Dep't of Sanitation v. R.M.

OATH Index No. 543/13 (Dec. 13, 2012)

Respondent violated attendance and leave rules on eleven occasions. Evidence established that respondent is a recovering alcoholic and most of the rule violations were due to his alcoholism. Thirty-day suspension without pay recommended. *See McEniry v. Landi*, 84 N.Y.2d 554 (1994).

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
- against -
R. M.[1]
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner brought this employee disciplinary action against respondent, a sanitation worker, under section 16-106 of the New York City Administrative Code. In ten sets of charges, petitioner alleged that respondent violated emergency and sick leave regulations, was absent without leave (AWOL), or committed insubordination on eleven occasions from June 2011 to September 2012 (ALJ Ex. 1). Petitioner withdrew another set of charges (Complaint 103507) without prejudice and withdrew two sets of charges (Complaints 101724 and 107835) with prejudice (Tr. 6-7).

At a hearing on October 23, 2012, respondent admitted to six sets of charges and the parties stipulated to the facts for the remaining four sets of charges (Tr. 6-10). Petitioner relied on the admissions and stipulated facts. Respondent testified, offered documentary evidence, and presented testimony from Martin Chestnut, director of petitioner's Employee Assistance Program (EAP).

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[1] Respondent's full name is being withheld from publication because this report discusses personal medical information. *See Dep't of Citywide Admin Serv. v. H.M.*, OATH Index No. 1670/04 at 1 n.1 (July 26, 2004); 48 RCNY § 1-49(d).

For the reasons below, I find that petitioner proved all but one of the charges and recommend a thirty-day suspension without pay.

ANALYSIS

Petitioner alleged that on eleven occasions from July 29, 2011 to September 28, 2012, respondent violated attendance or leave rules (ALJ Ex. 1). Respondent admitted most of the charges and stipulated to the facts for the remaining allegations (Tr. 11). He also admitted that he has had a longstanding problem with alcoholism (Tr. 11). On December 30, 2011, respondent voluntarily entered an in-patient rehabilitation program, which he successfully completed on January 20, 2012. He returned to work and, since then, has not been AWOL or late.

Admitted Charges

Respondent admitted the following charges: he failed to remain available for a home visit while on sick leave on July 29, December 17, and December 19, 2011; he was AWOL on August 17, 2011; he failed to document emergency leave for August 19, 2011; he disobeyed an order to report to the Department's medical clinic, or document his inability to do so, on December 13, 2011; he failed to report to the Department's medical clinic, or document his inability to do so, on March 1, 2012 (Tr. 6-10; ALJ Ex. 1).

Contested Charges

For the following charges, respondent stipulated to the facts and offered mitigating or exculpatory evidence: he failed to obey an order to report to the Department's trial room on September 20, 2011; he failed to remain home and failed to provide documentation for a doctor's visit on September 11, 2012; he failed to document emergency leave on September 27 and 28, 2012 (Tr. 6-10; ALJ Ex. 1).

Martin Chestnut, director of the Department's EAP unit, first became acquainted with respondent in August 2005, when he sought help to address his problems with excessive drinking (Tr. 17, 22-23). Among other things, respondent reported that he was on Commissioner's probation due to an arrest for drug dealing, he had been accused of forging a document, he was separated from his wife, and he suffered from depression (Tr. 23-24, 36-37). A counselor

referred respondent to a therapist and a substance abuse outpatient program, but respondent did not follow-up with those referrals (Tr. 24, 37).

Three months later, in November 2005, respondent called EAP while he was out with a line of duty injury. Respondent, who continued to report problems with depression and excessive alcohol consumption, again received the name of a therapist and treatment program (Tr. 24-25). Chestnut had no record of any follow-up by respondent (Tr. 25, 38). According to Chestnut, approximately 300 employees use EAP's services each year and it was not unusual for those with substance abuse problems to fail to follow-up after receiving a referral (Tr. 25-26 46). Chestnut explained that sometimes it takes a crisis for an employee to seek help (Tr. 35-36).

Three years later, in 2008, respondent contacted EAP regarding "anger issues" or an arrest (Tr. 25, 40-41). Respondent broke up with his wife and wanted to discuss treatment programs (Tr. 25). There was no record of EAP giving him a referral that year, but Chestnut recalled that respondent was involved in some kind of counseling program (Tr. 26, 40).

In January 2012, Chestnut received a call from a union representative who reported that respondent was in a treatment program in Florida and being carried AWOL by the Department (Tr. 26). Chestnut verified that respondent was being treated at a licensed and accredited substance abuse and mental health program, which other sanitation workers had used (Tr. 27-28). Based on his investigation, Chestnut considered it a good treatment program (Tr. 30). Respondent entered the program on December 30, 2011 (Tr. 29).

At some point, Chestnut heard from the Department's disciplinary unit that respondent had failed to attend a trial (Tr. 44). In reply, Chestnut reported that respondent was in a treatment program (Tr. 44). Chestnut did not know what prompted respondent to seek treatment, but he considered it a "great sign" that respondent was doing something about his problems (Tr. 46).

Respondent was released after he successfully completed the program on January 20, 2012 (Tr. 30, 41-42). Chestnut spoke with him several times and they met on January 23, 2012 (Tr. 31-32). According to Chestnut, respondent had been deemed AWOL because he had not contacted the Department (Tr. 31). Respondent explained that someone outside the Department had recommended the treatment program to him and assured him that required notifications would be made, but failed to do so (Tr. 33).

Chestnut did not know whether respondent would remain "clean and sober," but he said that respondent was not a "lost cause" (Tr. 33). When they met on January 23, 2012, Chestnut found him on a "good footing to stay clean and sober" (Tr. 32). As of the date of the hearing, October 23, 2012, EAP had not received any word that respondent had relapsed and Chestnut opined that respondent "must be doing okay" (Tr. 33, 42). Chestnut expressed concern that respondent did not go to an EAP-referred aftercare program (Tr. 33, 42). But Chestnut conceded that he did not know whether such treatment was still required, "We would have to reassess the situation to find out if services are necessary" (Tr. 33). If respondent kept his job, Chestnut would have "no problem" with reassessing him and monitoring his progress to help avoid a relapse (Tr. 34).

Respondent testified that, as a youth, he and his mother lived in Colorado, to be closer to his incarcerated father (Tr. 49-50). When respondent's father was paroled, respondent lived with him in New York (Tr. 51). A year later, respondent's father died from a drug overdose (Tr. 51). Respondent was expelled from high school after a few weeks. He resorted to drug dealing, he was repeatedly arrested but never sent to prison, and he earned his G.E.D. (Tr. 52-55).

In 1996, respondent married his wife (Tr. 57). He started working for the Department in 2001 (Tr. 48). Less than a year later, he was arrested for drug dealing and placed on extended probation (Tr. 58). The criminal case concluded when respondent pleaded guilty and received a sentence of five years probation and a $10,000 fine (Tr. 58). Petitioner placed him on Commissioner's Probation for a year (Tr. 58).

Respondent denied using drugs, but he conceded that he drank alcohol excessively (Tr. 55, 59). As a result, he had been AWOL and out sick on many occasions (Tr. 59). Although he received referrals from EAP, respondent never followed up (Tr. 60).

Finally, in late 2011, respondent's wife left him "for good" and he decided to seek treatment (Tr. 61). Co-workers told him about a program in Florida and gave him the name of a contact person (Tr. 62). Respondent entered the program on December 30, 2011. He assumed that the contact person was a union official who would notify the Department (Tr. 62).

On January 20, 2012, respondent was discharged upon successfully completing the treatment program (Tr. 64). After submitting to urinalysis, respondent returned to work and met with Chestnut on January 23, 2012 (Tr. 67). EAP referred respondent to a counseling program in Staten Island, but respondent, who lives in Brooklyn, did not go to that program due to

scheduling difficulties (Tr. 66). However, he attended Alcoholics Anonymous meetings at a local church for four or five months (Tr. 66-67). He has not had any alcohol since 2011 (Tr. 64).

By the time of the hearing, respondent had been "clean" for ten months. It was the longest he had gone without drinking since he was a teenager (Tr. 68). He has recently reunited with his wife and children (Tr. 68).

Respondent did not dispute any of the factual allegations contained in the eleven sets of charges, but he offered documentary evidence and explanations for some of the specifications. For example, although he had no recollection of why he failed to appear at the Department's trial room on September 20, 2011, he had a doctor's note indicating that he was unable to travel that day due to severe stomach pain (Tr. 76; Resp. Ex. E).

On September 27 and 28, 2012, respondent requested and received emergency leave for broken car windshields (Tr. 69). According to respondent, an ex-girlfriend who had a drug and alcohol problem, broke his windshield on September 27. Respondent took emergency leave to repair the windshield, but the ex-girlfriend returned the next day and broke it a second time (Tr. 79). The repair shop would not give respondent receipts until he paid for the work (Tr. 71). A week later, when respondent submitted the receipts to the Department, they were not accepted because it was too late (Tr. 71).

At the hearing, respondent produced copies of receipts dated September 28 and 29, 2012 (Resp. Exs. A, B). Respondent testified that the September 29 receipt had the wrong date and he produced a new, corrected receipt, dated September 27 (Tr. 73; Resp. Exs. B, C). The receipts support respondent's testimony. The incorrectly dated September 29 receipt has a lower job number than the correctly dated September 28 receipt (Resp. Ex. B, C). This documentary evidence confirmed that respondent had his car windshield repaired on two consecutive days, beginning September 27, 2012 (Resp. Exs. A, B, C).

Respondent also presented evidence regarding the charge that he failed to remain home while on sick leave and failed to provide medical documentation for September 11, 2012. He was out sick that day and he used the Department's automated phone system to receive authorization to leave his home for a doctor's appointment. Petitioner alleged that respondent failed to provide the required medical documentation when he returned to work. Respondent testified that he had oral surgery performed that day and he mailed a copy of his dentist's note to the Department's clinic (Tr. 75). When respondent learned that the clinic reported that it had not

received the note, he went to his dentist's office and obtained a copy of the note, which he introduced at the hearing (Tr. 75; Resp. Ex. D).

Respondent expressed a strong desire to continue working for the Department, a job that he wanted since he was a child, and he apologized "for not holding up my end of the bargain so far" (Tr. 77). He was amenable to attending aftercare treatment programs if necessary (Tr. 68). Respondent also expressed a desire to provide for his children and to avoid the mistakes of his own father, who died at a young age from substance abuse (Tr. 78). Moreover, respondent noted that he had not been late for work or AWOL in the ten months following his successful completion of the in-patient rehabilitation program (Tr. 78).

With one exception, all of the charges and specifications should be sustained. Respondent admitted six sets of charges that alleged misconduct on seven occasions. For the remaining four sets of charges, respondent stipulated to the facts alleged by petitioner. I credit respondent's documentary evidence which showed that he was too ill to travel on September 20, 2011, he had oral surgery on September 11, 2012, and he had car repairs performed on September 27 and 28, 2012. However, I was not convinced that respondent presented this evidence to the Department in a timely fashion. By his own admission, respondent had no recollection of his absence on September 20, 2011, and he failed to provide the September 27 and 28, 2012, car repair bills to the Department within two work days as required.

The evidence also showed that respondent failed to provide timely documentation for his doctor's visit on September 11, 2012, in violation of Department Rule 7.9. Although respondent produced a copy of a dentist's note and recalled mailing it to the Department, there was no evidence to confirm that he sent it. Even if respondent mailed the note, he offered no proof that it was sent on time. However, respondent received authorization to leave his residence for a doctor's appointment that day. Thus, the charge that he failed to remain at home while on sick leave, in violation of Department Rule 7.5, should be dismissed. *See Dep't of Sanitation v. Valletutti*, OATH Index No. 1995/11 at 4 (July 20, 2011) (sanitation worker who received permission to leave home for a medical appointment, and failed to provide the Department with acceptable medical documentation, violated Rule 7.9 (inadequate documentation), but did not violate Rule 7.5 (failure to remain at home)).

FINDINGS AND CONCLUSION

1. Petitioner proved that respondent failed to remain available at home while on sick leave on July 29, December 17, and December 19, 2011, as alleged in Complaints 98244 and 101679.

2. Petitioner proved that respondent was absent without leave on August 17, 2011, as alleged in Complaint 98366.

3. Petitioner proved that respondent failed to obey the Department's emergency leave rules on August 19, 2011, and September 27 and 28, 2012, as alleged in Complaints 98656, 108099, and 108101.

4. Petitioner proved that respondent failed to obey an order to report to the Department's trial room on September 20, 2011, or document his inability to do so, as alleged in Complaint 99179;

5. Petitioner proved that respondent failed to obey an order to report to the Department's medical clinic on December 13, 2011, or document his inability to do so, as alleged in Complaint 101366.

6. Petitioner proved that respondent failed to report to the Department's medical clinic, or document his inability to do so, on March 1, 2012, as alleged in Complaint 103485.

7. Petitioner proved that respondent failed to submit medical documentation as required for September 11, 2012, in violation of Department Rule 7.9, as alleged in Complaint 107798.

8. Petitioner failed to prove that respondent committed misconduct by failing to remain at home while on sick leave on September 11, 2012, in violation of Department Rule 7.5, as alleged in Complaint 107798.

RECOMMENDATION

Having admitted misconduct, respondent consented to submission of his disciplinary record at the hearing (Tr. 88). Respondent has worked for the Department for eleven years and he has a lengthy disciplinary record, including: one year of Commissioner's probation in 2003, for AWOL and damaging Department property; 5 and 12 days suspension and a 30-day pay fine in 2006, for violating emergency and sick leave rules; a 10-day pay fine in 2007, for violating

emergency leave rules; 5 days suspension and a reprimand in 2008, for violating emergency and sick leave rules; 5 and 11 days suspension and a 6-day pay fine in 2009, for AWOL; 10 and 24 days suspension, a reprimand, and a 15-day pay fine in 2010, for AWOL, insubordination, violation of sick leave rules, and conduct prejudicial to good order and discipline; and a 20-day suspension in 2011, for violating sick leave procedures.

Petitioner now seeks termination of respondent's employment (Tr. 87). Acknowledging that respondent should be credited for going into a rehabilitation program, petitioner emphasized his prior disciplinary record, his repeated failures to receive counseling, and the risk that he will continue to violate Department rules (Tr. 82, 84-86). Respondent's counsel requested any lesser penalty and was agreeable to any additional appropriate conditions (Tr. 81).

There is no dispute that most of the present charges are directly related to respondent's alcoholism. The evidence also showed that, for the first time in his adult life, respondent sought and obtained treatment for his alcohol abuse. Following successful completion of an in-patient treatment program, respondent has turned his life around. He has returned to work, stopped drinking, reunited with his family, and has not been late for work or AWOL.

Under these circumstances, termination of respondent's employment would be excessive. In *McEniry v. Landi*, 84 N.Y.2d 554 (1994), the Court of Appeals found that alcoholism is a disability under the state's Human Rights Law. Executive Law § 292(21)(a). The Court concluded that a recovering alcoholic should not be terminated for excessive absenteeism caused by alcoholism. 84 N.Y.2d at 559. As the Court explained, once an employee establishes that disciplinary misconduct was caused by a disability, the burden shifts to the employer who "must demonstrate that [the employee's] alcoholism prevents him from performing the duties of his job, failing which, his alcohol dependency may not serve as the basis of his termination." *Id.* Because the evidence showed that the employee had completed rehabilitation, had not relapsed, and had performed his job satisfactorily at the time of his discharge, the Court held that termination of his employment for time and attendance problems was improper. *Id*. at 560-61.

The Court made clear in *McEniry* that it was not creating a "safe haven" for employees who "resort to recovery programs as a pretext" to avoid disciplinary action. 84 N.Y.2d at 561. Furthermore, "in the appropriate case, an alcoholic who is found not to be actually rehabilitated, or who is shown to have a propensity to relapse may be found unable to perform the job in a reasonable manner." *Id.* Thus, there must be an individualized determination. *Id.* at 559.

Here, the evidence showed that respondent suffers from alcoholism, which qualifies as a disability under the Human Rights Law. The evidence also showed that most of the proven charges of misconduct were for time and sick leave violations that occurred before respondent sought in-patient treatment on December 30, 2011. It does not appear that respondent entered the treatment program as a pretext to avoid disciplinary charges; rather, it appears that he sought help because his personal life and marriage were falling apart.

Respondent's alcoholism is not a defense to the four remaining charges, which occurred after he completed treatment on January 20, 2012. However, for three of those charges, respondent presented mitigation. Documents showed that respondent received medical treatment on September 11, 2012, and his car was repaired on September 27 and 28, 2012, but the charges were sustained because he failed to provide the documents to the Department on time. For the fourth charge, respondent admitted that he called in sick on Thursday, March 1, 2012, he was required to report to the Department's medical clinic the next day, and reported to the clinic on Monday, March 5, 2012, without documenting his inability to travel from March 1 to March 3. These failures to follow procedure are misconduct that requires a significant penalty in light of respondent's poor disciplinary history, but they do not require termination of employment.

The circumstances here resemble *Department of Sanitation v. Linehan,* OATH Index No. 1508/04 (Aug. 23, 2004). There, an employee violated Department sick leave policies on more than a dozen occasions. *Id.* at 6-7. The employee had been addicted to controlled substances and completed a 15-day in-patient drug treatment program. *Id*. Finding that the employee's drug addiction qualified as a disability which related to the misconduct, this tribunal recommended a thirty-day suspension, with no credit for time served. Although the employee had been disciplined nine previous times, including recent suspensions for 38 and 30 days, this tribunal concluded that, based on the evidence of rehabilitation and *McEniry*, termination of employment was inappropriate. *Id.* at 9-10. The employee later accepted one year of probation in addition to the 30-day suspension. *See also Dep't of Sanitation v. Anonymous,* OATH Index No. 1637/12 (June 19, 2012), *modified on penalty,* Comm'r Dec. (Aug. 15, 2012) (recommendation of 30-day suspension modified by stipulation to add lifetime drug/alcohol testing, for employee who violated Department's substance abuse policy for the third time and then completed a rigorous in-patient treatment program); *Dep't of Sanitation v. Lockhart,* OATH Index No. 1591/03 (Sept. 17, 2003) (employee with prior disciplinary record disobeyed order to report to Department's

trial room and was AWOL for two-months; ALJ recommended 30-day suspension without pay, with credit for period that employee was out of work following a default hearing that was later annulled, where employee successfully completed detoxification program to address longstanding alcohol abuse).

Here, as in *Linehan*, a Department employee has taken dramatic steps to deal with a crippling addiction. With any addiction, there is a risk of relapse and petitioner is rightly concerned that respondent is not presently receiving additional counseling. Yet, as petitioner's EAP director aptly testified, respondent is not a lost cause. In light of respondent's recovery and progress to date, termination of his employment would be unduly harsh.

Accordingly, I recommend a 30-day suspension without pay, without credit for any time served. The parties may also wish to agree to other appropriate conditions to minimize the risk of respondent's relapse.

Kevin F. Casey
Administrative Law Judge

December 13, 2012

SUBMITTED TO:

JOHN J. DOHERTY
Commissioner

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