# *Health & Hospitals Corp. (Coler Goldwater Hospital) v. Steele*

OATH Index No. 749/14 (Jan. 23, 2014), *affirmed*, HHC Pers. Rev. Bd. Dec. No. 1555 (Mar. 11, 2015), **appended**

Service aide charged with being excessively absent and absent without leave. Charges sustained. Termination recommended.

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**NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS**

*In the Matter of*
**HEALTH AND HOSPITALS CORPORATION (COLER GOLDWATER HOSPITAL)**
*Petitioner*
*- against -*
**EARL STEELE**
*Respondent*

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## REPORT AND RECOMMENDATION

**JOHN B. SPOONER,** *Administrative Law Judge*

This disciplinary proceeding was referred to me pursuant to section 7.5 of the Personnel Rules and Regulations of the Health and Hospitals Corporation ("HHC"). Petitioner HHC, Coler Goldwater Hospital, charged respondent Earl Steele, a service aide, with being excessively absent and absent without leave (AWOL).

A hearing on the charges was conducted before me on December 6, 2013. Petitioner called a supervisor and a benefits manager. Respondent testified on his own behalf, asserting that he was unfit to work due to a medical condition and that he was denied a reasonable accommodation for a disability. The record was left open until December 15 to permit the parties to submit further documentation.

For the reasons provided below, I recommend that the charges be sustained and that respondent be terminated.

## ANALYSIS

Respondent has been employed as a part-time service aide at the Coler Goldwater Hospital on Roosevelt Island since 2000. At the same time, he has also worked on week days as an aide at the state courts, scanning court documents into the court electronic filing system. In 2012 the hospital assigned him to weekend shifts as a dietary aide, transporting trays of food from the kitchen to the patient floors and stripping and cleaning the trays after a meal.

The charges in this case allege that in 2012 and 2013, respondent was excessively absent. They also allege that, from June 1, 2013, to the time of the hearing, respondent was absent without authority. There were no factual disputes as to the absences themselves. As to the excessive absence charge, respondent's time records (Pet. Ex. 7) indicate that he had unscheduled absences on five occasions for eight days in 2012 and 2013: on December 2, 2012; from December 15 to 16, 2012; from January 19 to 20, 2013; on February 9, 2013; and on March 10, 2013. It is also undisputed that respondent was absent on medical leave from April 7, 2013, through May 31, 2013, and absent without leave from June 1, 2013, to the date of the hearing.

The Corporation's Operating Procedure 20-10 provides that a hospital may discipline an employee for unscheduled absences. Operating Procedure 20-10, § III (B). Pursuant to hospital rules, a supervisor may counsel an employee who has three unscheduled absences, or if there have been two unscheduled absences on days that immediately precede or follow a day off, within a six month period. Operating Procedure 20-10, § IV (A)(2)(b). A supervisor may conduct an additional counseling session for up to two additional unscheduled absences after the initial session. *Id*. The same criteria have been used as a threshold for finding absences to be excessive for disciplinary purposes. *Health & Hospitals Corp. (Jacobi Medical Ctr.) v. Grant*, OATH Index No. 1233/98 at 3-4 (Apr. 16, 1998); *Health & Hospitals Corp. (Bellevue Hospital Ctr.) v. Marshall*, OATH Index No. 185/96 at 3-4 (Oct. 2, 1995).

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 disruption they cause to the workplace and 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 4 (Mar. 5, 1990), *aff'd in part, rev'd in part*, Bd. Dec. (Apr. 19, 1990), *aff'd sub nom. Hunter v. NYC Bd. of Education*, 190 A.D.2d 851 (2d Dep't 1993).

Aggravating factors exist to support a finding that respondent's eight days of unscheduled absence during a four-month period were excessive. All of the absences occurred before or after respondent's regular days off. The last four absences occurred after respondent had exhausted his sick leave balances, resulting in leave without pay. Prior to the date of the first absence, on December 1, 2011, respondent accepted a penalty of 20 days' suspension for similar violations concerning excessive unscheduled absences (Pet. Ex. 19). These factors support the conclusion that respondent's absences were excessive, in violation of hospital attendance rules.

The second specification alleges that respondent's absence from June 1, 2013, to the date of the hearing was without authority. This allegation was contested by respondent, who insisted that medical leave was improperly denied for this period and that, in any event, he was unable to work due to a disability.

The parties agreed that, prior to June 1, respondent was on approved sick leave and then medical leave. After going out on sick leave on April 7, 2013, respondent continued on sick leave through the end of April. Then, on May 2, he submitted a medical leave request (Pet. Ex. 13) along with a letter (Pet. Ex. 14) signed by "Frank Morgera, D.C.," a chiropractor, stating that respondent had "sciatica" and a "low back condition" and needed "rest for the weekends until approximately June 1." On May 17, this request was granted retroactive to April 1, 2013, in a letter (Pet. Ex. 11). The letter advised respondent that, if he wished to extend the leave, he must request the extension with documentation of his "diagnosis, prognosis, and dates unable to work" prior to the expiration of the leave on June 1. Respondent was then carried on approved medical leave from April 1 to April 22 with pay and from April 23 to May 31, 2013, without pay (Jacques: Tr. 58). He was scheduled to return to work on June 1.

Respondent's contention that he was unfairly refused medical leave rests upon his testimony as to his communications with the hospital before and after he failed to return to work after the medical leave from April to June. When he initially contacted the hospital just before

June 1, he was told to get additional information from Dr. Morgera, which he did. In June 2013 Ms. Jacques, the Coler benefits manager and leave coordinator, was informed that respondent was "trying to get cleared" by the facility doctor to return to work, but had failed to supply sufficient documentation of his diagnosis and treatment (Tr. 63). The hospital received a note (Pet. Ex. 17) from Dr. Morgera, dated June 3, indicating that respondent's "back condition has improved and he is now able to resume to his regular duties."

Respondent testified that, in June, after receiving clearance to return to work from Dr. Morgera, he had a "relapse" of back pain (Tr. 89). He testified that he called his supervisor, Ms. Blackburn, and Ms. Jacques and made an appointment with Dr. Worrell, his primary care physician. He applied for an extended medical leave, faxing a medical note (Tr. 90; Pet. Ex. 2). This note (Pet. Ex. 2), dated July 12, 2013, and apparently signed by Dr. Worrell, was on a form with Dr. Worrell's letterhead and titled "Disability Certification/Return to Work." The note gave respondent's name, a notation "from 6/4/13 to 9/30/13," and, under the heading for remarks, "lumbar radiculopathy." The boxes to indicate that respondent was either "totally incapacitated" or "partially incapacitated" were not checked. Ms. Blackburn also contradicted respondent's testimony, stating that she did not recall having any communication with respondent after April 2013 (Tr. 28-29).

Respondent did not communicate with the hospital again until several months later when he sent the hospital another note (Pet. Ex. 15) from Dr. Worrell, dated November 4, 2013, indicating that respondent suffered from "lumbosacral radoculpathy [sic]" as well as "anxiety syndrome" and was in need of medical leave until January 27, 2014, "to facilitate his complete recovery." Ms. Jacques indicated that, after consulting with the facility medical officer, the facility decided neither of the Worrell medical notes were sufficient to grant a new or an extended leave (Tr. 60-71). On November 6, 2013, the hospital sent respondent a notice (Pet. Ex. 12) that his medical documentation was "insufficient." Respondent offered no further medical documentation.

The record indicates that the hospital acted reasonably in declining to extend respondent's medical leave beyond June 1. The request to extend the leave was not timely in that it was not made prior to June 1, 2013, as required by the leave letter. Instead respondent did not formally put in a leave request until November. Further, the two notes from Dr. Worrell were deficient in several ways. The July 12 note provided no indication that respondent was

unable to work, no prognosis, and contradicted the note of Dr. Morgera that respondent could work as of June 3 based upon the same diagnosis. The November 4 note, while providing specific dates that respondent would be unable to work, gave no information as to treatment and was vague as to prognosis. The conclusion of the facility doctor that the two notes failed to identify a condition which would prevent an employee, who had already been granted a two-month medical leave, from working for an additional eight months was reasonable.

Respondent further asserted that his absence from June 2013 through the date of the hearing was, in fact, due to a disability and that he should have been placed on disability leave rather than disciplined. This tribunal has held that an employee whose violation of rules resulted from a disability may not be punished for misconduct, which requires a showing of willful or intentional conduct, *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 negligence or carelessness, *McGinigle v. Town of Greenberg*, 48 N.Y.2d 949 (1979). Rather, the employee should be placed on leave pursuant to the more benevolent provisions of section 72 of the Civil Service Law, which governs leaves of absence for employees who are unfit to perform their duties due to disability. *Human Resources Admin. v. Barnes*, OATH Index No. 228/08 (Nov. 15, 2007), *adopted and remanded*, Administrator's Determ. (Jan. 29, 2008); *Health & Hospitals Corp. (Harlem Hospital Ctr.) v. Norwood*, OATH Index No. 143/05 (Jan. 25, 2005); *Dep't of Housing Preservation and Development v. Chambart*, OATH Index No. 380/84 at 14 (Feb. 22, 1985) (section 72 "was not intended to offer appointing authorities the ability to elect disciplinary action over the more humane treatment afforded under section 72, where an employee's conduct is attributable to a mental or physical disability"); *Housing Auth. v. Cosentino*, OATH Index No. 535/88 at 11-12 (Mar. 31, 1989), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 90-72-1 (Feb. 21, 1990); *see also Cymbalsky v. Dilworth*, 97 A.D.2d 543 (2d Dep't 1983) (a finding of unfitness, rather than guilt of misconduct, requires an employer to follow the procedures set forth in section 72 rather than section 75). HHC has promulgated a provision similar to section 72 of the Civil Service Law. *See* NYC HHC Personnel Rules and Regulations, §§ 6.2 and Regulation No. 1 (July 12, 2004).

I find that respondent's lumbar radiculopathy, as confirmed by medical documentation, constituted a disability. Respondent testified that he has a problem with a disc in his lower back that causes extreme pain and this pain is made worse by standing and bending. Respondent stated that the condition worsened in March and April 2013 (Tr. 86-87). He submitted a number

of 2013 medical notes from his primary care physician and from a chiropractor confirming this problem.

However, the evidence falls short of showing that respondent was unable to work at all at the hospital for the seven months that he was absent. Respondent acknowledged that, during the time he was absent from his hospital job, he was working full time at his court aid job scanning documents. His time records from the court system (Pet. Ex. 18) show that he worked for seven hours most week days from April 2013 through December 2013, taking off only occasional annual leave days and sick days for "care for spouse," "doctor's appointment," and other unspecified reasons.

Respondent attempted to explain this contradiction by indicating that the work he performed with the courts was less physically demanding (Tr. 97-98). Respondent stated that his hospital job duties consisted of pushing food trucks around the hospital wards and stripping and cleaning trucks. He indicated that this work was "labor intensive" (Tr. 84-85) and required standing, bending, and twisting (Tr. 86), while his aide job with the courts consisted only of sitting at a computer scanning documents (Tr. 80). He stated that, as of April 2013, he could not bend forward due to "a shooting pain coming down my thighs from my lower back" (Tr. 87).

Respondent's testimony as to the nature of his job duties as a court aide was not credible because it was inconsistent with the work description of his position, both as described by his supervisor and as defined in the official job description. In a letter (Resp. Ex. C) submitted after the hearing, respondent's supervisor at the County Clerk's Office stated that respondent's work duties as a court aide included the following: "assists at the counter when needed by interacting with litigants and court personnel, and retrieving files from aisles, microfiche and DD 214 cabinets, Transports 325 D files to Civil Court." The job title description also indicates that a court aide "carries files and other items to storage areas," "rearranges office equipment and furnishings," "stocks supplies in storeroom and maintains inventory of court forms," "files case papers," transports court documents between offices, courtrooms, and nearby courthouses," and "removes trash." Court aides must have the ability "to lift and carry objects which may weigh up to fifty (50) pounds" and "to stand and walk for lengthy periods." Based upon these records, I find that respondent's statements as to the physical demands of his court job were not credible and likely understated to support his disability defense.

I also found incredible respondent's testimony that, from April through the hearing in December, he was able to travel to five days per week as a court aide, while at the same time he was unable to work part-time on weekends as a hospital service aide. Respondent admitted that his job as a court aide required him to scan documents, a task that would have required him to retrieve files or documents and also do some bending. As described by respondent's supervisor, his job also consisted of assisting at a counter and retrieving files. Even assuming that the hospital job required more standing and bending than the court job, respondent's testimony that, for approximately six months, he was able to commute to and from and perform the court job for five days per week, while his back pain made him unable to perform the hospital job for a single day, was incredible.

Respondent also raised as a defense to the absence charges that he was denied a reasonable accommodation under the Americans with Disabilities Act (ADA). The ADA prohibits employment discrimination "against a qualified individual on the basis of a disability." 42 U.S.C. § 12112(a) (2014); *see also* Exec. Law § 296(1)(a) (Lexis 2013) ("It shall be an unlawful discriminatory practice" for an employer because of an individual's disability "to discriminate against such individual in compensation or in terms, conditions or privileges of employment."); Admin. Code § 8-107(1)(a) ("It shall be an unlawful discriminatory practice" for an employer because of an individual's disability "to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.").

A "qualified individual with a disability is an individual with a disability" who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (2014); *see also* Exec. Law § 292(21)(a) ("disability" means "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function"); Admin. Code § 8-102(16)(a) ("disability" means "any physical, medical, mental or psychological impairment, or a history or record of such impairment."). Once a reasonable accommodation is requested, the employer is obliged to "engage in a good faith interactive process whereby employer and employee clarify the individual needs of the employee and the business, and identify the appropriate reasonable accommodation." *Phillips v. City of New York*, 66 A.D.3d 170, 175 (1st Dep't 2009).

To prevail on this defense an employee bears the burden of showing that he or she suffers from a disability; that the employee is "otherwise qualified" to perform the essential functions of his or her job with or without an accommodation; that the employee requested an accommodation prior to the date of the misconduct alleged; and that his or her employer failed to reasonably accommodate him or her. *Fire Dep't v. A. G.*, OATH Index No. 771/12 at 14-19 (July 5, 2012), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 13-02-SA (Feb. 6, 2013); *Fire Dep't v. Rivera*, OATH Index No. 3416/09 at 4 (July 30, 2010), *superseding* (July 28, 2010), *adopted*, Comm'r Dec. (Sept. 24, 2010); *Dep't of Correction v. Swannick*, OATH Index No. 899/07 at 3-5 (Feb. 16, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 07-87-SA (Aug. 14, 2007). If these elements are established, the burden shifts to the employer to show that making the accommodation would be an undue hardship. *Jackan v. NYS Dep't of Labor*, 205 F.3d 562, 566 (2d Cir. 2000); *Stone v. City of Mount Vernon*, 118 F.3d 92, 98 (2d Cir. 1997).

Respondent offered no credible proof to show that he requested a reasonable accommodation for his back. He indicated that his current assignment of pushing food trucks around the hospital wards, and then stripping and cleaning the trucks, was "more labor intensive" than other kitchen assignments such as preparing soups, salads, or desserts, or transporting food for nurse "call backs" of single food items (Tr. 84-85). Respondent insisted that he asked Ms. Blackburn to assign him to these lighter duties but was told that there were no "light duty" assignments (Tr. 85, 109-10). He did not indicate when he had this discussion with Ms. Blackburn, and Ms. Blackburn herself had no recollection of being told that respondent had any problems with his back (Tr. 43-44). Ms. Jacques, the Coler benefits manager and leave coordinator, was unaware that respondent ever requested a reasonable accommodation for his back condition (Tr. 64). Respondent testified that he made a formal request for a reasonable accommodation two days prior to the hearing (Tr. 92).

I did not credit respondent's testimony that he requested a reasonable accommodation due to a disability at any time prior to December 2013. Respondent had a significant interest in the outcome of the hearing and his uncorroborated statements must be accorded limited weight. His vague references of discussions with Ms. Blackburn about his getting easier assignments runs contrary to the testimony of Ms. Blackburn herself, who did not recall the conversation or being aware that respondent had back pain. Furthermore, respondent's admission that he made a

reasonable accommodation request a few days prior to the hearing suggested he did not make such a request prior to this time.

I thus find that respondent failed to prove that he requested a reasonable accommodation prior to the absences charged here, a finding that requires dismissal of the ADA defense.

One final matter requires mention. Petitioner contended that respondent did not return to work in June because he was notified that his weekend shift would no longer be available. On June 9, 2013, Ms. Blackburn sent respondent a letter (Pet. Ex 16) stating that his shift was being changed, although no further information was provided as to what the change consisted of. The letter did not indicate respondent's mailing address. Respondent insisted that he never received this letter and a postal tracking form (Resp. Ex. A) indicated that the letter was not sent to an address which did correspond to respondent's zip code. As to this issue, there was insufficient proof to establish that the letter was properly mailed or received and therefore I do not adopt petitioner's theory that respondent stayed away from his hospital job because he was upset about the shift change.

In sum, I reject both of respondent's defenses as to his disability and a lack of a reasonable accommodation. I find that respondent's seven unscheduled absences in late December 2012 and early 2013 were excessive and that his absence from June 1, 2013, through the date of the hearing constituted absence without authorization as charged, in violation of HHC Operating Procedure 20-10.

## FINDINGS AND CONCLUSIONS

1. Specification 1 should be sustained in that, from December 2012 through March 2013, respondent was excessively absent in that he was absent on 5 occasions for 7 days in violation of HHC Operating Procedure 20-10, § III (B).

2. Specification 2 should be sustained in that respondent was absent without authorization from June 1, 2013, through December 6, 2013, in violation of HHC Operating Procedure 20-10, § III (B).

## RECOMMENDATION

Upon making the above findings, I requested and received a personnel history as to respondent's employment with the hospital. He was hired as a service aide in 2000. As mentioned above, he was disciplined and accepted a 20-day suspension for excessive absence and lateness in December 2011. Even though respondent's 13 years of service require some mitigation, his past penalty for similar misconduct requires that the penalty here be increased under the principle of progressive discipline. *Dep't of Correction v. Cross*, OATH Index No. 1348/13 at 7 (June 6, 2013); *Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Ford*, OATH Index No. 2383/09 (July 10, 2009) ("The theory of progressive discipline is to modify employee behavior through increasing penalties for the same or similar misconduct, and to give employees full notice if they do not modify their conduct, they risk termination.").

Respondent's past evaluations are generally poor and provide no grounds for mitigation. His evaluation from April 2008 rates him as generally "satisfactory," but notes that his attendance and punctuality are unsatisfactory. His October 2008 and 2009 evaluations rate him as "satisfactory." His 2010 evaluation rates him as "needs improvement" and notes that he "needs to improve on attendance." His 2011 evaluation rates him as "satisfactory" but again notes he needs to improve his attendance and provide notice for his absences. His 2012 evaluation rates him as "needs improvement" and notes that, while his work performance is "excellent," his "attendance/lateness" must be closely monitored. His 2012 evaluation rates him as "satisfactory" and notes that he "has improved on time and attendance." His 2013 evaluation rates him as "needs improvement" and notes that he "must improve on his attendance."

The charges sustained here demonstrate that respondent not only repeated his pattern of taking excessive unscheduled absences but abandoned his job for some six months. Respondent's medical records, while documenting a back condition, failed to show that his back problems rendered him unable to work his hospital job when he was working full time at the courts.

Petitioner's attorney requested that respondent be terminated for the misconduct alleged in the charges. Even though termination would be unduly harsh as a penalty for the excessive absence alone, *see Health & Hospitals Corp. (Lincoln Medical & Mental Health Ctr.) v. Davis*, OATH Index No. 1573/08 (May 8, 2008), employees who are continuously AWOL for extended periods have generally been terminated. *See Health & Hospitals Corp. (Kings County Hospital*

*Ctr.) v. Hines*, OATH Index No. 1385/10 (Jan. 20, 2010) (employee terminated for nine-month AWOL); *Dep't of Sanitation v. Enger*, OATH Index No. 2282/07 (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) (termination recommended for respondent who was AWOL for four months during a period of incarceration); *Human Resources Admin. v. Gonzalez*, OATH Index No. 972/11 (Mar. 17, 2011) (termination recommended for respondent who was AWOL for three periods totaling approximately 16 months).

Accordingly, based upon respondent's disciplinary record and the totality of the misconduct which occurred here, I recommend that respondent be terminated.

John B. Spooner
Administrative Law Judge

January 23, 2014

SUBMITTED TO:

**ROBERT K. HUGHES**
*Executive Director*

APPEARANCES:

**MATTHEW DRISCOLL, ESQ.**
*Attorney for Petitioner*

**MEAGHEAN MURPHY, ESQ.**
*Attorney for Respondent*

**PERSONNEL REVIEW BOARD**
**THE NEW YORK CITY HEALTH**
**AND HOSPITALS CORPORATION**

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**In the Matter of the Appeal of**

**EARL STEELE**
**Service Aide**

**DECISION NO.: 1555**
**DATE: March 11, 2015**
**DOCKET NO. 4061/13**

**Coler-Goldwater Memorial Hospital**

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This is an appeal to the New York City Health and Hospitals Personnel Review Board ("Board") by Earle Steele (Appellant") from the decision by Coler-Goldwater Memorial Hospital ("Hospital") to terminate him, effective February 25, 2014, from his position as a part time Service Aide pursuant to Rule 7.5 of the Personnel Rules and Regulations of the Health and Hospitals Corporation ("HHC").

HHC charged Appellant with being excessively absent and absent without leave. On December 6, 2013, the Office of Administrative Trials and Hearings (OATH), Administrative Law Judge John B. Spooner presiding, held a Rule 7.5 hearing on the charges. In a Report and Recommendation dated January 23, 2014, Judge Spooner recommended that the charges be sustained and that Appellant should be terminated. Howard Kritz, Senior Associate Executive Director, Human Resources, advised Appellant, by letter dated February 5, 2014, that he had reviewed the entire record in the case and that he agreed with Judge Spooner's Report and Recommendation. Accordingly, Appellant's employment was terminated. On March 24, 2014, Appellant appealed to this Board by his attorney, Meaghean Murphy, of District Council 37. On November 19, 2014, a hearing was conducted before the Board. Michele McCarthy, Esq. appeared for HHC and Meaghean Murphy, Esq. and Ivy Chiu (law student), appeared for Appellant. As explained below, the Appeal is denied.

## BACKGROUND

Appellant worked for the Hospital as a part time Service Aide since September 2000. For at least four years prior to being terminated, Appellant worked at the Hospital only on weekends. HHC charged that ( 1) commencing October l, 2012 through July 18, 18, 2013 Appellant was excessively absent, and (2) from June l, 2013 through July 18, 2013 Appellant was absent without authorization. Appellant contends that he was on authorized medical leave from April to June 2013, that he thought he could return to work but had a relapse, that although he did not follow the appropriate protocols for requesting extended medical leave he should be allowed to retain his job with HHC because he had a legitimate disability. Appellant also contends the principles of progressive discipline should not apply because he had a disability. During this period Appellant was employed full time as a Court Aide in the Clerk's Office of the Kings County NYS Unified Court System.

Under HHC Operating Procedure 20-10, a hospital may counsel and discipline an employee for unscheduled absences. Appellant was counseled on December 1, 2011 for excessive absences from January 1, 2011 through July 30, 2011. The record shows 22 absences during this period. Appellant accepted a ten day suspension, with another ten days to be served if he violated the Rules within six months of the date of the agreement. Commencing April 7, 2013, Appellant was out of work on sick leave. By letter dated April 22, 2013 the Hospital advised Appellant that as a part time employee he was ineligible under the Family Medical Leave Act, but that he could apply for a medical leave of absence if he supplied proper documentation. Appellant sent the Hospital a letter from Appellant's doctor, Frank Mogera, D.C., dated on or about April 23, 2013, stating Appellant is under his care for a "low back condition," and is being treated for sciatica, that Appellant could return to work without restrictions approximately June 1, 2013, but that he needed to rest on the weekends until that time. On May 17, 2013, the Benefits Department for the Hospital, Debbie Jacques, advised Appellant that he was granted leave with pay through April 22, 2013, and leave without pay until May 31. 2013. The May 17, 2013 letter clearly states that Appellant was expected to return to work on June 1, 2013. A letter from Frank Morgera, D.C., dated June 3, 2013, states that Appellant was seen that day and is able to resume his regular duties.

Appellant testified at the OATH hearing that he had a relapse of back pain the week following his visit to Frank Morgera, D.C., spoke to his supervisor who told him that he had to apply for extended leave, and that he faxed a letter, dated July 12, 2013, from Dr. Trevor Worrell to Occupational Health Service and HHC. The note states under remarks: lumbar radiculopathy," but there was no diagnosis and neither the box for totally incapacitated nor the box for partially incapacitated were checked. Apparently, Appellant was not notified that the July 12 letter was insufficient. However, on July 18, 2013, HHC notified Appellant that he was being charged with: excessive absences for the period October 1, 2012 to July 18, 2013; and with being away without authorization from on or about June 1, 2013. A Step I-A Informal Conference was held on July 30, 2013. Termination was recommended on the grounds that Appellant had seven days of unscheduled absences and was away without leave from June 1, 2013 until July 30, 2013, the date of the conference, that Appellant's medical documentation was inadequate, and that he previously was suspended for attendance issues.

Appellant did not communicate with the Hospital again until November 2013, when he sent a letter from Dr. Worrell dated November 4, 2013 stating that "Mr. Earl Steele.....suffers from Lumbosacral Radoculpathy (sic.) as well as Anxiety Syndrome....[that his} progress is guarded" ... [and that he] is in need of a prolonged Medical Leave of Absence..." On November 6, 2013 the Hospital advised Appellant that his medical documentation was insufficient.

## DECISION AND ORDER

ALJ Spooner held an OATH hearing on December 6, 2013. Appellant was represented by Meaghean Murphy, Esq.; Matthew Driscoll, Esq. represented the Hospital. ALJ Spooner concluded that the Hospital acted reasonably in declining to continue Appellant on medical leave. The Board agrees. Appellant was obligated to seek a further extension of his leave by June 1, 2013. Even assuming that Appellant attempted to communicate his desire to have an extended medical leave, he did not make sufficient efforts to secure that leave until November 2013. The April 23, 2013 letter from Frank Morgera, D.C. states that Appellant will return to work on or about June l, 2013. The June 3, 2013 letter from Frank Morgera, DC. to the Hospital states

that Appellant was seen that day by doctor Morgora and that he is able to resume his regular duties. Appellant did not go back to work in June 2013, and ALJ Spooner found incredible Appellant's claim that he attempted to secure a reasonable accommodation at any time prior to December 2013. The November 4 letter from Dr. Worrell describes a back issue and anxiety and states that he is in need of a prolonged medical leave, at least until January 27, 2014. The letter does not contain any information as to a course of treatment or why Appellant could not work when his conditions are “episodic." In other words Dr. Worrell's statement that Appellant could return to work January 27, 2014, had no basis in fact.

As ALJ Spooner concluded, although the documents, and Appellant's testimony may be sufficient to prove some disability, there is no credible explanation for why Appellant could not return to his job with the Hospital when he was able to work five days a week as a Court Aide; during the relevant period Appellant took time off from his job as a Court Aide only for occasional annual leave days and sick days for “care for spouse," "doctor's appointment," and other unspecified reasons. ALJ Spooner found not credible Appellant's testimony that during the period April 2013 through December 2013 he was able to work as a Court Aide five days a week while unable to work at the Hospital for even one day. ALJ Spooner also found incredible Appellant's testimony that his job duties as a Court Aide were not physical. According to the December 12, 2013 letter submitted by the County Clerk's Office to Appellant's Counsel, Appellant's job includes: "Assist[ing] at the counter when needed by interacting with litigants and court personnel, and retrieving files from aisles, microfiche and DD 214 cabinets, [and transporting] 325 D files to Civil Court."

Further, the Record reflects that Appellant has a long history of excessive absences at the Hospital. Appellant's Counsel urges that the Hospital should allow all of the absences for Appellant's back injury to be ignored, while Appellant worked his full time job. The fact that Appellant was a good worker when he appeared at his job is not the determining factor. Appellant worked for the Hospital only on the weekends. If, as Appellant's doctor reports, Appellant needs the weekends to rest, it is not unreasonable for the Hospital to terminate his employment.

## ORDER

After a hearing before the Board, and upon review of the record, the Board has no reason to overturn the Recommendation of ALJ Spooner and the decision of the Hospital to terminate Appellant. The Appeal is denied.

Gayle A. Gavin
Chair

Jonathan L. Kimmel
Board Member

Pamela G. Ostrager
Board Member