

Dep't of Buildings v. Rodriguez

OATH Index No. 2059/12 (Oct. 1, 2012)

Petitioner demonstrated that clerical associate was excessively late and absent. Termination from employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF BUILDINGS
Petitioner
- against -
DIANNE RODRIGUEZ
Respondent

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORGNIOTTI, *Administrative Law Judge*

This employee disciplinary proceeding was referred by petitioner, the Department of Buildings ("DOB"), pursuant to section 75 of the Civil Service Law. Petitioner alleges that respondent Dianne Rodriguez, a community associate, has been excessively late and absent since July 2011, and that she made false representations regarding one of her absences (ALJ Ex. 1).

A hearing on the charges was conducted before me on September 13, 2012. Respondent failed to appear. Counsel for respondent advised that he had met with her the night before and did not know why she had not appeared for the hearing. Counsel's request to adjourn the trial was denied (Tr. 4-6). At the hearing petitioner submitted documentary evidence and the testimony of three agency witnesses. Respondent's counsel was provided an audio recording of the hearing and a continued hearing was scheduled for September 18, 2012, so that respondent could defend against the charges. On September 17, 2012, respondent's counsel advised that respondent would not appear and the record was closed.

I find that the charges should be sustained and recommend that respondent be terminated from her employment.

ANALYSIS

Respondent has been a community associate for DOB since 2003. She is responsible for picking up documents from various departments within DOB, scanning them, and making sure that the documents are published online correctly (Tr. 42).

DOB’s employee handbook (Pet. Ex. 2) sets forth the agency’s time and leave policies and the disciplinary consequences for failure to follow these rules. Respondent acknowledged receipt of the handbook on May 19, 2006 (Tr. 18-19; Pet. Ex. 2 at 28-37).

Respondent has flex time and can arrive to work between 9:00 and 9:30 a.m. If she arrives after 9:30 a.m., she is considered late (Tr. 42-43).

Petitioner alleges that since July 2011, respondent has been excessively absent, late, or otherwise not present for duty in violation of agency rules.¹ According to agency records, respondent has been absent, late, or otherwise not present as follows:²

Dianne Rodriguez		
Attendance July 1, 2011 - August 31, 2012		
Event Description	Earned Date	Detail Hours
UNSCHD LWOP	07/01/11	7 : 00
UNSCHD LWOP	07/04/11	7 : 00
UNSCHD LWOP	07/05/11	7 : 00
UNSCHD LWOP	07/06/11	7 : 00
UNSCHD LWOP	07/07/11	7 : 00
AL OTH USG	07/08/11	2 : 00
UNSCHD LWOP	07/12/11	7 : 00
UNSCHD LWOP	07/14/11	7 : 00
UNSCHD LWOP	07/15/11	7 : 00
UNSCHD LWOP	07/18/11	7 : 00
UNSCHD LWOP	07/19/11	7 : 00
AL PERS BUS	07/21/11	2 : 00
LATE EXC TRN	07/22/11	0 : 08

¹ The charges list time and leave violations through August 10, 2012. However, the proof submitted at the hearing list time and leave violations through August 31, 2012.

² UNSCHD LWOP means unscheduled leave without pay; AL OTH USG means other usage of annual leave; AL PERS BUS means annual leave for personal business; LATE EXC TRN means late excused; AWOL means absent without leave; LATE TO AL means unexcused lateness chargeable to annual leave; LATE to LWOP means unexcused lateness chargeable to leave without pay; CT USG NFLSA means compensatory time used for non Federal Leave Standards Act; UNDOC SL means undocumented sick leave; EXC-SPECIAL means special excusal.

UNDOC SL	07/26/11	7 : 00
UNSCHD LWOP	07/28/11	7 : 00
UNSCHD LWOP	07/29/11	7 : 00
AWOL	08/01/11	7 : 00
AWOL	08/02/11	7 : 00
AWOL	08/04/11	7 : 00
AWOL	08/05/11	7 : 00
AWOL	08/08/11	7 : 00
AWOL	08/10/11	7 : 00
AWOL	08/11/11	7 : 00
AWOL	08/12/11	7 : 00
UNSCHD LWOP	08/15/11	7 : 00
UNSCHD LWOP	08/16/11	7 : 00
UNSCHD LWOP	08/17/11	7 : 00
UNSCHD LWOP	08/18/11	7 : 00
UNSCHD LWOP	08/19/11	7 : 00
UNSCHD LWOP	08/22/11	7 : 00
UNSCHD LWOP	08/23/11	7 : 00
UNSCHD LWOP	08/24/11	7 : 00
UNSCHD LWOP	08/26/11	7 : 00
CT USG NFLSA	08/29/11	0 : 45
UNSCHD LWOP	09/05/11	7 : 00
UNSCHD LWOP	09/06/11	7 : 00
UNSCHD LWOP	09/07/11	7 : 00
UNSCHD LWOP	09/13/11	7 : 00
AL OTH USG	09/15/11	0 : 30
UNSCHD LWOP	09/16/11	7 : 00
UNSCHD LWOP	09/19/11	7 : 00
UNSCHD LWOP	09/20/11	7 : 00
UNSCHD LWOP	09/21/11	7 : 00
UNSCHD LWOP	09/22/11	7 : 00
UNSCHD LWOP	09/23/11	7 : 00
UNSCHD LWOP	09/26/11	7 : 00
UNSCHD LWOP	09/27/11	7 : 00
UNSCHD LWOP	09/28/11	7 : 00
UNSCHD LWOP	09/29/11	7 : 00
UNSCHD LWOP	09/30/11	7 : 00
AWOL	10/03/11	7 : 00
AWOL	10/04/11	7 : 00
AWOL	10/05/11	7 : 00
AWOL	10/06/11	7 : 00
AWOL	10/07/11	7 : 00

AWOL	10/10/11	7 : 00
AWOL	10/11/11	7 : 00
AWOL	10/12/11	7 : 00
AWOL	10/13/11	7 : 00
AWOL	10/14/11	7 : 00
AWOL	10/17/11	7 : 00
AWOL	10/18/11	7 : 00
AWOL	10/19/11	7 : 00
AWOL	10/20/11	7 : 00
AWOL	10/21/11	7 : 00
CT USG NFLSA	10/27/11	3 : 45
CT USG NFLSA	10/28/11	0 : 30
LATE TO AL	10/28/11	0 : 26
AWOL	10/31/11	7 : 00
AWOL	11/01/11	7 : 00
AWOL	11/02/11	7 : 00
AWOL	11/03/11	7 : 00
AWOL	11/04/11	7 : 00
AWOL	11/07/11	7 : 00
AWOL	11/08/11	7 : 00
AWOL	11/09/11	7 : 00
AWOL	11/10/11	7 : 00
AWOL	11/14/11	7 : 00
AWOL	11/15/11	7 : 00
AWOL	11/16/11	7 : 00
AWOL	11/17/11	7 : 00
AWOL	11/18/11	7 : 00
AWOL	11/21/11	7 : 00
LATE TO AL	11/22/11	0 : 05
AWOL	11/23/11	7 : 00
AWOL	11/24/11	7 : 00
AWOL	11/25/11	7 : 00
AWOL	11/28/11	7 : 00
AWOL	11/29/11	7 : 00
AWOL	11/30/11	0 : 30
AWOL	12/01/11	7 : 00
AWOL	12/02/11	7 : 00
LATE TO AL	12/05/11	1 : 29
LATE TO AL	12/06/11	0 : 57
LATE TO AL	12/07/11	0 : 09
UNDOC SL	12/08/11	7 : 00
LATE TO AL	12/09/11	3 : 04

LATE TO AL	12/13/11	0 : 14
AWOL	12/14/11	7 : 00
AWOL	12/15/11	7 : 00
AWOL	12/16/11	7 : 00
LATE TO AL	12/19/11	0 : 03
LATE TO AL	12/20/11	2 : 42
LATE TO AL	12/21/11	0 : 45
AL OTH USG	12/23/11	0 : 15
LATE TO AL	12/23/11	2 : 32
AWOL	12/27/11	7 : 00
LATE TO AL	12/28/11	0 : 05
AWOL	12/29/11	7 : 00
AWOL	12/30/11	7 : 00
LATE TO AL	01/04/12	0 : 53
LATE TO AL	01/05/12	0 : 20
AWOL	01/06/12	7 : 00
AWOL	01/09/12	7 : 00
LATE TO LWOP	01/10/12	2 : 29
LATE TO LWOP	01/11/12	0 : 31
AWOL	01/12/12	7 : 00
LATE TO LWOP	01/19/12	1 : 46
LATE TO LWOP	01/20/12	0 : 21
AWOL	01/23/12	7 : 00
LATE TO LWOP	01/24/12	1 : 32
LATE TO LWOP	01/26/12	0 : 11
AWOL	01/30/12	7 : 00
AWOL	02/01/12	7 : 00
AWOL	02/02/12	7 : 00
AWOL	02/03/12	7 : 00
LATE TO AL	02/06/12	0 : 01
AWOL	02/07/12	7 : 00
AWOL	02/08/12	7 : 00
AWOL	02/09/12	7 : 00
AWOL	02/10/12	7 : 00
AWOL	02/13/12	7 : 00
AWOL	02/14/12	7 : 00
LATE TO LWOP	02/16/12	0 : 45
AWOL	02/17/12	1 : 45
LATE TO LWOP	02/17/12	1 : 06
AWOL	02/21/12	7 : 00
AWOL	02/22/12	7 : 00
AWOL	02/23/12	7 : 00

AWOL	02/24/12	7 : 00
AWOL	02/27/12	7 : 00
AWOL	02/28/12	7 : 00
AWOL	02/29/12	7 : 00
AWOL	03/01/12	7 : 00
AWOL	03/02/12	7 : 00
AWOL	03/05/12	7 : 00
AWOL	03/06/12	7 : 00
AWOL	03/07/12	7 : 00
AWOL	03/08/12	7 : 00
AWOL	03/09/12	7 : 00
AWOL	03/12/12	7 : 00
AWOL	03/13/12	7 : 00
AWOL	03/14/12	7 : 00
AWOL	03/15/12	7 : 00
AWOL	03/16/12	7 : 00
AWOL	03/19/12	7 : 00
AWOL	03/20/12	7 : 00
AWOL	03/21/12	7 : 00
AWOL	03/22/12	7 : 00
AWOL	03/23/12	7 : 00
AWOL	3/26/12 - 4/11/12	91:00
AL PERS BUS	04/17/12	7 : 00
AL PERS BUS	04/23/12	1 : 00
LATE TO AL	04/23/12	1 : 41
AWOL	04/24/12	7 : 00
AWOL	04/25/12	7 : 00
AWOL	04/26/12	7 : 00
AWOL	04/27/12	7 : 00
AWOL	04/30/12	7 : 00
AWOL	05/01/12	7 : 00
AWOL	05/02/12	7 : 00
AWOL	05/03/12	7 : 00
AWOL	05/04/12	7 : 00
AWOL	05/07/12	7 : 00
AWOL	05/08/12	7 : 00
AWOL	05/09/12	7 : 00
AWOL	05/10/12	7 : 00
AWOL	05/11/12	7 : 00
AWOL	05/14/12	7 : 00
AWOL	05/15/12	7 : 00
AWOL	05/16/12	7 : 00

AWOL	05/17/12	7 : 00
AWOL	05/18/12	7 : 00
AWOL	05/21/12	7 : 00
AWOL	05/22/12	7 : 00
AWOL	05/23/12	7 : 00
AWOL	05/24/12	7 : 00
AWOL	05/25/12	7 : 00
AWOL	05/28/12	7 : 00
AWOL	05/29/12	7 : 00
AWOL	05/30/12	7 : 00
AWOL	05/31/12	7 : 00
AWOL	06/01/12	7 : 00
AWOL	06/04/12	7 : 00
AWOL	06/05/12	7 : 00
AWOL	06/06/12	7 : 00
AWOL	06/07/12	7 : 00
AWOL	06/08/12	7 : 00
AWOL	06/11/12	7 : 00
AWOL	06/12/12	7 : 00
AWOL	06/13/12	7 : 00
AWOL	06/14/12	7 : 00
AWOL	06/15/12	7 : 00
AWOL	06/18/12	7 : 00
AWOL	06/19/12	7 : 00
AWOL	06/20/12	7 : 00
AWOL	06/21/12	7 : 00
AWOL	06/22/12	7 : 00
LATE TO AL	06/26/12	0 : 38
AWOL	06/27/12	7 : 00
LATE TO AL	06/28/12	0 : 17
AWOL	06/29/12	7 : 00
AWOL	07/02/12	7 : 00
AWOL	07/03/12	7 : 00
LATE TO AL	07/05/12	3 : 35
AWOL	07/06/12	7 : 00
AWOL	07/09/12	7 : 00
AWOL	07/10/12	7 : 00
AWOL	07/11/12	7 : 00
LATE TO AL	07/12/12	1 : 34
LATE TO AL	07/13/12	3 : 56
AWOL	07/16/12	7 : 00
EXC-SPECIAL	07/17/12	7 : 00

LATE TO AL	07/18/12	0 : 10
LATE TO AL	07/19/12	0 : 11
LATE TO AL	07/20/12	0 : 11
AWOL	07/23/12	7 : 00
AL PERS BUS	07/24/12	4 : 00
LATE TO AL	07/24/12	2 : 16
AWOL	07/25/12	7 : 00
AWOL	07/26/12	7 : 00
AWOL	07/27/12	7 : 00
AWOL	07/30/12	7 : 00
AWOL	07/31/12	7 : 00
AWOL	08/01/12	7 : 00
AWOL	08/02/12	7 : 00
AWOL	08/03/12	7 : 00
AWOL	08/06/12	7 : 00
AWOL	08/07/12	7 : 00
AWOL	08/08/12	7 : 00
AWOL	08/09/12	7 : 00
AWOL	08/10/12	7 : 00
AWOL	08/13/12	7 : 00
AWOL	08/14/12	7 : 00
AWOL	08/15/12	7 : 00
AWOL	08/16/12	7 : 00
AWOL	08/17/12	7 : 00
AWOL	08/20/12	7 : 00
AWOL	08/21/12	7 : 00
AWOL	08/22/12	7 : 00
AWOL	08/23/12	7 : 00
AWOL	08/24/12	7 : 00
AWOL	8/27/12 - 8/29/12	21:00
LATE TO AL	08/30/2012	0 : 07
LATE TO AL	08/31/2012	0 : 02

(Pet. Ex. 1).

According to the DOB employee handbook, “Regular attendance is an implicit and essential job requirement” (Pet. Ex. 2 at 28). Indeed, attendance has been found to be an “essential function” of most jobs. *Lyons v. Legal Aid Society*, 68 F.3d 1512, 1516 (2d Cir. 1995) (“It is clear that an essential aspect of many jobs is the ability to appear at work regularly and on time”); see also *Shepherd v. City of New York*, 577 F. Supp. 2d 669, 676 (S.D.N.Y. 2008), *aff’d*, 360 Fed. Appx. 249 (2d Cir. 2009) (“Another essential function that would necessarily be

required of a [Department of Correction] Captain is reporting to work.”). The broad language of the opinions on attendance “may be applied equally to absence and tardiness.” *McMillan v. City of New York*, 2011 U.S. Dist. LEXIS 95062 at 17 (S.D.N.Y. Aug. 23, 2011); *see also Mislek-Falkoff v. IBM Corp.*, 854 F. Supp. 215, 227 (S.D.N.Y. 1994), *aff’d*, 60 F.3d 811 (2d Cir. 1995) (“some degree of regular, predictable attendance is fundamental to most jobs”).

In cases where excessive absence is charged but not specifically defined by agency regulations, this tribunal has examined three circumstances that establish misconduct: (1) absences which are so extensive in number that they are excessive *per se*; (2) absences which are excessive because of the adverse impact they have on office efficiency and operations; and (3) absences which are excessive based on circumstances surrounding the missed days of work. Factors considered in evaluating these circumstances include the availability of leave accruals, the lack of advance notice, the timing of such absences in relation to weekends and holidays, the legitimacy of the need for the absences, and whether respondent was ever warned that the absences were considered excessive. *Health & Hospitals Corp. (Harlem Hospital Ctr.) v. Pabon*, OATH Index No. 270/04 at 3 (Oct. 29, 2003); *Bd. of Education v. Hunter*, OATH Index No. 384/90 at 35-26 (Mar. 5, 1990), *aff’d in part, rev’d in part*, Bd. Dec. (Apr. 16, 1990), *aff’d* 190 A.D.2d 851 (2d Dep’t 1993).

Between July 11, 2011, and August 31, 2012, respondent was absent from work on approximately 223 occasions including being AWOL on 182 occasions, using unscheduled leave without pay on 36 occasions, and taking undocumented sick leave on two occasions in contravention to directives from her supervisors (Tr. 49; Pet. Exs. 3, 5, 18). In the same 13-month period respondent was late on 35 occasions for a total of 35 hours and 26 minutes. According to agency records, of the 293 days worked during the charged period, respondent had attendance issues 257 times (Pet. Exs. 2, 11).

Here, the sheer number of absences is excessive *per se*. *Fire Dep’t v. A. G.*, OATH Index No. 771/12 (July 5, 2012) (165 absences in two-year period excessive *per se*). Indeed, far fewer absences from the workplace have been deemed excessive. *See Health & Hospitals Corp. (Bellevue Hospital Ctr. v. Seabrook*, OATH Index No. 1089/12 at 6 (May 4, 2012) (23 unscheduled absences in 17 months excessive *per se*); *Health & Hospitals Corp. (Harlem Hospital Ctr.) v. Rhines*, OATH Index No. 1888/10 at 3 (June 4, 2010) (14 unscheduled absences in 13 months excessive *per se*); *Pabon*, OATH 270/04 at 4 (finding 57 absences over a 13 month period excessive); *Health & Hospitals Corp. (Metropolitan Hospital Ctr.) v. Coley*, OATH Index

No. 2044/96 at 7 (Sept. 11, 1996) (21 absences in nine months excessive *per se*); *Dep't of Parks & Recreation v. Lenoble*, OATH Index No. 823/91 at 9 (Apr. 30, 1991), *aff'd*, NYC Civ. Serv. Comm'n Item No. 92-43 (Apr. 9, 1992) (69 unauthorized absences in 15-months excessive).

To the extent some of the absences may have been approved, it is irrelevant to whether respondent's pattern of unscheduled absences is excessive. *Health & Hospitals Corp. (Elmhurst Hosp. Ctr.) v. J.E.*, OATH No. 248/11 at 5 (Sept. 14, 2011); *see also Cicero v. Triborough Bridge & Tunnel Auth.*, 264 A.D.2d 334, 336 (1st Dep't 1999) (the fact that petitioner's absences were authorized was irrelevant to whether "his unreliability and its disruptive and burdensome effect on the employer rendered him incompetent to continue his employment"); *Transit Auth. v. Montgomery*, OATH Index Nos. 1144/99 & 1145/99 at 4-5 (July 15, 1999), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 00-33-SA (Apr. 6, 2000) (excessive absenteeism shown even though absences approved).

Additionally, there are aggravating factors to support a finding that respondent's absences were excessive. Many of the absences were before or after a regularly scheduled day off. Respondent's leave balances during the applicable period were generally low and 34 days were taken as leave without pay. Moreover, between July 20, 2011, and June 25, 2012, respondent was given 16 verbal and written counselings and warnings regarding her absences and lateness (Tr. 29-32, 47-54, 73-75; Pet. Exs. 3, 4, 5, 13, 16, 17, 18). Despite these notices, respondent continued to be excessively late and absent. In April 2012 disciplinary proceedings were commenced (Pet. Exs. 7, 8, 9, 10) and she still continued to be late and absent.

Similarly, respondent's lateness on 35 occasions for a total of 35 hours and 26 minutes is excessive. *See Seabrook*, OATH 1089/12 at 3 (20 occasions of lateness for a total of 439 minutes in an 18-month period found to be excessive). On at least 12 of these occasions, respondent's tardiness exceeded an hour with several exceeding two and three hours.

I also credit the testimony of Mr. Roman, who was respondent's supervisor, that her absences and tardiness have an adverse impact on operations in the agency. Mr. Roman testified that when respondent is late or absent, he has to pull people away from their duties to do her work because documents need to be scanned within a certain timeframe. This not only takes time away from his work but it requires him to do their work to pick up the slack. Sometimes work in the unit is not completed on time (Tr. 44, 67).

Finally, the record supports a finding that respondent falsely represented to Mr. Roman her need for sick leave. Mr. Roman testified that respondent requested annual leave for July 25

through July 31, 2012, so that she could travel with her son to Florida. Due to previously scheduled vacations of other staff members, Mr. Roman denied the request (Tr. 57-58; Pet. Ex. 15). On July 20, respondent provided Mr. Roman with a note saying that she needed bed rest between July 25 and 31, 2012 (Tr. 55-57; Pet. Ex. 14). Respondent did not appear for work and was marked AWOL from July 25, through August 29, 2012. According to the chief administrative officer at DOB, when she reported to work at the end of August respondent claimed that she had been approved to go to Florida with her son (Pet. Ex. 12). On this record it is reasonable to find that unhappy with her denial of annual leave, respondent obtained a note from a doctor to excuse her absence based on false medical needs.

FINDINGS AND CONCLUSIONS

1. Respondent was excessively late and absent as charged.
2. Respondent misrepresented the need for sick leave as charged.

RECOMMENDATION

Upon making the above findings, I reviewed a summary of respondent's personnel history. She was appointed in 2003. She has no prior disciplinary history.

Excessive absenteeism routinely results in termination of employment. *See A. G.*, OATH No. 771/12 (termination from employment where employee was absent 165 times in a two-year period and was also excessively late); *Seabrook*, OATH 1089/12 at 10 (termination from employment where employee was absent 23 times in 17 months and was also excessively late); *Dep't of Correction v. Peters*, OATH Index No. 1118/03 at 5-6 (Sept. 24, 2003) (termination of employment where employee used 69 sick days in 12 months); *Dep't of Correction v. Purcell*, OATH Index No. 1336/96 at 18 (July 8, 1996), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 97-106-SA (Nov. 21, 1997) (termination of employment deemed the "only appropriate penalty" where employee used 90 sick days in 12 months); *Bd. of Education v. Gomez*, Bd. Dec. (Jan. 10, 1985), *modifying*, OATH Index No. 228/84 (Nov. 13, 1984), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 88-64 (May 12, 1988), *aff'd sub nom. Gomez v. NYC Civ. Serv. Comm'n*, NYLJ, Dec. 29, 1988, at 26, col. 4 (Sup. Ct. N.Y. Co. 1988) (employment terminated for time and leave violations, including 46 absences and 129 latenesses in one year, despite lack of prior disciplinary record); *see also Chaffer v. Bd. of Education of the City School Dist. of City of Long Beach*, 229 F. Supp.2d 185 (E.D.N.Y. 2002), *aff'd*, 75 Fed. Appx. 12 (2d

Cir. 2003) (upholding termination of employment of school groundskeeper who was absent more than 87 times within 18 months).

Respondent received ample warnings throughout the charged 13-month period that she needed to improve her time and attendance. Instead of improving she continued to be late and absent. Respondent's deception about her need for sick leave when her annual leave was denied is a further aggravating factor. Since respondent was on notice that her conduct was unacceptable and was given ample opportunity to correct it, termination does not violate the principle of progressive discipline. *Dep't of Correction v. Davis*, OATH Index No. 238/03 at 21 (Mar. 28, 2003), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 04-04-SA (Jan. 26, 2004) (termination for respondent who showed himself to be "a major time and leave rule violator," "contemptuous of the most elemental rules of the workplace," and "devious and generally untrustworthy"); *Sanchez v. Bd. of Education*, Civil Service Comm'n Item No. CD 85-1 (Jan. 7, 1985) (termination of employee lacking previous disciplinary record for extended absenteeism without authorization, lateness, and failure to perform work assignments, does not violate progressive discipline). Moreover, since respondent failed to appear for the hearing no mitigation was offered and none is apparent from the record. Accordingly, I recommend termination of respondent's employment.

Alessandra F. Zorgniotti
Administrative Law Judge

October 1, 2012

SUBMITTED TO:

ROBERT D. LIMANDRI
Commissioner

APPEARANCES:

KEVIN SCHULTZ, ESQ.
Attorney for Petitioner

ALAN ROBERTS, ESQ.
Attorney for Respondent