Human Resources Admin. v. Gonzalez

OATH Index No. 972/11 (Mar. 17, 2011)

Petitioner established that respondent was absent without authorization for three periods totaling approximately 16 months. Mitigating factors argued were insufficient to overcome the lengthy, unexcused absences. Termination of respondent's employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
HUMAN RESOURCES ADMINISTRATION
Petitioner
-against-
EMMA GONZALEZ
Respondent

REPORT AND RECOMMENDATION

JOAN R. SALZMAN, *Administrative Law Judge*

This disciplinary action was referred by petitioner, the Human Resources Administration ("HRA" or "the Department") pursuant to section 75 of the Civil Service Law. The Department alleges that Emma Gonzalez, an Eligibility Specialist II working in a food stamp program, engaged in misconduct by being absent without authorization, in violation of HRA agency time and leave regulations, Procedure No. 03-03 and the HRA Code of Conduct (Executive Order No. 651), for three periods totaling approximately 16 months: July 24 through September 25, 2009; October 8 through December 4, 2009; and January 3 through December 22, 2010 (Pet. Exs. 1, 3, 6, 10; Tr. 8).

A hearing was held before me on January 11, 2011. Petitioner submitted documentary evidence and the testimony of Nuvia Robertson, Assistant Office Manager at respondent's assigned office at HRA (Tr. 10-11). Respondent submitted documentary evidence and testified on her own behalf. The record was held open until February 16, 2011, for the submission of post-hearing briefing on whether respondent's contentions about her medical issues, particularly her claim that she suffered from depression, provided a defense to the charges or should be

considered in mitigation of any penalty. The parties filed their briefs and replies and the record was closed on that date.

For the reasons set forth below, I find that respondent was absent without authorization for three periods totalling approximately 16 months and recommend the termination of respondent's employment.

ANALYSIS

Respondent is alleged to have violated Human Resources Procedure No. 03-03 pertaining to unauthorized leave. Under section II (K) of that Procedure, an unauthorized leave includes "[a]n unplanned leave for which the employee failed to submit to his/her immediate supervisor a formal request and an acceptable written explanation on the day the employee returns to his/her assigned location," as well as all incidents defined as "Absence Without Official Leave" ("AWOL").[1] HRA Procedure No. 03-03, Supervision of Employee Attendance and Punctuality § II (K) at 5 (Feb. 12, 2003).

It was undisputed that respondent was absent without authorization during the periods alleged and that she did not comply with the Department's time and leave requirements for medical absence. Uncontradicted documentary and testimonial evidence submitted by petitioner supported its contention that respondent was in fact absent without authorization during the periods alleged (Pet. Exs. 1-10; Tr. 24-25). Respondent admitted that her absences were unauthorized (Tr. 69, 82).

Respondent testified that, in January of 2010, she was assigned to the Crotona Center (Tr. 52), and that when she was sick, she regularly called in to notify Ms. Tirado, the Center's manager for food stamps. After a couple of months, respondent was informed that she would have to call the agency offices at 180 Water Street to report her absences; instead she completely stopped calling in (Tr. 54-56, 63-64). In essence, respondent admitted that she did not call in for 10 months in 2010. Respondent presented no evidence that she submitted a formal request and written explanation of her absence on the day she returned to work as required by Procedure No. 03-03, section II (K).

Respondent is also charged with violating the Department's Code of Conduct, Executive Order No. 651, which requires employees to comply with time and leave rules, and not be absent

[1] "AWOL" is defined as absence for a half day or more without contacting the agency. HRA Procedure No. 03-03 § II (E) at 4.

without authorization. Exec. Order No. 651, § III (5), (6) (Dec. 17, 1998). The time and leave rules embodied in Procedure No. 03-03 require a formal request and a written explanation for all leaves, HRA Procedure No. 03-03, § II (K) at 5, and medical documentation when an employee's sick leave exceeds three days or there are more than five undocumented sick days in a six-month period. HRA Procedure No. 03-03 § III (A), (B) at 6, 9.

Respondent asserted that her absences were caused by various medical conditions (Tr. 46, 51, 60, 68). She testified that she "just wasn't feeling well" and "couldn't get [herself] out of the house" (Tr. 61).

Respondent did not produce any medical notes contemporaneous with her absences that complied with the requirements of Procedure 03-03 (*see* Resp. Ex. A). The notes she did produce were unconvincing. The notes were dated at the end of 2010 or early 2011, yet were proffered to excuse respondent's long-term absence for nearly all of 2010. Respondent submitted two notes from a Dr. Edgar F. Baraya, one dated November 23, 2010, and another dated January 8, 2011. The notes say nothing about her absences in 2009.

The Department offered at trial a third note dated December 6, 2010, purportedly also from Dr. Baraya, a photocopy of which respondent had submitted to the agency (Tr. 75) on letterhead that differs from that of the two notes she offered at trial. This note states that respondent "is treated in this office," but then says, in the past tense, that "Due to multiple medical conditions," including depression, respondent "has been disable[d] Disabled since 1/04/10 to 12/20/10," a date after the note was written. The handwritten dates appear to have been marked over or altered. The word "disabled" is oddly written twice in sequence; the last letter of the word is cut off on the copy the first time it appears, and is followed by the same word beginning with a capital "D" on the next line. Moreover, while all of the notes were from the same doctor, a general practitioner, one of the notes, dated November 23, 2010, states that respondent was cleared to work on November 29, 2010, while another note, dated January 8, 2011, states vaguely, a year after-the-fact, that she "was disabled" for the entire year -- January 4, 2010 to January 8, 2011. That note recites that respondent "was disabled since 01/04/10" and summarily lists six different ailments, not including depression, all of which I have considered, adding that the "patient improved and is cleared to work with no restrictions." Yet there is no record that respondent had medical appointments for evaluation and treatment for any of these conditions that might justify the particular absences as they were occurring (*see* Resp. Ex. A).

These contradictions undermine the weight that might be accorded to the 2010 notes, and it was undisputed that there was no medical documentation, contemporaneous or otherwise, to substantiate respondent's alleged medical absences in 2009. I find respondent's proffered documentation to be insufficient to excuse her admitted absences. *See Dep't of Correction v. Michaels,* OATH Index No. 1870/01 (Nov. 15, 2001) (recent medical documentation supplied by respondent was inadequate to excuse an absence of two years retroactively).

In her testimony, respondent admitted that she never received authorization to excuse her absences (Tr. 69), nor was she ever granted a leave of absence (Tr. 82). While respondent may have discussed with Deputy Director Viera, once in December 2009, the possibility of taking leave under the Family and Medical Leave Act (known as FMLA), there was no evidence that respondent ever applied for that leave (Tr. 26-28). Respondent's vague and contradictory testimony that she had submitted medical documentation to HRA (*see* Tr. 83) was unsupported by documentary proof.

Nor was there any lack of notice to respondent that her absences were a matter of concern: petitioner's evidence showed that the Department had issued letters for each of the respective absence periods that alerted respondent that she was absent without authorization. These writings allowed her 10 days to respond and explain her absence (Pet. Exs. 2, 4, 5, 7; Tr. 12-16). The Department sent six letters to respondent, each one giving her a chance to offer an explanation for her absence. These letters placed her on notice early on that she was facing discipline, including termination of employment, and must respond (Pet. Exs. 2, 4, 5, 7, 8, 9; Tr. 15, 19), yet she stayed out of work for extended periods of time without responding at all. Respondent testified that while she was absent, she simply stayed home and read a lot, and went to the supermarket as needed. She testified that she did not watch television, but read instead, and that her daughters urged her to seek help when they learned she was not going to work. She did not tell her husband that she was missing work and he initially did not know it because they worked different shifts at their respective jobs and they met at home at their usual times (Tr. 50-51, 61-64, 87).

In light of respondent's admissions and the lack of adequate or timely medical documentation justifying the absences, I find that all the charges should be sustained in full.

FINDINGS AND CONCLUSIONS

Petitioner proved by a preponderance of evidence that respondent violated Human Resources Administration Procedure No. 03-03, sections II (K) and III (A) and (B), and Human Resources Administration Code of Conduct, section III (5), (6), pertaining to unauthorized leave, by being absent without authorization from July 24 through September 25, 2009; October 8 through December 4, 2009; and January 3 through December 22, 2010, for a total of about 16 months, and by failing to comply with departmental time and leave regulations regarding her absences.

RECOMMENDATION

Because the underlying misconduct was admitted, this case concerns the recommendation of an appropriate penalty. The Department seeks termination of employment, while respondent argues that mitigating circumstances, medical and psychological problems, warrant a penalty short of termination. Upon making the above findings, I requested and received from HRA an abstract of respondent's personnel history. She began her employment with the agency on May 3, 2004 as a Clerical Associate Level II. Her evaluation in 2004-05 was "good" for both performance and attendance. Her evaluation for 2005-06 was "good" or "very good" as to work performance, but "not satisfactory" with respect to attendance. Although she was promoted to Eligibility Specialist Level II in May 2009, she did not pass her probationary period due to her long period of absence in 2010, and was demoted back to Clerical Associate Level II on December 23, 2010.[2] Respondent had a recent, prior disciplinary matter alleging more than a month of unauthorized absence from December 1, 2008 through January 6, 2009, and accepted a two-day pay fine in settlement of those charges on June 2, 2009.

Long-term absence without authorization has been held to be a fundamental form of misconduct that interferes with an agency's mission. The usual penalty for a long-term, unauthorized absence -- even for a shorter time period than is at issue here -- is termination. *See, e.g., Dep't of Sanitation v. Moore,* OATH Index No. 1035/10 (Feb 2, 2010), *adopted,* Comm'r Dec. (Feb. 25, 2010) (proof of personal hardships and complex surgery did not excuse failure to return to work for seven months after respondent was medically cleared to work again); *Human Resources Admin. v. Beauford,* OATH Index No. 1517/03 (Dec. 5, 2003), *adopted,* Comm'r Dec. (Dec. 6, 2004), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD06-15-SA (Jan. 9, 2006)

[2] We have held that demotion from a probationary position may not suffice as a penalty for long-term absence. *Human Resources Admin. v. Jamieson,* OATH Index No. 104/91 at 20 (Feb. 22, 1991).

(termination recommended where respondent was AWOL on 52 occasions in four months); *Dep't of Sanitation v. Singh*, OATH Index No. 1438/01 (July 27, 2001), *adopted*, Comm'r Dec. (Aug. 2, 2001), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 02-58-SA (July 1, 2002) (termination recommended for employee who was AWOL for one year and failed to correspond with agency or provide medical documentation of back pain); *Human Resources Admin. v. Jamieson***,** OATH Index No. 104/91 (Feb. 22, 1991) (termination recommended for nine-month AWOL where respondent absented himself from work without permission in order to attend college).

While there are cases in which a penalty less than termination has been imposed for a long-term unauthorized absence where a disability was proved, *see, e.g., Dep't of Sanitation v. Lockhart*, OATH Index No. 1591/03 (Sept. 17, 2003) (alcohol and substance abuse led to two-month AWOL, but respondent was committed to recovery), termination has been imposed in the absence of proof that a *bona fide* disability caused the absence, despite mitigating circumstances. *Compare Beauford*, OATH 1517/03 at 13 (termination recommended where respondent could prove he received treatment for depression, but failed to prove it was the cause of his AWOL); *Dep't of Sanitation v. Perrone*, OATH Index No. 845/01 (Feb. 2, 2001), *adopted*, Comm'r Dec. (Feb. 27, 2001) (termination recommended for a three-month AWOL where employee demonstrated his need to care for his three children and manage a bitter custody battle with his wife while he had stress-related health problems).

In cases where termination was not imposed, the mitigating circumstances were found to be compelling or "exceptionally sympathetic." *See, e.g., Dep't of Sanitation v. Delio*, OATH Index No. 900/04 at 4 (Apr. 20, 2004) (five-month AWOL was mitigated by psychological trauma caused by working at the World Trade Center site in the weeks following September 11, 2001); *Lockhart*, OATH 1591/03. These and other cases cited by respondent in support of a penalty short of termination are distinguishable on their facts from this case.

In *Lockhart*, cited in respondent's brief, a sanitation worker was AWOL for two months. He testified that losing his friend at the World Trade Center disaster, and nearly losing his wife, who also worked at the World Trade Center, sent him into a tailspin of alcohol and substance abuse that lasted fourteen months and left him divorced, homeless, and jobless. Yet at the time of the trial, Mr. Lockhart had made great strides in turning his life around: he showed that he had completed almost a year of treatment with Alcoholics Anonymous ("AA"), as corroborated

by his AA sponsor and his ex-wife. He also presented letters of recommendation from his pastor, a community leader, an Assemblyman, and his prior supervisors to attest to his recovery and outstanding character. *Dep't of Sanitation v. Lockhart*, OATH Index No. 1591/03 (Sept. 17, 2003).

By contrast, exceptionally compelling circumstances were not shown here. Respondent asserted that during the time of the absences, she suffered from depression. While respondent testified that she spoke to her general practitioner about feeling depressed, she admitted that he was not a psychiatrist and that he never made a diagnosis of depression, nor did she undergo any treatment or take any medication for depression (Tr. 61-62). Neither did her regular doctor make a referral to a psychiatrist or therapist (Tr. 62). Respondent admitted that she has never been to any specialist for depression (Tr. 46). Instead, respondent testified that she had not sought treatment for depression as of the time of the hearing. She began talking to a union personnel services representative about whether she might in the future see a psychiatrist if the union gives her a referral, but this was only after a conference was held in this case (Tr. 65; Resp. Ex. A).

Respondent did not offer into evidence any medical notes even mentioning depression until the agency introduced a third medical note from respondent's general practitioner in evidence. Of the three medical notes submitted by the parties, only that December 6th note even appears to indicate that respondent was depressed. Petitioner offered it to show that it looked as if it had been altered and I included it in Respondent's Exhibit A, with the other two medical notes, which respondent proffered at trial. Respondent objected that without testimony or other evidence from the doctor's office, the agency had failed to prove that the notes were altered. Petitioner declined to continue the matter to submit proof of forgery (Tr. 88-91). I agree that the proof fell short of fraud or forgery. But neither was this note convincing proof that respondent was in fact disabled. Respondent then sought to rely on this note to show that it was the agency that had introduced the only note in which respondent's doctor apparently mentioned depression.

The medical notes submitted here were too late and too minimal, only a few lines each, and too lacking in detail to support the conclusions respondent would have this tribunal draw from them. Nor did respondent present any record of the dates she saw her doctor during the 16 months in issue. I find that the December 6, 2010 note, written well after the bulk of the absences and containing some questionable, apparent alterations to the handwritten dates and possibly the language on the photocopy, is insufficient to show that respondent had a diagnosis

of depression from a medical doctor or mental health professional at any time during her three periods of absence, or that the depression was the cause of her absences. *See Dep't of Correction v. Michaels*, OATH Index No. 1870/01 (Nov. 15, 2001), *adopted*, Comm'r Dec. (Dec. 13, 2001) (recent medical documentation supplied by respondent was inadequate to excuse an absence of two years); *Dep't of Housing Preservation & Development v. Six*, OATH Index No. 2204/04 at 7 (July 25, 2005), *adopted*, Comm'r Dec. (Aug. 22, 2005) (notes created after 10-month absence were insufficient to justify a penalty short of termination).

Significantly, as noted above, the December 6th note contradicts respondent's own key admission at the hearing that she was never treated for depression, that her doctor was not qualified to diagnose it, and did not "want to" because he is not a psychiatrist, and that never had given her a diagnosis of depression (Tr. 61-62). Thus, the December 6th note is of no probative value. Respondent's lack of proof that she suffered a disabling condition and was treated for it prior to the initiation of disciplinary charges is in marked contrast to the record in *Lockhart*.

Respondent's counsel admirably tried to help his client by having an employee locate her, coax her back to work, and try to get her to the doctor (Tr. 6). Nonetheless, those commendable efforts do not substitute for proof. Respondent's counsel, instead of proving any disability, submitted the elements of a medical defense as pure legal argument and asked that the tribunal simply accept or infer that: (1) respondent suffered from depression and was disabled; (2) the disability caused her extended unauthorized absence and impaired her ability to comply with the agency's sick leave rules; and (3) she is now cured. Without sufficient proof as to these important facts that require professional expertise, I am unable to reach the conclusions advocated. In closing argument, counsel argued that in 25 years of experience, "I've learned about medicine and depression. So what you have here is a clear case of depression. Depression can be caused [by] numerous factors. You can take judicial notice of this, check through all the old cases that talk about depression. . ." (Tr. 93). He thus offered his "amateur diagnosis" of depression (Tr. 93). We have held in similar circumstances that a medical diagnosis must be based on evidence, and is not a matter of which official notice can be taken. *Human Resources Admin. v. Anonymous*, OATH Index No. 1242/10 at 14 (May 4, 2010); *see* 48 RCNY § 1-48(a) (Lexis 2009). Similarly, counsel offered insufficient proof as to the supposed cure respondent reportedly experienced: "I'll submit to you what happened was she cured herself. That after sitting in the room for like a year, and the passage of time, and she convalesced and she treated

her own illness. . . " (Tr. 101). Respondent testified, to the contrary, that she may, for the first time, seek a referral in the near future to a psychiatrist for depression (Tr. 65), suggesting that she has not recovered.

By claiming a disability and a serendipitous, self-administered cure as of the time of trial, respondent's counsel appears to be trying to wedge this slim record within the legal protections of the Human Rights Law for proven disabilities that apply in entirely different circumstances. *See McEniry v. Landi*, 84 N.Y.2d 554, 560 (1994) (employee must prove disability caused the behavior for which he or she is terminated; burden then shifts to employer to show that the disability prevented the employee from performing the job in a reasonable manner or that termination was motivated by a legitimate, non-discriminatory reason; employee recovering from alcoholism and rehabilitated at the time of termination should not have been fired, but *McEniry* is "not intended to create a safe haven for individuals who resort to recovery programs as a pretext for avoiding otherwise legitimate disciplinary action"). Here, however, respondent has never been treated for the claimed disability on which she principally relies, and there is insufficient proof of disability, any causal link between the supposed disability or disabilities and the long-term absence, or of any recovery. Indeed, none of the notes respondent submitted indicated that respondent's absence was caused by any of the asserted medical conditions (Resp. Ex. A). Respondent submitted no medical documentation during the period of her absence to document her condition at the time she was failing or refusing to respond to the agency's multiple notices that she was facing termination of employment.

Respondent also argued that her family circumstances should be considered in mitigation of any penalty. However, she has not presented evidence of circumstances that would mitigate the penalty of termination. She described several upsetting events that occurred in early 2010, including the unexpected deaths of a sister-in-law and a brother-in-law and an assault on her grandson, from which he has recovered. She testified that after these events she felt she could not go back to work (Tr. 57-58), and felt alone (Tr. 70). Respondent's personal circumstances, while poignant, do not explain the failure to attend work without submission of an excuse for 16 months and do not outweigh the extremely lengthy unexcused absence here. *Cf. Dep't of Sanitation v. Delio,* OATH 900/04. Neither do the deaths in respondent's family in 2010 in any way explain her four months of silence and unexcused absence in 2009, which, taken alone, would merit termination. *See Dep't of Sanitation v. Moore,* OATH 1035/10 at 5

(while surgery was an explanation for a portion of respondent's absence it was an inadequate explanation for all of it); *Dep't of Sanitation v. Revitch*, OATH Index No. 724/99 (Jan. 19, 1999*), modified on penalty*, Comm'r Dec. (Feb. 10, 1999), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 00-115-A (Nov. 14, 2000) (Commissioner modified ALJ's recommendation of 40-day suspension and terminated the employment of a 16-year employee for a four-month AWOL; claim of severe depression documented for only a two-day period, and numerous personal problems did not excuse employee's failure to communicate with agency during long-term absence).

Respondent's six-year tenure with the Department is too brief to diminish the applicable penalty of termination. Indeed, respondent's 16-month unauthorized absence constitutes about 20% of her time as an employee of the Department. And this is not the first time she has been AWOL for an extended period.

Finally, Ms. Robertson's testimony demonstrated that respondent's extended unscheduled absence created a hardship to her unit, forcing other employees to cover her work and causing the agency to pay for overtime by other workers. Thus, respondent's extended absence increased the costs and burdens on the agency to deliver essential food stamp services to the public (Tr. 24-25, 32, 38-39).

Showing up for work is the most fundamental requirement of the job. Upon consideration of the full record in this matter, I recommend termination of respondent's employment.

Joan R. Salzman
Administrative Law Judge

March 17, 2011

SUBMITTED TO:

ROBERT DOAR
Commissioner

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