

Dep't of Sanitation v. Anonymous

OATH Index No. 181/11 (Dec. 9, 2010)

60-day suspension recommended for long-term AWOL in consideration of extraordinary mitigating circumstances coupled with respondent's commendable and lengthy record of prior service.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
-against-
ANONYMOUS
Respondent

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

This is a disciplinary proceeding brought by the Department of Sanitation pursuant to section 75 of the Civil Service Law. Petitioner alleges that respondent, an associate sanitation enforcement agent holding the rank of sergeant, was absent without authorization from May 2, 2009 through April 24, 2010 (ALJ Ex. 1; Tr. 8, 12).

Trial was held on October 22, 2010. At the start of the proceedings, counsel for petitioner verbally amended the complaint, which was written in narrative form, to clarify that respondent was charged solely with being absent without authorization during the referenced time period (Tr. 12; ALJ Ex. 1). Respondent's union representatives, who appeared on her behalf, did not object (Tr. 12). This amendment was in accordance with our rules of practice, which require that the petition be "a short and plain statement of the matters to be adjudicated." 48 RCNY § 1-22.

Because respondent appeared without an attorney, but with three union representatives, I advised her of her right to be represented by counsel and asked if she wanted to retain an attorney to represent her (Tr. 17). *See* Rule 103(A)(8) of Appendix A to title 48 of the Rules of the City of New York, the Rules of Conduct for Administrative Law Judges and Hearing

Officers of the City of New York. Respondent stated that she did not want to retain an attorney and elected to proceed with union representation (Tr. 18).

Respondent's representative requested, pursuant to OATH Rule of Practice 1-49 (d), that I redact respondent's name from the decision because of the personal and sensitive nature of her testimony (Tr. 12). See 48 RCNY § 1-49 (d) (2010) ("On the motion of a party, or *sua sponte*, the administrative law judge may determine that publication of certain information will violate privacy rights set forth in applicable law or rules and may take appropriate steps to ensure that such information is not published"); *Human Resources Admin. v. Anonymous*, OATH Index No. 1242/10 (May 4, 2010) (employee's name withheld where decision discussed extensive personal medical information relating to drug and alcohol addiction and mental health disorder); *Taxi & Limousine Comm'n v. Anonymous*, OATH Index No. 1053/09 at 1 (Jan. 12, 2009) (employee's name withheld where decision discusses personal issues contained in medical records); *Fire Dep't v. Anonymous*, OATH Index No. 1273/08 at 1 n.1 (June 12, 2008) (employee's name withheld where decision discusses personal issues contained in medical records). I granted respondent's motion upon hearing her testimony, which involved not only her own health issues but those of her minor daughter.

Once the trial proceeded, petitioner presented one witness, while respondent testified on her own behalf. Both parties introduced documentary evidence. The record was left open until November 5, 2010, to give both parties the opportunity to submit additional evidence. Only petitioner availed itself of this opportunity, submitting a clearer photocopy of one particular exhibit (Pet. Ex. 7).

As set forth below, I find that respondent was absent without authorization from May 2, 2009 through April 24, 2010. In light of the extraordinary mitigating circumstances presented, I recommend that respondent be suspended for 60 days.

ANALYSIS

Respondent has been employed by the Department since 1993 (Tr. 199). The parties stipulated that from May 2, 2009, through April 24, 2010, she was not at work and did not submit a written request for leave. A leave of absence was never authorized (Tr. 23). However, it was undisputed that respondent had called in sick on a weekly basis during this period, as reflected in the logbook kept by the radio room (Pet. Ex. 7).

Respondent asserted that she should not be found absent without authorization because she had called in to the radio room on a weekly basis (Tr. 15). I disagree. Deputy Inspector Benjamin Kelly, who oversees all the administrative aspects of timekeeping, testified that an employee is required to call the headquarters radio room if he or she will not be able to report to work, at least an hour prior to the scheduled start of their shift (Tr. 49, 76). The radio room is staffed 24 hours a day, except for a period from Saturday midnight through 6:00 p.m. Sunday evening, when it is closed (Tr. 50). From 6:00 a.m. to 2:00 p.m. Mondays through Friday, calls are answered by sanitation enforcement agents. The rest of the time, sanitation police officers serve as the operators who answer calls. The sanitation enforcement agents are below respondent in title, and the sanitation police officers are in a separate unit from respondent and outside her chain of command. Neither the sanitation enforcement agents nor the sanitation police officers are authorized to grant leave. Rather, they simply take down the information from the employee who is calling in. If someone calls in sick, that person is carried sick until a decision is made whether they conform to sick leave guidelines (Tr. 51, 52, 63, 77, 90, 95).

Inspector Kelly testified that an employee can not be carried on leave without submitting a leave request and having it approved. Thus, respondent should have asked her lieutenant or captain for leave rather than simply call into the radio room (Tr. 42, 48). He did not recall being contacted by respondent during the period of her absence. No one from the union ever called him to explain respondent's absence, and he does not believe respondent called anyone in timekeeping (Tr. 62, 63). The call logs (Pet. Ex. 7) reflect that respondent called in at various times, sometimes in the middle of the night, when no one was present at enforcement headquarters. Other calls were made after 6:00 a.m., when a timekeeper would have been present at headquarters (Tr. 70, 71). Ultimately, respondent was carried as AWOL because of a failure to submit required documentation. Based on Inspector Kelly's credible testimony, I concluded that respondent did not comply with the procedures to request leave despite calling in sick to the radio room on a weekly basis.

Beyond Inspector Kelly's testimony, petitioner introduced evidence, in the form of letters sent to respondent, that she was warned that she was in a no pay status and needed to report to the clinic with documentation or risk being carried as AWOL since May 2, 2009 (Pet. Ex. 1, 2, 3). Although respondent testified that she had moved from the address that the first two letters were sent to (Tr. 130), the last letter, dated June 2, 2009 (Pet. Ex. 3) was sent to her current

address. Hence, respondent received notice, at least as of June 2, 2009, that she was in jeopardy of being placed in AWOL status if she did not provide appropriate documentation of her illness.

Respondent did appear at the clinic on May 1, 2009 (Resp. Ex. A), but acknowledged that she did not return on May 8, 2009, as instructed (Tr. 130). Respondent explained that she did not report to the clinic on May 8, 2009, because she was sick with menorrhagia, which is unusually heavy menstrual bleeding from which she suffers (Tr. 154). She testified that throughout the period of her absence from work, she suffered from chronic menorrhagia which required extensive treatment. Additionally, in 2009, her teenage daughter tried to commit suicide and was hospitalized four or five times for psychiatric evaluation and treatment. At the same time, her son was indicted for murder in connection with the death of a child and subsequently convicted. Respondent explained that she had to take time not only to care for herself but to care for her daughter. Asked why she had not requested FMLA leave, which is designed for situations such as this, respondent answered that she was “reluctant” to request leave because she was “afraid” that any information that she provided would not be kept confidential (Tr. 110, 135). She testified that there had already been media coverage, both of her daughter having gone missing, and of the criminal charges involving her son. She testified that the Department was “not always discrete” with the information provided and she had already heard “certain superiors” say that she had a “crazy daughter” and a son who was a “baby killer” (Tr. 110).

As will be discussed below, I credited respondent’s testimony, which was supported by documentary evidence, concerning the family crises involving her daughter and son, as well as her own serious health issues. I had no doubt that respondent was physically and emotionally drained by these circumstances. I am confident that sick leave, and/or FMLA leave would have been granted, had she applied for it, particularly during the period of her time when her daughter was in and out of psychiatric hospitals. Further, I believed that respondent was sincere in believing that there was a lack of confidentiality within the Department because of derogatory comments that she had overheard. Nonetheless, respondent was still obligated to request leave, rather than simply call in sick. There is no evidence that respondent supplied the requested medical documentation until January 2010, several months before her return to work in April. Nor is there any evidence that respondent went to her union for assistance during the extensive period that she was out of work.

Respondent testified that on January 13, 2010, she submitted a medical note to the clinic, dated January 7, 2010, from her gynecologist, Dr. Nigel. In the note, Dr. Nigel stated that he had treated respondent for menorrhagia for over five years, using “multiple procedures and medical therapies,” and that “recently” respondent’s condition had improved so that she was to return to work without restrictions (Pet. Ex. 8; Tr. 149). Respondent explained that she did not return to work until April 2010 because the doctor at the clinic wanted updated blood work, and because she had a subway accident in January 2010, in which her leg fell between the platform and the train. She sustained injury to her knee and had to wear a brace (Tr. 129). Respondent submitted documentation corroborating this injury, which included: a preliminary report from the Bellevue Hospital radiology Department, dated January 22, 2010, referencing an imaging study of the ankle, knee, and tibia (Pet. Ex. 9c), a note from her orthopedist, dated February 19, 2010, indicating that she was seen for evaluation of her leg and is in “out of work” status (Pet. Ex. 9b), and another note from the orthopedist, dated April 22, 2010, confirming that respondent had been under his care for a right knee injury since February 10, 2010 but could return to work on April 26, 2010 without restrictions (Pet. Ex. 9a). Respondent testified that she provided these notes to the clinic on April 26, 2010, at which time she was resumed to work (Tr. 159). She acknowledged having a conference with the disciplinary unit on February 16, 2010, and being informed that she was being carried as AWOL (Tr. 161).

It appears that respondent attempted to comply with Department procedures governing AWOL in mid-January 2010, when she submitted Dr. Nigel’s note to the clinic. Respondent’s delay in providing the follow-up blood work requested by the clinic may have been in part excusable because of her unfortunate subway accident. However, respondent acknowledged not submitting documentation of the injury to the Department until April 26, 2010, despite having a radiology assessment dated January 22, 2010 and despite being warned in February that she was being carried as AWOL. Thus, even though respondent would likely have been entitled to a separate leave, based upon her knee injury, her failure to comply with time and leave procedures meant that her continued absence was unauthorized.

In a similar vein, respondent most certainly would have been entitled to sick leave based upon her hospitalization from September 15, 2009 through September 17, 2009 for chest pains, for which she submitted documentation to the clinic in January 2010 (Tr. 11, 116, 168; Resp. Ex. B). Unfortunately, however, respondent did not submit the documentation in a timely fashion,

nor was there any evidence that she called at the time to advise that she was hospitalized and therefore unable to come to work.

In sum, from May 2, 2009 through April 24, 2010, respondent was confronted by problem after problem, none minor and some tragic: her own serious bleeding condition, her daughter's attempted suicide and multiple hospitalizations, her son's criminal case and conviction, and finally, her subway injury. I credited her testimony that she feared a lack of confidentiality if she requested leave for her own health issues and her need to care for her teenage daughter. Further, respondent called the radio room at least weekly to report her continuing absence. Nonetheless, she did not return to the clinic as directed with documentation of her medical condition until January 2010 and she never filed a request for leave. Her failure to comply with time and leave regulations renders her absence without authorization misconduct, sanctionable under the Civil Service Law. *See Admin. for Children's Services v. Keyes*, OATH Index Nos. 230/06 & 559/06 at 6 (Mar. 13, 2006) (employee committed misconduct because she failed to document the reasons for unscheduled latenesses or absences); *Admin. for Children's Services v. Snead*, OATH Index No. 333/04 at 11 (Oct. 19, 2004) (lateness charges sustained where there was no evidence that employer authorized employee to be late); *cf. Dep't of Sanitation v. Chaudhuri*, OATH Index No. 1674/08 at 6, 8-9 (May 21, 2008) (respondent not guilty of AWOL where she failed to obtain prior authorization for three and a half hour absence but showed she had an unscheduled illness, filed leave request upon her return to work, and agency failed to show why leave was denied).

FINDINGS AND CONCLUSIONS

Respondent was absent without authorization from employment from May 2, 2009, through April 24, 2010.

RECOMMENDATION

Petitioner seeks a recommendation of termination, stressing the length of respondent's absence. This penalty would be unduly harsh given the extraordinary difficulties which respondent faced during this time period as well as her exceptional record of service over 17 years.

It is important to note that this is the first time that respondent has been disciplined for time and leave violations. Personnel information which I requested upon making these findings

indicates that respondent began working for the Department in 1993 as a sanitation enforcement agent. She was promoted to an associate sanitation enforcement agent in 2004. Over her 17-year tenure, she had one instance of adjudicated discipline, consisting of a reprimand in 2000 for assorted rule violations concerning the unauthorized use of a Department vehicle. Respondent testified that in 2006, she won the Sanitation Enforcement Division's "employee of the year" award, for which she received a \$500.00 check (Resp. Ex. E). She represented the Department in a British Broadcasting Corporation documentary and an interview with a British news program (Tr. 112; Resp. Ex. F). Her 2006 and 2007 performance evaluations were exemplary (Resp. Ex. F).

In 2008, however, respondent received three written warnings, relating to a damaged radio (February 22, 2008), an inaccurate count (March 26, 2008), and the loss of a handheld unit (April 29, 2008). Respondent also received a written warning more recently (May 11, 2010), relating to signing in with a second surname, for which she has not yet supplied documentation. Respondent's 2008 performance evaluation, which petitioner provided as part of the personnel abstract, was mixed.

Respondent's difficulties at work in 2008 dovetail with the hardship she was encountering at home. She testified with emotion and in detail about the situation involving her teenage daughter. Her daughter began running away in 2008, when she was 15. The date that she lost the handheld was the first time that her daughter ran away (Tr. 173). Her daughter developed a pattern where she would return, stay at home for as long as several months, and then go "back into the streets again" (Tr. 172-73). Respondent had started using a lot of leave time in March and April 2009. Because of her daughter's behavior, she needed time off from work to attend to her daughter's needs and try to be sure she was safe (Tr. 133). One day in early 2009, her daughter left home and said she was going to school, but did not do so and did not return home. Respondent found an entire empty pill bottle of Motrin, and realized that her daughter had ingested the pills in an attempt to kill herself. A few days later her daughter called and said that a woman had given her change to call home because she had told the woman that she wanted to jump in front of the subway train. Her daughter came home and respondent took her to the hospital, where she was admitted and diagnosed with bipolar disorder. She was discharged after about ten days and readmitted about two weeks later, because she was hearing voices (Tr. 108, 175).

Respondent submitted proof of two hospitalizations of her daughter: one in February 24, 2009, and the other from May 12, 2009, through May 26, 2009. She also submitted documentation of doctor's appointments in March and April 2009, and an emergency room visit on April 30, 2009 (Resp. Ex. C). Respondent testified that she had a lot more documentation, but had not brought all of it to her hearing, largely because she did not know if her name would be redacted from the decision and she wanted to protect the privacy of her daughter (Tr. 122-23).

Respondent testified that in all, her daughter had four or five hospitalizations for psychiatric treatment during 2009. Her last hospitalization was in a psychiatric hospital in Westchester County, during Christmas 2009, for about 12 days (Tr. 180-81). Further, the medication which her daughter was prescribed for bipolar disorder caused her to have seizures, which are now controlled through medication. Another made her too drowsy and swelled her tongue (Tr. 178-79). Respondent testified that the rest of her family was "in denial" about the bipolar disorder so respondent was on "her own" for much of the care of her daughter (Tr. 109). This included looking for her daughter when her daughter had run away; even though her daughter's father had a car, he would not look for his daughter (Tr. 175). Also, in the "early stages," until the medication had "kind of regulated her," respondent "really needed" to be around her daughter to make sure that she was safe (Tr. 176). She needed to bring her daughter to doctor's appointments because her daughter could not be trusted to get there on her own (Tr. 177). She also needed to make sure that her daughter's blood pressure did not get too high (Tr. 176).

All this stress exacerbated respondent's bleeding condition, to the point where she had to wear diapers to go outside (Tr. 176). Respondent testified that her bleeding disorder is so severe that she at times bleeds through her clothes and is unable to travel (Tr. 170). She has undergone multiple treatments and therapies, including an endometrial biopsy on April 14, 2009 (Pet. Ex. 10). The menorrhagia was the initial reason for her absence in 2009 (Tr. 108). Respondent testified that she still suffers from the condition, and the doctors have still not determined what causes it, but that her doctor has been able to control the extent of the bleeding with medication (Tr. 111, 176).

During 2009, while her daughter was in and out of psychiatric wards, her son was facing trial on murder charges arising out of the death of a child. Respondent testified that her son had lived with her niece, and that one night, her niece beat the child to death. Her son was arraigned

on charges of second degree murder in October 2008, and after a trial held in January 2010, was found guilty of second degree murder and sentenced to 17 years to life (Tr. 109; Resp. Ex. D).

Respondent's daughter is now with family members in North Carolina, and will be resuming school (Tr. 177-78). Respondent has been back to work since April 2010, with the exception of when she was hospitalized in September 2010 for chest pains (Tr. 187). She testified that she has "always dedicated" herself to her job but that "everything just fell apart during this time period" (Tr. 187). She would like an opportunity to "continue to give the Department the 110 % I've always given them" (Tr. 187).

In prior cases, despite lengthy periods of multiple instances of AWOL, this tribunal has recommended penalties of less than termination where, as here, there were exceptional mitigating circumstances. For example, in *Dep't of Sanitation v. Burgos*, OATH Index No. 1295/00 (Aug. 11, 2000), *modified on penalty*, Comm'r Decision (Sept. 13, 2000), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD01-74-M (July 25, 2001), Judge Kramer recommended a 60-day suspension for an employee who was AWOL for four months. In that case, the employee had serious physical and emotional health problems, and testified that he was so depressed over his health that he went to Nicaragua to recover with his family and wound up staying for four months. Judge Kramer declined to recommend termination, even though the employee had a prior disciplinary history for unauthorized absence, in light of the "serious emotional and physical health issues" that respondent faced, which impaired his judgment and led to his failure to notify the agency of his whereabouts. *Burgos*, OATH 1295/00 at 17. Although the Commissioner modified the penalty to termination, the Civil Service Commission concluded on its review that "emotional and medical concerns clouded [the employee's] judgment" and "serve[s] to mitigate the severity of the penalty." NYC Civ. Serv. Comm'n Item No. CD01-74-M (July 25, 2001) at 3. Accordingly, the Commission reinstated the employee, without back pay, in effect imposing a lengthy unpaid suspension.

More recently, in *Admin. for Children's Services v. Keyes*, OATH Index Nos. 230/06 & 559/06 (Mar. 13, 2006), Judge Casey considered similar issues in recommending a two-month suspension for an employee who was AWOL on 13 occasions and late for work 47 times, noting that only recently in her lengthy tenure had attendance problems developed and that respondent had been "besieged by personal problems and family obligations." *Keyes*, OATH 230/06 & 559/06 at 9.

Although not an unauthorized absence case, Judge Maldonado's decision in *Transit Authority v. Paniagua-Castillo*, OATH Index No. 700/02 (Mar. 8, 2002) is instructive. That case involved the submission of applications for sick leave which contained fraudulent information. Although the submission of fraudulent documents usually results in termination, Judge Maldonado noted the employee's credible testimony that she had been experiencing a number of traumatic events for three years, including her divorce, declaration of bankruptcy, and her teenage son's serious illness, which required extensive hospitalization, including three surgeries, and extended treatment. Judge Maldonado concluded that the respondent's actions were "an aberration resulting from the cumulative effects of an extended period of serious adversity brought on by the illness of her son." *Paniagua-Castillo*, OATH 700/02 at 4. Also noting respondent's nine-year tenure and lack of any prior disciplinary history, Judge Maldonado concluded that the appropriate penalty was a 60-day suspension.

In this case, it is unfortunate that respondent never sought formal leave during the lengthy period that she did not report to work. Respondent was under an obligation to comply with time and leave procedures, not just call into the radio room. However, respondent is a 17-year employee with one instance of adjudicated discipline ten years ago. She has never before been disciplined for time and leave violations. She won the enforcement division's "employee of the year" in 2006. While she may have had some difficulties at work in 2008, this was around the time that her daughter began running away. Respondent's characterization of 2009-2010 being the period when "everything just fell apart" appears apt. It is difficult to conceive of more challenging circumstances than those which respondent faced: not only her personal health difficulties, but also her son's criminal case and her teenage daughter's suicide attempt and repeated psychiatric hospitalizations. Under these difficult, almost impossible circumstances, respondent did what she had to do to take care of her daughter and neglected to comply with time and leave procedures, even though she no doubt would have been granted sick leave and FMLA leave. Respondent's failure to apply for leave was no doubt an aberration stemming from the nightmarish situation which she faced. This is misconduct, but it does not mean that she should be fired. Given what respondent faced in 2009 and 2010, the concepts of mercy and fairness require a different outcome. See *Health & Hospitals Corp. (Woodhull Medical & Mental Health Center) v. Carter*, OATH Index No. 2101/06 at 16 (Nov. 2, 2006).

Accordingly, I recommend that respondent be suspended for a period of 60 days. This is the harshest penalty available under the Civil Service Law short of termination and should be sufficient to impress upon respondent the necessity of complying with all written procedures and policies. Respondent should also be on notice that similar misconduct will likely result in the termination of her employment.

Faye Lewis
Administrative Law Judge

Dec. 9, 2010

SUBMITTED TO:

JOHN J. DOHERTY

Commissioner

APPEARANCES:

MICHAEL BENNETT

Representative for Petitioner