dec. (Feb. 25, 2010) (terminating employment after over six-month period of AWOL where employee returned to work but, despite agency requests, did not timely provide documentation to support her leave).

Respondent was absent from work for four months from December 4, 2023, to April 1, 2024, despite receiving multiple notices to return or apply for a reasonable accommodation if her

absence was caused by illness. Accordingly, even if respondent's earlier misconduct were discounted entirely, the prolonged unauthorized absence independently provides sufficient grounds to terminate her employment.

Orlando A. Rodriguez
Administrative Law Judge

October 31, 2025

SUBMITTED TO:

MOLLY WASOW PARK
Commissioner

APPEARANCES:

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