Human Resources Admin. v. Cornelius

OATH Index No. 2041/13 (July 10, 2013)

Undisputed evidence established that respondent was continuously absent without leave (AWOL) for more than a year, from January 12, 2012 to the present. Misconduct found.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

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

REPORT AND RECOMMENDATION

JOAN R. SALZMAN, *Administrative Law Judge*

This is a disciplinary proceeding referred by the petitioner, the New York City Human Resources Administration, pursuant to section 75 of the Civil Service Law. Respondent Emma Cornelius, a former eligibility specialist of the agency, is charged with being absent without authorization (AWOL) from January 12, 2012 to the present. Respondent has been incarcerated since that time.

A hearing was scheduled to be conducted before me on May 29, 2013. Upon respondent's failure to appear, petitioner presented proper proof of service of the charges and the notice of hearing scheduled at this tribunal for that date. The agency had respondent served personally and via certified mail, return receipt requested, at the Bedford Hills Correctional Facility in Bedford Hills, New York, with notice of this hearing (Pet. Ex. 4). Petitioner previously served respondent at the Rose M. Singer Center at Rikers Island, when she was incarcerated there, with notice of the charges via certified mail, return receipt requested, together with notice of an earlier informal conference date in 2012 (Pet. Ex. 2); petitioner also served the charges and notice of informal conference upon respondent at her last known address of record in Brooklyn by delivering them to a person of suitable age and discretion at that address (Pet. Ex. 3). The uncontested evidence established the jurisdictional prerequisites for finding respondent in default. *See Health & Hospitals Corp. (Elmhurst Hospital Ctr.) v. Wallen,* OATH Index No. 658/09 at 1-2 (Oct. 3, 2008) (service of notice of hearing and statement of charges on employee-

inmate in correctional facility sufficient).

Respondent was represented at the hearing by counsel. At the May 29th hearing, respondent's counsel represented that he had corresponded with her and sent her a resignation form to sign, but had not heard back from her any decision about resignation (Tr. 6-7). Given the many adjournments afforded to respondent in a prior proceeding with respect to the same charges filed under OATH Index No. 1979/12, and the length of those adjournments while her criminal case moved forward, petitioner objected to, and I denied respondent's counsel's request at the May 29th hearing for one more adjournment (Tr. 5-8). However, I indicated that I would not issue my decision for two weeks, to allow time for respondent to submit a resignation if that were her intention (Tr. 8-12).

The facts in this matter are undisputed. The only contested issue was whether a decision should be issued in light of the fact that respondent submitted her resignation shortly after the hearing was concluded (Tr. 12). After the close of the brief hearing on the morning of May 29th, respondent's counsel emailed to his adversary and to me later that afternoon, at 2:33 p.m., a completed resignation form signed by respondent, effective two weeks earlier, May 14, 2013. Counsel represented that his office received the resignation in the mail on May 29th (ALJ Ex. 2).[1] I emailed counsel for both sides the same day, indicating that in light of the resignation, I would not write a Report and Recommendation. Petitioner objected and requested a written decision nonetheless, citing cases via email on May 30th. I wrote to both sides on June 4th that I would give respondent's counsel the opportunity to respond by June 10th to the legal citations submitted by petitioner. Respondent's counsel submitted no response.

I then emailed both sides on June 11th and informed them that in the absence of any other submissions, and without reaching all the arguments advanced by petitioner, I would issue a recommended decision in this matter. On June 11th, respondent's counsel wrote back, conceding that petitioner's citations were "correct," but noted that respondent had been convicted of a felony and argued that there was no good reason to expend tribunal resources to write a decision concerning an employee who had resigned (ALJ Ex. 2). The record closed on June 11, 2013.

Petitioner correctly argued that an agency may proceed with a disciplinary matter if the charges were served before the employee resigned, citing *Borges v. McGuire*, 107 A.D.2d 492,

[1] I have collected and marked into the record as ALJ Exhibit 2 the emails among counsel and the tribunal in this case.

498 (1st Dep't 1985) (noting the clear rule "that an employee may not forestall the consequences of an adverse determination in properly commenced [disciplinary] proceedings by retiring during their pendency"); and *Hiralall v. New York City Housing Authority*, NYC Civ. Serv. Comm'n Item No. CD 98-106-A at 5 (Sept. 8, 1998) (appellant was entitled to resign even though disciplinary charges were pending when the resignation was tendered, but the resignation does not preclude an agency from making findings that are pertinent to other issues such as suitability for future employment).

Where, as here, the employee serves a resignation after the disciplinary hearing has been completed, the employer "has the right to request a determination on the merits of the charges," for the "legitimate public purpose" of assessing future public employment under Civil Service Law section 50(4)(e). *Bd. of Education v. Telepan*, OATH Index No. 262/87 at 5 (Oct. 8, 1987); *Human Resources Admin. v. Tranes*, OATH Index No. 367/85 at 3 (Nov. 26, 1985) ("Relevant case law clearly indicates that a disciplinary proceeding which is pending at the time of resignation may be pursued to its conclusion for purposes of affecting any future application for public employment by the resigning employee"). The charges in this matter were originally served on April 9 and 13, 2012 (Pet. Exs. 2 and 3), more than a year before respondent resigned (ALJ Ex. 2). Accordingly, I granted petitioner's request that a decision be issued.

For the reasons set forth below, I find that respondent was AWOL for more than a year and has committed misconduct.

ANALYSIS

As noted, the facts in this matter are undisputed: Respondent has been AWOL for more than a year and has been incarcerated all that time. She has been found guilty and convicted of manslaughter in the first degree, a Class B felony, N.Y. Penal Law § 125.20 (Lexis 2013), and confined to prison in upstate New York until at least September 2018, the conditional release date (Tr. 5, 8; Pet. Ex. 5).[2] Respondent's counsel stipulated to all of petitioner's evidence and stated that there was no way for respondent to get to work, "and you know based on the rules I

[2] Ordinarily a certificate of conviction and official record of sentencing would be required as proof of the disposition of the criminal case. Here, however, the facts were stipulated by counsel for both sides. Petitioner submitted an electronic report from the New York State Department of Corrections and Community Supervision of "Inmate Information" showing the conviction and incarceration. Respondent's counsel did not dispute the fact of the conviction or of the long-term incarceration of respondent (Tr. 5-8). Respondent submitted "[n]o evidence . . . given the facts that everything that's in evidence is -- cannot be controverted by the Respondent, you know. She just can't come to work by operation of law" (Tr. 19).

can't say that they should hold this job open until 2018[,] which is her release date from incarceration. I mean I can ask but it's not going to happen" (Tr. 12-13). Petitioner previously brought these disciplinary charges under OATH Index No. 1979/12.[3] When the charges were served previously, respondent, who has been represented by counsel throughout the OATH proceedings, was incarcerated in a City jail and awaiting trial for many months on a charge of intentional, second degree murder (Tr. 4). I attempted, on consent, to make arrangements for a hearing in that matter with respondent appearing via videoconference from a City jail, so that she could participate in her disciplinary hearing. At the hearing in this matter, respondent's counsel thanked the tribunal for affording his client due process (Tr. 5, 20).

During the pendency of the previously filed matter, respondent had not yet had her day in court in the criminal matter. After a series of adjournments that were initially contested by the agency, but ultimately granted by stipulation, the parties agreed to mark the previous matter off-calendar as of February 1, 2013, as respondent's criminal trial was scheduled and became imminent (Tr. 4). Respondent then had her criminal trial and was convicted of manslaughter in the first degree in or about February 2013. Since March 2013, she has been serving a sentence of eight years in prison in Bedford Hills Correctional Facility, Bedford Hills, New York (Pet. Ex. 5).

In support of the charges, petitioner presented the Affidavit of April Hill, Implementation Liaison in the Office of Staff Resources, Employee Discipline Unit of the agency, sworn to August 9, 2012 (Pet. Ex. 1). The affidavit establishes without dispute that the agency notified respondent that she was AWOL, that she must respond, and that she faced discipline, including termination of her employment (Pet. Exs. 1, 3). Respondent did not return the necessary paperwork prior to the hearing herein (Pet. Ex. 1).

Respondent's incarceration is no impediment to holding the hearing as an inquest upon respondent's default. *Rao v. Gunn*, 73 N.Y.2d 759 (1988); *Dep't of Sanitation v. Mejia*, OATH

[3] I am transmitting herewith to counsel for both sides the August 16, 2012 transcript of the pre-trial proceedings in OATH Index No. 1979/12, as well as the transcript of the May 29, 2013 hearing in this case. In addition, I return to petitioner herewith the original exhibits it submitted on May 29, 2013, and on August 16, 2012, including: the previously numbered set of Petitioner's Exhibits 1 through 6 that were marked into the pre-trial record with proofs of service of notifications the agency had sent to respondent concerning her disciplinary case; and ALJ Exhibit 1 from that earlier proceeding, an email I sent to both sides on July 27, 2012, concerning stipulated videoconferencing arrangements contemplated at a time when it was unclear when this disciplinary hearing would go forward, as counsel and the tribunal monitored developments in respondent's criminal case.

317/03 at 2 (Oct. 4, 2002), *adopted*, Comm'r Dec. (Oct. 16, 2002), *appeal dismissed as moot*, NYC Civ. Serv. Comm'n Item No. CD 04-63-D (Nov. 17, 2004). Under Civil Service Law section 75, in order to establish misconduct, the employer must make some showing of fault on the part of the employee: the conduct must be shown to be willful or intentional, *Reisig v. Kirby*, 62 Misc.2d 632, 635 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008 (2d Dep't 1969), or the product of negligence or carelessness, *McGinigle v. Town of Greenburgh*, 48 N.Y.2d 949, 951 (1979).

As noted by Judge Richard in *Health & Hospitals Corp. (Elmhurst Hospital Ctr.) v. Wallen*, OATH Index No. 658/09 at 4 (Oct. 3, 2008): "It is well established that an employee's incarceration is actionable as an absence without leave." *Dep't of Sanitation v. Watson*, OATH Index No. 656/96 at 2 (Oct. 23, 1995), citing, *inter alia*, *Transit Auth. v. Daniels*, OATH Index No. 140/94 (Nov. 18, 1993); *Dep't* of *General Services v. Lertola*, OATH Index No. 328/89 (May 18, 1989). "Simply stated, if an employee commits a crime for which he is jailed, thereby rendering him unable to appear at work, the fact that his absence is involuntary is not a bar to discipline." *Dep't of Environmental Protection v. Licari*, OATH Index No. 1685/07 at 6 (June 5, 2007), *adopted*, Comm'r Dec. (June 8, 2007); *Dep't of Sanitation v. Enger*, OATH Index No. 2282/07 at 19 (Jan. 14, 2008), *adopted*, Comm'r Dec. (Jan. 28, 2008), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 08-31-SA (May 30, 2008) (same). This is so because "one is deemed responsible for the natural consequences of one's intended acts, including, in this context, incarceration and enforced absence from work as a result of one's voluntary and intentional commission of a crime." *Licari*, OATH 1685/07 at 6; *Mejia*, OATH 317/03 at 3 (same); *Health & Hospitals Corp. (Coney Island Hospital) v. Clanton*, OATH Index No. 2169/01 at 9-10 (Feb. 26, 2002) (incarceration is not a defense to AWOL charges where it is the direct result of an employee's own voluntary criminal acts as evidenced by his criminal plea); *Dep't of Environmental Protection v. Torres*, OATH Index No. 194/01 at 5 (Sept. 27, 2000).

Here, respondent has been convicted after a criminal trial of manslaughter in the first degree, a felony that, in relevant part, requires proof of intentional conduct (though I note that petitioner did not specify the precise subsection under which respondent was convicted). *See, e.g.*, N.Y. Penal Law § 125.20 (Lexis 2013) ("A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person. . . ."); *see People v. Ramos*, 19 N.Y.3d 133, 135-37

(2012) (intent is an element of first degree manslaughter). Respondent has been absent from work for an extended period of time without authorization due to her adjudicated, voluntary criminal conduct that directly resulted in her incarceration. Accordingly, based on the above-cited case law, with a conviction of an intentional felony of record, respondent's incarceration is no defense to the long AWOL shown here. Based on the undisputed evidence, I find that respondent engaged in the charged misconduct.

FINDINGS AND CONCLUSIONS

1. Respondent was properly served with the charges and notice of hearing.

2. Respondent has been absent without authorized leave from January 12, 2012 to the present.

RECOMMENDATION

Respondent has abandoned and resigned from her job. Having been appointed in January 2009 (Pet. Ex. 1 ¶ 19), she has had a short tenure with the agency, a fact that does nothing to mitigate the lengthy AWOL shown here. Respondent's unauthorized absence is a fundamental form of misconduct that impedes the agency's ability to fulfill its mission.

The only appropriate penalty for such misconduct is termination of employment, and I would recommend that penalty but for respondent's resignation, which moots any penalty recommendation in this case. *See Dep't of Sanitation v. DeSantis*, OATH Index No. 1494/05 at 2 (Oct. 31, 2005), *adopted*, Comm'r Dec. (Nov. 1, 2005) (respondent resigned from his employment after trial but prior to decision; issue of penalty was moot, and, therefore, no recommendation was made); *Human Resources Admin. v. Taylor*, OATH Index No. 1436/04 at 19-20 (Nov. 28, 2005)("In light of respondent's retirement, no penalty recommendation can be made . . . since an employer cannot convert a voluntary resignation into a dismissal . . . and no other penalty would be enforceable") (citations omitted); *Human Resources Admin. v. Ghiraldi*, OATH Index No. 160/04 (Sept. 19, 2003) (same); *Dep't of Correction v. Griffith*, OATH Index No. 925/96 at 27 (Dec. 23, 1996), *modified on penalty*, Comm'r Dec. (Feb. 18, 1997) ("This tribunal has held on several prior occasions that when a public employee tenders her resignation after disciplinary charges are served, the agency is entitled to proceed with it[s] attempt to prove

the charges, but cannot refuse to accept the resignation and cannot convert it into a dismissal from employment") (citations omitted).

The record and findings thereon are transmitted to the parties for such action as may be deemed appropriate should respondent apply again for City employment.

Joan R. Salzman
Supervising Administrative Law Judge

July 10, 2013

SUBMITTED TO:

ROBERT DOAR
Administrator/Commissioner

APPEARANCES:

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