Human Resources Admin. v. Griffin

OATH Index No. 941/12 (May 10, 2012), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 12-52-SA (Oct. 26, 2012)

Evidence established that respondent failed to report to new work location, engaged in insubordinate and unprofessional conduct, was repeatedly absent without leave, and has been continuously absent without leave since November 28, 2011. Termination of employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
HUMAN RESOURCES ADMINISTRATION
Petitioner
-against-
ANISAH GRIFFIN
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner, the Human Resources Administration, brought this employee disciplinary proceeding against respondent, caseworker Anisah Griffin, under section 75 of the Civil Service Law. Petitioner alleged that respondent failed to report to a new work location, was repeatedly absent without leave, and engaged in insubordinate and unprofessional conduct (ALJ Ex. 1).

At a three day hearing, which concluded on March 16, 2012, petitioner relied on testimony from eight witnesses and offered documentary evidence. Respondent testified in her own behalf and also presented documentary evidence.

For the reasons below, I find that petitioner has proved the charges and recommend termination of respondent's employment.

ANALYSIS

Background

Petitioner hired respondent as a caseworker in 2000 (Tr. 9, 13, 336). She was first assigned to a back-to-work program where she helped clients find employment (Tr. 358). In 2007, petitioner transferred respondent to the agency's headquarters on Water Street in lower Manhattan, where she performed analysis and had less client contact (Tr. 400, 451-52).

In 2011, petitioner disbanded respondent's unit. Seven supervisors and nine caseworkers were transferred from headquarters to locations with more client contact. On April 8, 2011, petitioner sent an e-mail regarding the transfer to respondent and other members of her unit. At a "recruitment pool" on April 12, scheduled from 9:00 a.m. to 2:00 p.m., employees listed three preferred locations (Tr. 151, 153). Reassignments were on a first-come, first-served basis with consideration given to employee preferences and seniority (Tr. 149-50, 155; Pet. Exs. 13, 14).

Respondent took annual leave on the morning of April 12 and did not get to the recruitment pool until the afternoon (Tr. 403; Pet. Ex. 3). By then, the selection process was over (Tr. 154, 158, 188). The next day, respondent and other members of her unit received their new assignments, via e-mail (Tr. 161; Pet. Exs. 1, 14). Respondent was reassigned to a back-to-work location in Far Rockaway, Queens (Pet. Ex. 1). Because respondent and a co-worker did not attend the recruitment pool, their transfers were deemed "involuntary" (Tr. 158; Pet. Ex. 1).

Petitioner alleged that respondent: failed to report to her new location, engaged in unprofessional behavior, was repeatedly AWOL, and has not been to work since November 2011. Denying misconduct, respondent testified that her commute from her home in Long Island City to Far Rockaway was a hardship, she was told that she did not have to report to work until a better location could be found, a disability prevented her from working with clients, and the Far Rockaway office was a hostile environment. Because petitioner's evidence was more persuasive than respondent's, the charges should be sustained.

Failure to Report to Far Rockaway

Petitioner alleged that, between April and June 2011, respondent received orders to begin working in Far Rockaway on June 6 and, despite those orders, she continued to go to Water

Street (ALJ Ex. 1, Complaint 2392-11). The evidence showed that respondent was permitted to report to Water Street on the morning of June 6; however, she committed misconduct by staying there the entire day and returning there on June 7 and 9.

Respondent received three e-mails advising her to report to Far Rockaway (Tr. 17-18; Pet. Ex. 1). The first e-mail, sent April 13, notified respondent of the new location but it did not specify the transfer date (Pet. Ex. 1). The second and third e-mails, sent May 24 and June 3, respectively, included the June 6 start date (Pet. Ex. 1). Respondent claimed that she had no prior notice of that date (Tr. 406). Although respondent was not at work on May 24 or June 3, she was at work on June 1 (Pet. Ex. 3). She had ample opportunity to see the May 24 e-mail. Her professed lack of knowledge about the start date, affecting her entire unit, was not credible.

However, respondent was required to report to Water Street on June 6 to attend to other business. On June 2, she received a two-day suspension for an unrelated matter (Pet. Ex. 5). Respondent went to the employee discipline unit on June 6 to be reinstated (Tr. 82-83). After reinstatement, respondent should have proceeded to Far Rockaway. Mark George, from the employee discipline unit, credibly testified that he gave respondent a form confirming her return from suspension and listing her new location (Tr. 82-83; Pet. Ex. 6). He recalled that respondent expressed displeasure about the new location, she complained that it was too far to travel, and said that she was "not going to go" there (Tr. 85-86). George told her that she could apply for a travel hardship transfer but that she had to report to the new location (Tr. 86, 122). He noted that respondent "stormed" out of his office (Tr. 86).

Respondent testified that she went directly to George's office on June 6, but she did not recall receiving the reinstatement form (Tr. 409). According to respondent, after reinstatement she returned to her desk at Water Street because she had unfinished work, her belongings were at her desk, and her union was attempting to meet with management regarding her transfer (Tr. 410).

The next day, June 7, respondent again reported to Water Street. She was supposed to meet with her supervisor, Fernando Lopez, at 4:00 p.m., but he arrived a few minutes late and respondent left. Lopez did not see respondent until after 6:00 p.m. (Tr. 57-58). When he tried to

hand her a memorandum regarding her failure to report to Far Rockaway, she refused to accept it (Tr. 19, 21; Pet. Ex. 1). Respondent said that she was "off the clock" (Tr. 22, 71).

Respondent called in sick on June 8 and returned to Water Street on June 9 (Tr. 23). Later that morning, an assistant to a deputy director told respondent that she had to leave the building and report to the new location, or else she would be escorted out of the building by security. Respondent left but did not go to Far Rockaway (Tr. 24-25, 163, 167; Pet. Ex. 3).

Even if respondent could be excused from reporting to Far Rockaway on June 6, there was no excuse for her refusal to go there on June 7 or 9. By the end of the day on June 6, respondent had received the May 24 and June 3 e-mails and she had received explicit written and oral instructions from George to report to her new location. I did not credit respondent's claim that she could not recall receiving the reinstatement form. Nor did I credit her claim that she first learned of the transfer date on June 9, when petitioner threatened to have her escorted from her former office. The more likely reason for respondent's failure to go to Far Rockaway is the one that she gave to George on the morning of June 6 – she was unhappy about the lengthy commute.

By failing to report to her new location, and returning to her former office on Water Street, respondent committed insubordination. *See Health & Hospitals Corp. (Bellevue Hospital Ctr.) v. Tanvir*, OATH Index No. 797/10 at 5 (Dec. 17, 2009) (to prove insubordination, petitioner must establish that an unambiguous order was communicated to employee and employee willfully refused to obey the order); *see also Human Resources Admin. v. Shehid*, OATH Index No. 1603/05 at 3 (Aug. 26, 2005) (insubordination committed by failing to report to reassigned work location); *Transit Auth. v. Merrit*, OATH Index No. 963/97 (Oct. 30, 1997) (same). This charge should be sustained.

AWOL

Petitioner alleged that respondent was continuously AWOL from June 10 to July 15, 2011 (ALJ 1, Complaint 2392-12, Charge 1); AWOL for all or part of the day on 25 occasions, for more than 100 hours, from July 18 to August 24, 2011 (Complaint 2392-14, Charge V); continuously AWOL from September 26 to October 14, 2011 (Complaint 2392-13, Charge I); and continuously AWOL from November 28, 2011 to date (Complaint 2392-15, Charge I) (ALJ

Ex. 1). The evidence showed that respondent was absent on all of those occasions and she never received approval for any of those absences (Tr. 501; Pet. Ex. 3).

After respondent left the Water Street offices on June 9, she did not return to work until July 18 (Pet. Ex. 3; Tr. 43). From July 18 to August 24, she often arrived late, left early, or did not show up for work at all (Pet. Ex. 8; Tr. 91-93). On August 24, 2011, a grievance from an earlier disciplinary action was decided and respondent was suspended for 30 days (Tr. 69, 93; Pet. Ex. 9). The suspension notice, sent to respondent via express mail, instructed her to report to the disciplinary unit on Water Street for reinstatement on September 26 (Tr. 96-97, 126; Pet. Ex. 9). Respondent failed to report to work on September 26 (Tr. 46). Additional letters were sent to her home advising her that she was AWOL and directing her to contact her supervisor and the employee discipline unit (Tr. 51-52; Pet. Exs. 4, 10).

On October 14, 2011, respondent reported to the employee discipline unit and received a decision from another grievance advising her that she would be suspended for an additional 45 days (Tr. 102-03, 117, 130, 312; Pet. Ex. 11). The suspension notice, which respondent refused to sign, advised her to report back to the employee discipline unit on November 28, 2011 (Tr. 315, 335, Pet. Ex. 11). Respondent did not return on November 28 and, by the time of the hearing in March 2012, she had not reported back to work (Tr. 46-47, 104-05).

As for her June 10 to July 15 absences, respondent claimed that she was told that she could stay home while her union and management negotiated a transfer to a closer location (Tr. 404, 413-15, 472). Respondent also said that she suffered from anxiety and was unable to work with clients. She referred to an altercation with "volatile" clients in 2007, including one client who threw a chair at her (Tr. 404). According to respondent, after she said that she would "appreciate" not working in the back-to-work program, her union intervened and management transferred her and promised her that she would not return to that program (Tr. 404-05).

There was no credible evidence to support respondent's claims that management promised her that she never had to work with clients again or that there were ongoing negotiations regarding her transfer. Respondent did not produce any documents or call any witnesses, such as a union representative, to support either claim. Instead, respondent testified that it was her "assumption" that she would never be reassigned to the back-to-work program

(Tr. 405). And there was no reliable evidence that anyone told her to "stay home" from June 10 to July 15. It is unlikely that a manager or union representative would have told respondent that she did not have to go to work (Tr. 170). On the contrary, petitioner made clear that it expected her to work. Petitioner sent respondent a letter on June 21 advising that she had been absent for five days and that she needed to contact her supervisor (Tr. 29; Pet. Ex. 2). On June 29, petitioner sent her a letter notifying her that she was AWOL and facing disciplinary action (Tr. 87-89; Pet. Ex. 7).

Respondent also offered no plausible explanation for her sporadic, unauthorized absences from July 18 to August 24. She only testified about one of those days, July 19, and her explanation did not make sense. Respondent arrived for work two and one-half hours late, at 12:30 p.m. (Tr. 48; Pet. Ex. 3). She testified that, because it would take two hours for her to travel from Long Island City to Far Rockaway by subway, she decided to try the bus and it took three hours (Tr. 424-25). It is doubtful that respondent thought that the bus would be faster than the subway. Even if one accepted that excuse, it meant that she left Long Island City at 9:30 a.m. to get to work in Far Rockaway by 10:00 a.m., her scheduled starting time. At best, respondent was negligent; at worst, she took deliberate efforts to ensure that she would be late for work.

Furthermore, respondent offered no explanations for the remaining 24 occasions of unauthorized lateness or absences from July 18 to August 24. During that period, respondent took seven unauthorized days off. When she reported to work, she never showed up on time. Instead, she was always at least 90 minutes late and routinely two hours late (Pet. Ex. 3).

Respondent expressed confusion about the suspensions that she served in 2011 (Tr. 443). At first, she testified that she did not receive any documentation regarding the 30-day sentence imposed August 24, but she later conceded that she received notification by mail (Tr. 509-10). Respondent acknowledged that she received another suspension and that she was supposed to report back to work on November 28, but she also claimed that she did not report back to work on that date because she received another 60-day suspension (Tr. 510-11).

There was no credible evidence to support respondent's claim that she received a 60-day suspension beginning November 28 (Tr. 73-75; Pet. Ex. 5). The last suspension imposed was for

45 days, ending November 28. Indeed, petitioner sent respondent a written notice on December 5 advising her that she had been AWOL since November 28 (Tr. 105, 107; Pet. Ex 12).

Respondent also testified that she has not returned to Far Rockaway because it was a hostile environment (Tr. 444). There was no support for this claim. Contrary to respondent's suggestion, management did not conspire to punish her by sending her to that location. If respondent had arrived earlier for the recruitment pool, she could have been transferred to a more convenient location of her choosing. Although the Far Rockaway office was inconvenient, it was not hostile. Her supervisor credibly testified that she was delighted to have respondent assigned there because they needed the help (Tr. 219-20).

In sum, respondent offered no credible defense to the AWOL allegations. Those charges should be sustained.

Insubordination and Discourtesy

Petitioner alleged that when respondent eventually reported to the Far Rockaway office she engaged in additional acts of insubordination and unprofessional behavior (ALJ Ex. 1). Supervisor Yvonne Prince claimed that respondent refused to go to training on July 19 (Complaint 2392-14, Charge I, specification 1). That same day, respondent reportedly prevented site director Samantha Goldstein from setting up respondent's e-mail account (Complaint 2392-14, Charge I, Specification 2). On July 19 and 20, respondent covered the windows of her office with paper, to prevent anyone from looking inside and she refused to take the paper down (Complaint 2392-14, Charge I, Specification 3). On July 21 and 22, respondent was heard yelling, cursing, and slamming things in her office (Complaint 2392-14, Charge II, Specifications 1, 2). Respondent denied any wrongdoing.

When respondent arrived at the Far Rockaway office, at 12:30 p.m. on July 19, Prince called her supervisor, Lopez, to tell him that respondent had arrived (Tr. 222). Lopez told Prince that respondent needed to report to Water Street for training at 2:00 p.m., because she had missed an earlier session connected with the transfer (Tr. 66, 169, 223). When Prince tried to pass that order along, respondent told her to "write me up" because she would not go to training (Tr. 223).

Later that day, Goldstein tried to set up respondent's e-mail account (Tr. 224). However, respondent sat in front of her computer and would not move (Tr. 224). Respondent said that she did not feel well and she told Goldstein, "I'm not moving" and "write me up" (Tr. 224). According to Goldstein, respondent said that she did not "give a fuck" and did not "give a shit" about the work that had to be done (Tr. 257).

On July 20, Goldstein told respondent to remove papers covering the windows to her office (Tr. 258). Respondent said that she did not want clients looking at her (Tr. 258). When respondent refused to remove the papers, Goldstein directed someone else to take them down (Tr. 258). However, respondent put the papers back up again (Tr. 258). Goldstein also testified that seven or eight people, including three or four clients, told her that respondent was cursing and yelling in her office on July 19 and 20 (Tr. 257, 266, 271, 281; Pet. Ex. 20). In addition, Goldstein heard respondent banging or throwing things inside her office (Tr. 272).

Supervisor Stephen Alexander heard respondent yelling and using profanity during a phone conversation on July 21 (Tr. 287). Although respondent was inside her office, "everyone" could hear what she was saying (Tr. 290). Alexander knocked on the door, but respondent did not answer (Tr. 287). According to Alexander, respondent had covered the windows to her office with paper (Tr. 288). He told her to remove that paper because he needed to see inside the office for the protection of clients and employees (Tr. 288).

Prince gave respondent a memorandum regarding her behavior (Tr. 225; Pet. Ex. 18). On the memorandum, respondent wrote that, following her arrival at the Far Rockaway office, she had hypertension, severe migraine headaches, and extreme nervousness (Pet. Ex. 18). She noted, "This place is isolated" and "too far" from her home (Pet. Ex. 18).

Conceding that she arrived two and one-half hours late on July 19, her first day at the Far Rockaway office, respondent claimed that she was at the location for an hour before Prince told her about the 2:00 p.m. training on Water Street (Tr. 428). By that time, respondent claimed, it was too late to travel to lower Manhattan (Tr. 489). She did not go to the training because it would have been over by the time she got there (Tr. 489). However, respondent offered conflicting explanations. At first, she testified that Prince told her about the training after giving her a tour of the facility. On cross-examination, respondent testified that the tour only took five

minutes, but she also went to lunch before Prince mentioned the training (Tr. 487). Respondent denied that she "refused" to go to training; she said that her supervisors came to an agreement and she assumed that she would go another day (Tr. 429).

Respondent denied that she was uncooperative when Goldstein tried to set up her e-mail (Tr. 430). According to respondent, she was not feeling well and she offered to "move over" when Goldstein arrived at her desk (Tr. 430). Goldstein told respondent that she had to get up from her chair (Tr. 430). Respondent asked, "Get up?" and "Don't you want to just get a chair?" (Tr. 305). At this point, respondent claimed, Goldstein said that she did not "have time for this" and walked away (Tr. 305). Respondent testified that Goldstein, who was eight months pregnant at the time, was "hormonal" and "had an attitude" (Tr. 430, 432, 492).

Acknowledging that she covered her office window with papers, respondent testified that she felt uncomfortable and nervous with clients looking at her (Tr. 432, 493). Respondent acknowledged that she kept putting the papers back up after being told that they were removed for safety reasons (Tr. 433). According to respondent, supervisors stopped taking the papers down and "we came to a compromise" (Tr. 495). She kept her door open and her supervisor let her keep the papers up on the windows (Tr. 495). Respondent denied yelling, raising her voice, or cursing at anyone (Tr. 425, 446, 495-96).

The insubordination charges should be sustained. Petitioner's witnesses were more credible than respondent. Prince, Goldstein, and Alexander all impressed me as experienced professionals. They had little or no prior knowledge of respondent, no reason to fabricate claims against her, and vivid recollections of their dealings with her. In particular, I credited Prince's claim that, shortly after arriving at 12:30 p.m., respondent was directed to go to the training in Manhattan and she refused to do so. There was no support for respondent's claims that Prince waited an hour before mentioning the training or that there was an agreement to attend a future session. Similarly, I credited Goldstein's claim that respondent refused to allow access to her computer. Such behavior, including respondent's request to be "written up," was consistent with her pattern of non-cooperation. Likewise, there was no agreement to let respondent obstruct her window. She defiantly refused to comply with directives. All of this conduct was insubordinate.

See Health & Hospitals Corp. (Central Office) v. Jimoh, OATH Index No. 979/06 at 4 (Apr. 10, 2006) (failure to move from office to cubicle deemed insubordinate).

I also credited petitioner's evidence that respondent inappropriately yelled, used profanity, and made loud noises in her office. Employees may express disagreement at the workplace but it is not permissible to engage in loud, profane, or disruptive conduct. *Human Resources Admin. v. Kaplan*, OATH Index No. 1369/90 at 17 (Oct. 25, 1990), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 92-15 (Jan. 31, 1992) (misconduct established where employee resorted to name calling and profanities and disrupted a meeting attended by outside guests). Respondent's repeated disruptions triggered complaints from co-workers and clients, and were loud enough to draw the attention of different supervisors. This was misconduct.

Failure to Accommodate Alleged Disability

Respondent asserted that she suffered from post-traumatic disorder and she faulted petitioner for failing to accommodate her disability. This claim lacked merit.

According to respondent, she brought a note from a social worker/psychoanalyst to petitioner's personnel department on July 18. The note indicated that respondent suffers from post-traumatic stress disorder, which interferes with her "ability to work in situations where aggression or hostility might be found" (Resp. Ex. A). According to the note, respondent would require continued treatment for at least three more months and she was "able and willing" to work in a non-threatening environment, "such as an office setting where there is no client contact" (Resp. Ex. A). Respondent testified that she suffered from anxiety related to her prior experience with clients and the death of her infant child in 2008 (Tr. 418-19, 422). According to respondent, Roger McKenzie and Iris Muriel, two employees from the personnel department, refused to accept the note because it said that she could not work with clients (Tr. 19).

McKenzie and Muriel testified that they met with respondent on July 18 and talked with her about her new assignment in Far Rockaway (Tr. 357). Muriel noted that respondent was eligible for a travel hardship transfer because she lived two hours from the new location, but there were no vacancies available for caseworkers (Tr. 351). Respondent would have to report to her new location until there was an opening at a closer location (Tr. 370). McKenzie and Miller

also talked to respondent about the Family Medical Leave Act, but respondent was not interested (Tr. 350). They read respondent's note and Muriel recalled that it referred to "no client contact" (Tr. 358). Muriel did not think that respondent's request could be reasonably accommodated because client contact was a fundamental part of being a caseworker (Tr. 346, 358). However, Muriel wanted to show the note to a supervisor to see whether respondent qualified for an accommodation (Tr. 347, 358). But respondent demanded the note back and would not let Muriel copy it (Tr. 346-47). Respondent, who was very loud and upset during the meeting, eventually stormed out (Tr. 181-82, 362-63).

Anti-discrimination laws may form the basis of an affirmative defense in an employee disciplinary action. *See Human Resources Admin. v. Varone*, OATH Index No. 457/95 at 9 (Mar. 17, 1995). The American with Disabilities Act (ADA) prohibits employment discrimination "against a qualified individual with a disability." 42 U.S.C.A. § 12112(a) (Lexis 2012). The Human Rights Laws of New York State and New York City employ similar language but afford broader protections. *See* Exec. Law § 296(1)(a) and Admin. Code § 8-107(1)(a); *see Phillips v. City of New York*, 66 A.D.3d 170, 176 (1st Dep't 2009).

To prevail on this defense, respondent must show that she has a disability; she is otherwise qualified to perform the essential functions of her job, with or without reasonable accommodation; and petitioner denied her request for a reasonable accommodation. 42 U.S.C.A. § 12111(8) (Lexis 2012); *see also* Exec. Law § 292(21)(a); Admin. Code § 8-102(16)(a); *Pimentel v. Citibank, N.A.*, 29 A.D.3d 141, 148 (1st Dep't 2006); *Dep't of Correction v. Swannick*, OATH Index No. 899/07 at 3-4 (Feb. 16, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 07-87-SA (Aug. 14, 2007). An employer's obligation to provide a reasonable accommodation is triggered by a request from the employee which should include information regarding the nature of the disability and the requested accommodation. Admin. Code § 8-107(15)(a); *see Dep't of Correction v. Astacio*, OATH Index No. 1715/99 at 5 (July 14, 1999), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 01-36-SA (Apr. 17, 2001). Respondent failed to show that she requested a reasonable accommodation, that she has a disability, or that she is otherwise qualified to perform the duties of a caseworker.

As a preliminary matter, respondent's claim regarding the July 18 meeting is not a defense to the charges that she failed to report to the Far Rockaway site in June 2011 or that she was AWOL from June 10 to July 15, 2011. *See Health & Hospitals Corp. (Metropolitan Hospital Ctr.) v. Ricketts*, OATH Index No. 2386/09 at 5 (June 22, 2009), *aff'd*, 88 A.D.3d 593 (1st Dep't 2011) (disability not a defense where employee never requested reasonable accommodation prior to absences); *Human Resources Admin. v. Hampton*, OATH Index No. 517/08 at 11 (Dec. 12, 2007) (accommodation request is not a defense to earlier misconduct). Similarly, respondent's claim of disability would not be a defense to the charges of insubordination or unprofessional behavior that occurred at the Far Rockaway site. Even if respondent has a disability that prevented her from working with clients, it did not excuse her failure to report to training, denial of computer access, and refusal to allow a view of her office. Nor would her disability relieve her of the obligation to behave in a professional manner in the workplace.

Respondent's claimed disability is also questionable. *See Ricketts*, OATH 2386/09 at 6-7 (rejecting claim that momentary attack of diabetes caused full-day absence); *Astacio*, OATH 1715/99 at 7 (rejecting ADA claim in part because employee's testimony regarding request for accommodation was highly suspect). As noted, respondent's testimony generally lacked credibility. Although she claimed that her anxiety prevented her from dealing with clients at a back-to-work facility, it appeared that respondent's real objection to Far Rockaway was that it was too far from her home in Long Island City. Indeed, respondent testified that she was willing to work, temporarily, at a location closer to home until a solution could be found to her desire to complain about going to a back-to-work location (Tr. 472-73). This suggests that her stated inability to work with clients was a pretext or merely a preference.

Even assuming that respondent's note demonstrated that she had a disability, her claim must fall because she prevented petitioner from engaging in an interactive process. As the First Department has held, "the first step in providing a reasonable accommodation is to engage in a good faith interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested." *Phillips*, 66 A.D.3d at 176. However, an "employee who is responsible for the breakdown of that interactive process may not recover for

a failure to accommodate." *Vinikoff v. NYS Div. of Human Rights*, 83 A.D.3d 1159, 1163 (3rd Dep't 2011) (disability discrimination claim rejected where employer asked for information regarding connection between employee's disabilities and requested accommodations, and employee failed to provide timely response). Here, petitioner's staff were doubtful about respondent's request, but they were willing to look into it. They were thwarted, however, by respondent's actions. She refused to let them copy the note. It is not unreasonable for an employer to request some proof of disability. Because respondent refused to comply with that basic request, she cannot fault petitioner for failing to engage in the interactive process.

I did not credit respondent's claim that petitioner refused to accept the note. McKenzie and Muriel credibly testified that they sympathized with respondent and tried to help her. I was particularly impressed by Muriel's testimony. She has served the agency for nearly thirty years, her recollection of the July meeting was clear, she had no motive to lie, and she recognized that she lacked final decision making authority. It made sense that she would ask for a copy of the note to show her supervisor. Notably, respondent also testified that she faxed the note to other managers and gave a copy to her union. But she offered no other proof to support those claims.

Even if respondent had properly submitted the note or allowed petitioner to copy it, she did not prove her affirmative defense. Petitioner presented evidence that client contact was an essential requirement of a caseworker's responsibilities (Tr. 346-47). Given that the note said that respondent was unable to have client contact, she failed to prove that she was otherwise qualified to perform the essential functions of her title. *See Pimentel*, 29 A.D.3d at 149 (financial analyst who could not work with clients was not "otherwise qualified" to perform job); *Human Resources Admin. v. Hines*, OATH Index No. 1069/06 at 13-14 (Apr. 4, 1996) (contract manager who was unable to make site visits was not "otherwise qualified" to perform essential functions of job title). There was also undisputed evidence that respondent's unit had been disbanded and there were no other available positions for caseworkers. Petitioner was under no obligation to create a new position to accommodate respondent's request. *See Pimentel*, 29 A.D.3d at 148; *Esposito v. Altria Group, Inc.*, 67 A.D.3d 499 (1st Dep't 2009) (employer not required to grant indefinite leave of absence or transfer employee to a position occupied by another).

In sum, respondent failed to prove her affirmative defense that she has been discriminated against due to a disability.

Duplicative Charges

Based on the same facts as the proven charges, petitioner charged respondent with additional misconduct (ALJ Ex. 1, Complaint 2392-11, Charges II, III; Complaint 2392-12, Charges II, III; Complaint 2392-13, Charges II, III; Complaint 2392-14, Charges III, IV, VI, VII; Complaint 2392-15, Charges II, III). Because those charges are duplicative they will not be considered separately in the penalty recommendation. *See Dep't of Finance v. Rodriguez*, OATH Index No. 430/10 at 9 (Mar. 5, 2010); *Dep't of Homeless Services v. Chappelle*, OATH Index No. 1918/07 at 5 (Aug. 30, 2007).

FINDINGS AND CONCLUSIONS

1. Petitioner proved that respondent committed insubordination when she continued to report to her former work location on Water Street, after she had been ordered to report to a Far Rockaway office, effective June 6, 2011.

2. Petitioner proved that respondent was AWOL from June 10 to July 15, 2011.

3. Petitioner proved that respondent was insubordinate on July 19, 2011, when she refused to report to training.

4. Petitioner proved that respondent was insubordinate on July 19, 2011, when she refused to allow a site director set up an e-mail account.

5. Petitioner proved that respondent was insubordinate on July 20, 2011, when she refused to remove paper that covered windows to her office.

6. Petitioner proved that respondent engaged in unprofessional behavior when she yelled, used profanity, banged office furniture on July 21 and 22, 2011.

7. Petitioner proved that respondent was AWOL on 25 occasions from July 18 to August 24, 2011.

8. Petitioner proved that respondent was AWOL from September 26 to October 14, 2011.

9. Petitioner proved that respondent has been continuously AWOL from November 28, 2011, to date.

10. The remaining charges are duplicative.

RECOMMENDATION

After making the above findings, I requested and received a summary of respondent's personnel record. Petitioner hired respondent in 2000. She has an extensive disciplinary record. In the past ten years, she received suspensions or pay fines on six occasions: a 47-day suspension in 2010 for intimidating behavior and unbecoming conduct in 2010; a 30-day suspension for offensive language and engaging in conduct prejudicial to good order in 2009; a 7-day suspension for insubordination, detrimental conduct, and failure to report an arrest in 2008; a 5-day suspension and a 5-day pay fine for intimidating behavior, offensive language and detrimental conduct in 2007; a 9-day suspension for insubordination and excessive lateness and absenteeism in 2006; and a 20-day suspension for insubordination, failure to perform duties, and time and leave violations in 2004.

Petitioner now seeks termination of respondent's employment. That is appropriate. For five consecutive years, from 2006 to 2010, petitioner brought disciplinary charges against respondent. Yet her conduct did not improve. She repeatedly failed to report to work and when she did so, she engaged in insubordinate and unprofessional conduct. Due to respondent's poor disciplinary history involving similar misconduct and her continued unwillingness to follow agency rules, petitioner may terminate her employment. *See Human Resources Admin. v. Krisilas*, OATH Index No. 931/11 at 23 (Dec. 30, 2010), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-69-A (Sept. 22, 2011) (termination of employment for various misconduct, including discourtesy and poor attendance, where employee had received progressive discipline for similar misconduct and failed to modify behavior).

Respondent's continued absence without leave since November 28, 2011 is a particularly serious form of misconduct that interferes with the agency's mission. Refusal to report to work, by itself, is grounds for termination of employment. *See Human Resources Admin. v. Shehid,* OATH No. 1603/05 at 4 (termination of employment recommended for staff analyst who went AWOL after refusing to report to new location); *see also Human Resources Admin. v. Turnage,* OATH Index No. 538/12 at 2 (Dec. 14, 2011) (termination of employment recommended due to employee's long-term absence without leave); *Human Resources Admin. v. Petito,* OATH Index No. 975/11 at 2 (Dec. 7, 2010) (same).

In light of respondent's disciplinary history and the seriousness of the present charges, which include a long-term absence without leave, I recommend termination of her employment.

Kevin F. Casey
Administrative Law Judge

May 10, 2012

SUBMITTED TO:

ROBERT DOAR
Commissioner

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