

***Health & Hospitals Corp. (Dr. Susan Smith McKinney  
Nursing & Rehabilitation Ctr.) v. Ellis***

OATH Index No. 1710/14 (Nov. 25, 2014), *affirmed*, HHC Pers. Rev. Bd. Dec. No. 1566 (May 21, 2015), **appended**

Respondent is charged with five individual absences without authorization and a long-term absence without authorization. In addition, respondent is charged with failing to comply with two directives to clarify her employment status. All of the charges are sustained and termination of her employment is recommended.

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

*In the Matter of*  
**HEALTH AND HOSPITALS CORPORATION  
(DR. SUSAN SMITH MCKINNEY NURSING  
AND REHABILITATION CENTER)**

*Petitioner*

*-against-*

**TIMEKA ELLIS**

*Respondent*

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**REPORT AND RECOMMENDATION**

**KARA J. MILLER**, *Administrative Law Judge*

The Health and Hospitals Corporation brought this disciplinary proceeding pursuant to section 7.5 of its Personnel Rules and Regulations. Respondent Timeka Ellis, a service aide at Dr. Susan Smith McKinney Nursing and Rehabilitation Center (“McKinney” or “facility”), is charged with failing to report and/or request permission for her absence on five days in December 2012 and January 2013, failing to report to duty on those five days, failing to report and/or request permission for her absence from January 20, 2013 to present, failing to report to duty from January 20, 2013 to present, failing to adhere to a directive sent by the Director of Food and Nutrition, and failing to adhere to a directive sent by Human Resources (ALJ Ex. 2).

Following a two-day hearing held before me, I find that petitioner established that respondent was absent without authorization on five individual days in December 2012 and January 2013, was absent without authorization from January 20, 2013 through present, and

failed to follow two directives to clarify her employment status. Consequently, termination of her employment as a service aide is recommended.

### ANALYSIS

Respondent is a Health and Hospitals Corporation employee who works as a service aide in the dietary department of McKinney, which is managed by Sodexo, an outside contractor. Merna Swaby is employed by Sodexo as a patient service manager and is respondent's direct supervisor. As a dietary aide, respondent is responsible for serving and picking up patients' meal trays. Respondent works a part-time schedule of three days per week. She does not work a set schedule and her assigned days vary from month to month depending upon the department's needs. A schedule is generated every two weeks and then posted on the notice board (Tr. 9-11, 50-52, 81, 119).

#### *Five Absences without Authorization between December 30, 2012 and January 8, 2013*

Respondent is charged with failing to report or request permission for her absences on December 30 and 31, 2012, and January 1, 7, and 8, 2013 (ALJ Ex. 2). Ms. Swaby testified that respondent was scheduled to work on December 30 and 31, 2012, and January 1, 7, and 8, 2013. Respondent, however, was absent without authorization on those days. Ms. Swaby's testimony was corroborated by respondent's time sheets for that period and the personnel absence monitoring record, which both indicate that respondent was coded as "06" on the days in question. Ms. Swaby explained that code 06 means that respondent did not call in or report for work those days and is classified as "absent without pay" (Pet. Exs. 1, 2; Tr. 22-24, 27-28).

When an employee follows protocol and calls in sick to the department, either leaving a message on the voicemail or speaking to someone, the information is noted in the daily communication log by the supervisor on duty. The entries in the communication log for December 30, and 31, 2012, and January 1, 7, and 8, 2013, indicate that respondent was a "no call/no show" for each of these days (Pet. Ex. 3; Tr. 23-27).

Respondent acknowledged that she did not come to work on December 30, 2012, but contended that she called her department the day before to inform them that she would be out the following day. Respondent submitted her telephone records to corroborate that she called her department on December 29, 2012. She asserted that she called a day in advance since her shift

begins at 6:00 a.m. and she wanted to provide them with enough time to find a replacement (Resp. Ex. A; Tr. 119).

Her telephone records indeed reflect that respondent called the Food Services department at 5:55 a.m. on December 29, 2012 (ALJ Ex. 2). Respondent's personnel absence monitoring record, however, indicates that respondent was coded as "49 – unscheduled annual leave" on December 29 (Pet. Ex. 2). Since respondent was scheduled to begin work on December 29, 2012, at 6:00 a.m., the 5:55 a.m. call noted on her telephone records was more likely than not to inform her department that she would not be in on December 29, 2012. Although it is undisputed that respondent called her department on December 29, 2012, I was not persuaded by respondent's testimony that this call was to provide notice for her absence on December 30, 2012.

With respect to December 31, 2012 and January 1, 7, and 8, 2013, respondent could not recall if she went to work on those days. Moreover, she failed to submit evidence that she called her department to apprise them of her absence.

I find that petitioner established by a preponderance of the credible evidence that respondent failed to report and/or request permission for her absence from duty on December 30, and 31, 2012, and January 1, 7, and 8, 2013.

#### *Long-Term Absence without Authorization from January 20, 2013 to Present*

Respondent is further charged with failing to report or request permission for her long-term absence from January 20, 2013 to present (ALJ Ex. 2). Ms. Swaby testified that respondent had not reported to work since January 20, 2013. In support of her testimony, petitioner submitted respondent's time sheets from January 20, 2013 through May 4, 2013, and her 2013 personnel absence monitoring record to demonstrate that respondent was absent without authorization during this period of time (Pet. Ex. 1, 2; Tr. 28).

Ms. Swaby testified that the first time she had heard from respondent during her prolonged absence was when respondent called her on July 25, 2013. During this conversation, respondent informed Ms. Swaby that her attorney had instructed her to return to work. Ms. Swaby told respondent that she needed to obtain a clearance from Occupational Health Services ("OHS") before returning. Respondent was displeased and wanted to know why she needed to go to OHS if she was not ill. Ms. Swaby explained that the facility requires all employees who

have been absent from work for a prolonged period of time to be cleared by OHS. Respondent relented and agreed to go to OHS the following day. Since Ms. Swaby was going to be out of the office the following day, she told respondent that she would leave the referral paperwork for OHS with her colleague, Kevin Haller (Pet. Ex. 4). Respondent, however, did not appear the next day and never picked up the referral paperwork from Mr. Haller (Tr. 28-30, 75-76, 153).

Respondent admitted that she did not report to work between January 20, 2013 and present. She contended, however, that she was unable to return to work because no one would tell her what days she was scheduled to work. Since her work days were dependent upon the needs of the facility, she maintained that she did not know when to report to work without being privy to the schedule. Respondent testified that she called the food services department on January 17, 2013, to obtain a schedule so that she would know when to return to work but she did not receive one (Tr. 123, 126, 157-58, 164-65).

Respondent further testified that she subsequently called every department that she could think of in the facility to complain that her department was preventing her from returning to work because they would not give her the schedule. Respondent contended that "it was always something" because first the facility refused to tell her when she was scheduled to work, then she was informed that she needed a doctor's note to return to work (Tr. 129). According to respondent, she subsequently submitted a doctor's note to Human Resources so that she could get a referral to OHS, but was then told that she was being brought up on disciplinary charges and could not return to work (Resp. Ex. B; 128-30, 135-36).

Respondent submitted a copy of her telephone records to document her attempts to contact the facility to request a schedule. Unfortunately, after reviewing the records, respondent was unable to recall who she spoke with at the particular numbers or what was said during the conversations (Resp. Ex. A; Tr. 123, 126, 128, 142-43, 146).

Respondent maintained that she spoke directly with Sophia Isaac, Senior Associate Director of Human Resources, regarding Ms. Swaby's refusal to give her a schedule, but denied that Ms. Isaac had ever told her to report to OHS for clearance. Later she testified that Ms. Isaac told her she had to deal directly with her department (Tr. 161, 182). Ms. Isaac testified that from December 30, 2012 to the present, she had received only two telephone calls from respondent. The first call took place in January 2013, when respondent inquired about not receiving a check for her buyout waiver. Respondent did not receive health insurance through the facility, so twice

a year she would receive a check for the buyout waiver. Ms. Isaac followed up with the benefits department and was informed that the office of labor relations did not approve respondent's check. The only topic of discussion during this conversation was about the buyout waiver (Pet. Ex. 12; Tr. 219-21, 226-27).

Ms. Isaac testified that respondent's second telephone call occurred in spring 2013, when respondent called to ask about returning to work. Ms. Isaac explained to respondent that she needed to submit a doctor's note to OHS that includes a diagnosis, prognosis, and a date that she can return to work. Respondent asked Ms. Isaac how she could submit a note if she was not sick. Ms. Isaac did not answer respondent's question, but put her on hold while she checked with Labor Relations to confirm what respondent needed to do. Labor Relations confirmed that respondent would have to submit a doctor's note to OHS before returning to work. Ms. Isaac testified that respondent never complained to her about scheduling issues during either of her conversations with respondent (Tr. 227-29).

Respondent further acknowledged that she did not go to OHS between October 2013 and May 2014. Respondent admitted that no one prevented her from going to OHS. Yet, she contended that she did not go because her department told her that "it didn't make sense" to go to OHS because the case was going to trial (Tr. 168, 170-72).

Kent Tomson, a Sodexo employee and the director of food services, testified that respondent contacted him about returning to work in May 2014, ten months after she had spoken to Ms. Swaby. Mr. Tomson directed respondent to come in to pick up referral paperwork for OHS, so that she could be cleared for duty. Respondent subsequently picked up the paperwork, but Mr. Tomson was unaware if respondent went to OHS because he had not heard from her since then (Tr. 80-83).

Respondent testified that she went to OHS and was seen by a doctor and a nurse in May 2014 but could not recall if they had directed her to report or if she went on her own accord. According to respondent, the doctor told her that he needed to speak to Ms. Isaac before he could clear her to return to work. Respondent contended that the doctor later informed respondent that Ms. Isaac had said that she could not be cleared because she did not submit all of her paperwork (Tr. 137-38, 156, 169).

Dr. Steven Kaner, the Medical Director at OHS, confirmed that respondent had come to OHS in May 2014, but recalled that she did not have the proper paperwork. Although

respondent had a department referral to OHS, she did not have the appropriate medical documentation. Dr. Kaner instructed respondent to get her doctor's clearance to return to work, but she never returned with the paperwork (Pet. Ex. 13; Tr. 235-36).

During the hearing, respondent produced a doctor's note dated May 21, 2013, which indicated that she was seen by a doctor at Nostrand Medical Practice that day and could return to work the following day, May 22, 2013 (Resp. Ex. B). The note did not explain why respondent had been absent since January 20, 2013, and merely reflects that she had a doctor's appointment on May 21, 2013. Respondent believed that she gave the note to someone at the facility but was unable to recall to whom. Respondent produced a second note from the same medical practice dated October 29, 2013, which indicated that respondent had suffered from a medical complication in June 2013 and was "cleared to return to work from August 2013" (Resp. Ex. C). Respondent testified that she submitted this doctor's note to human resources but still was not given permission to go to OHS for clearance (Tr. 151-53).

Respondent never submitted a request to the facility for FMLA leave nor did she request annual or sick leave for the period of January 20, 2013 to present. As a direct result of respondent's prolonged absence, the facility had to hire an agency service aide to cover respondent's shifts or required other employees to work mandatory overtime (Tr. 47, 86, 107, 229).

In analyzing credibility, this tribunal may consider such factors as: witness demeanor; consistency of a witness' testimony; supporting or corroborating evidence; witness motivation; bias or prejudice; and the degree to which a witness' testimony comports with common sense and human experience. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff'd* NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998); *Dep't of Correction v. Hansley*, OATH Index No. 575/88 at 19-20 (Aug. 29, 1989), *aff'd*, 169 A.D.2d 545 (1st Dep't 1991). Petitioner's witnesses were very credible. Their testimonies were consistent and corroborated by the documentary evidence submitted. None of the facility's witnesses appeared to have any animus towards respondent and were merely frustrated with her failure to follow through with the necessary steps to return to work.

Respondent's testimony, on the other hand, was disjointed, non-responsive, and vague. She had difficulty remembering details and relied on her telephone records to establish that she called the facility to return to work. When asked about who she had spoken to and what was

said, she was unable to respond. When respondent did provide answers, her testimony was confusing and failed to comport with common sense.

I do not credit respondent's contentions that it was the facility's fault that she failed to return to work. Ms. Swaby, Mr. Tomson, Ms. Isaac, and Dr. Kaner, credibly testified that they explained the clearance process and had told respondent what documentation she needed to bring to OHS in order to return to work. Moreover, petitioner's evidence demonstrated that respondent could have obtained a copy of her work schedule had she been diligent in trying to get it.

On February 27, 2006, when respondent first started working at McKinney, she signed a human resources orientation checklist indicating that she received the employee handbook as well as other documents (Pet. Exs. 7, 8, 9, 10; Tr. 93-95). In addition, respondent acknowledged receipt of the facility's time sheet procedures (Pet. Exs. 7, 8). The employee handbook explains the time and leave procedures in great detail. It also includes an extensive section on OHS, which states in part, "Employees, who were out on sick leave for four or more days, or on extended leave, must be medically cleared by Occupational Health Services before returning to work" (Pet. Ex. 7). Respondent's testimony regarding a lack of knowledge of the protocols for returning to work after an absence was disingenuous. Besides having complied with these policies and procedures in the past, she was provided with an explanation of her responsibilities as an employee of McKinney when she received the employee handbook (Pet. Ex. 5, 12).

I find that petitioner established by a preponderance of the credible evidence that respondent failed to report and/or request permission for her absence from duty from January 20, 2013 to present.

#### *Failure to Comply with Two Directives to Resolve her Employment Status*

Respondent was additionally charged with failing to adhere to a directive sent by Mr. Tomson and a directive sent by human resources (ALJ Ex. 2). After an employee has failed to report to work for a certain amount of time, their department sends a five-day letter, directing the employee to resolve their employment status within five days of the date on the letter. On January 7, 2013, September 16, 2013, September 20, 2013, and October 11, 2013, Mr. Tomson sent a five-day letter to respondent by regular and certified mail explaining that she has been absent without authorization and must properly report her absence to her supervisor. The letters

notified respondent if she failed to respond within five days then disciplinary action would be initiated (Pet. Ex. 6, 11; Tr. 49, 84-85).

Respondent did not respond to the five-day letters so the matter was referred to Human Resources. Human Resources followed-up by sending respondent a ten-day letter on September 27, 2013, October 3, 2013, and October 18, 2013. The ten-day letters informed respondent that she remained on unauthorized leave and directed her to contact the hospital within ten days of receipt of the letters, which were sent by regular and certified/return receipt mail. The letters that were mailed by certified mail/return receipt were returned to the facility as “unclaimed” but the letters sent by regular mail were never returned to the facility and were presumed to have been delivered to respondent’s address, which she verified during the hearing (Pet. Exs. 6, 11; Tr. 106).

Although respondent acknowledged receiving mail previously from the facility at the same address, she denied that she ever received that five- and ten-day letters. Respondent’s denials of receiving the five- and ten-day letters were not believable. Respondent provided her address to the facility as required, she received mail from the facility in the past, the regular mail envelopes were never returned to the hospital, and the certified mail envelopes were marked “unclaimed” not “undeliverable” (Pet. Ex. 11; Tr. 139-41, 174).

To establish disobedience of an order, the employer must prove: (1) that an order was communicated to the employee, (2) the contents of the order were clear and unambiguous, and (3) the employee willfully refused to obey. *Dep’t of Correction v. Hipp*, OATH Index No. 337/00 at 3 (Dec. 3, 1999). The letters clearly and unambiguously communicated the directives of her supervisor and human resources. I do not credit respondent’s assertion that she did not receive the letters. Consequently, I find that respondent willfully refused to obey the orders in the letters to resolve her employment status.

I, therefore, find that petitioner established that respondent failed to adhere to directives sent by Mr. Tomson and directives sent by human resources via the five- and ten-day letters.

#### *Failure to Report to Duty*

Respondent was further charged with failing to report for duty on the same days that she was absent without authorization. Since these remaining charges repeated the factual allegations addressed above they are cumulative. Where those facts were proved, the charges should be



sustained without additional penalty. *Fire Dep't v. Feret*, OATH Index No. 885/00 at 37 (Mar. 10, 2000).

### **FINDINGS AND CONCLUSIONS**

1. Petitioner established by a preponderance of the evidence that respondent failed to report and/or request permission for her absences from duty on December 30, and 31, 2012 and January 1, 7, and 8, 2013.
2. Petitioner established by a preponderance of the evidence that respondent failed to report to duty on December 30, and 31, 2012 and January 1, 7, and 8, 2013.
3. Petitioner established by a preponderance of the evidence that respondent failed to report and/or request permission for her absence from duty from January 20, 2013 through present.
4. Petitioner established by a preponderance of the evidence that respondent failed to report to duty from January 20, 2013 through present.
5. Petitioner established by a preponderance of the evidence that respondent failed to adhere to a directive sent on October 11, 2013, by the Director of Food and Nutrition.
6. Petitioner established by a preponderance of the evidence that respondent failed to adhere to a directive sent on October 18, 2013, by the Human Resources Department.

### **RECOMMENDATION**

Upon making the above findings and conclusions, I obtained and reviewed an abstract of respondent's personnel record provided to me by the Hospital. Respondent was appointed to her position as a service aide on February 27, 2006. During her eight-year tenure with the Hospital, she has been formally disciplined on three occasions. On July 27, 2011, pursuant to a stipulation of settlement, respondent was suspended for five days for unauthorized absence, insubordination and profanity. Pursuant to a stipulation of settlement, respondent was suspended for nine days for an unauthorized absence on January 27, 2012. Respondent was subsequently suspended for 30 days and incurred a six-month probation in accordance with a stipulation of settlement on

June 6, 2012, for insubordination, leaving early without authorization, and failing to perform duties.

Petitioner requested that respondent be terminated if the charges were sustained. Petitioner established that respondent failed to report and/or request permission for five absences from duty between December 30, 2012 and January 8, 2013, failed to report and/or request permission for a long-term absence from duty from January 20, 2013 to present, and failed to comply with two directives sent to her by her department and human resources.

In prior cases involving a long-term unauthorized absence, this tribunal has consistently held that termination is warranted. *See Human Resources Admin. v. Gonzalez*, OATH Index No. 972/11 (Mar. 17, 2011) (termination recommended for an eligibility specialist who had been absent for three periods totaling approximately 16 months); *Dep't of Correction v. O'Brien*, OATH Index No. 1888/06 (Sept. 14, 2006) (officer terminated for being out of residence on one occasion and an unauthorized absence for five months); *Dep't of Correction v. Latty*, OATH Index No. 737/04 (Mar. 19, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 05-24-SA (Apr. 15, 2005) (officer terminated for multiple unauthorized absences and failure to appear at the Department's Health Management Division, followed by no contact with Department); *Dep't of Sanitation v. Perrone*, OATH Index No. 845/01 (Feb. 2, 2001) (employee with minor disciplinary record terminated for three-month unauthorized absence).

Respondent has been found guilty of an unauthorized absence from work for an extended period of time in addition to some other related charges. It is noteworthy that respondent has been previously disciplined for similar wrongdoing and was aware of petitioner's policies and procedures regarding time and leave violations. Respondent's unauthorized absence is a fundamental form of misconduct which substantially impedes the agency's ability to fulfill its mission. *See Health & Hospitals Corp. (Bellevue Hospital Ctr.) v. Owens*, OATH Index No. 986/12 at 2 (Feb. 27, 2012). The only appropriate penalty for such misconduct is termination of employment, and I so recommend.

Kara J. Miller  
Administrative Law Judge

November 25, 2014

SUBMITTED TO:

**MICHAEL TARTAGLIA**

*Executive Director*

APPEARANCES:

**ANDREA CHILAKA, ESQ.**

*Attorney for Petitioner*

**THOMAS COOKE, 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**

**TIMEKA ELLIS**

**Service Aide  
Dr. Susan Smith McKinney Nursing  
and Rehabilitation Center**

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**DECISION NO.: 1566**

**DATE: May 21, 2015**

**DOCKET NO.: 4079/15**

This is an appeal to the New York City Health and Hospitals Corporation Personnel Review Board ("Board") by Timeka Ellis (Appellant") from the decision by Dr. Susan Smith McKinney Nursing and Rehabilitation Center ("Facility") to terminate her, 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 August 25 and October 30, 2014, the Office of Administrative Trials and Hearings (OATH), Administrative Law Judge Kara Miller presiding, held a Rule 7.5 hearing on the charges. In a Report and Recommendation dated November 25, 2014, Judge Miller recommended that the charges be sustained and that Appellant should be terminated. On December 29, 2014, Michael Tartaglia, Executive Director of the Facility advised Appellant that he agreed with Judge Miller's Report and Recommendation and that she was terminated, effective January 2, 2015, from her position as a Service Aide. Appellant appealed to the Board on January 13, 2015, by her attorney, Thomas Cooke, of District Council 37. On April 8, 2015, a hearing was conducted before the Board. Andrea N. Chilaka, Esq., appeared for HHC and Thomas Cooke, Esq., appeared for Appellant. As explained below, the Appeal is denied.

**BACKGROUND**

Appellant worked for the Facility as a part-time Service Aide in the dietary department of the Facility since February 2006. During her period of employment Appellant had a number of issues with absences and behavior. In the case before the

Board, HHC charged that: Appellant failed to report or request permission for absences from duty on or about December 30 and 31, 2012 and January 1, 7 and 8, 2013; Appellant failed to report to duty on or about December 30, 2012, December 31, 2012, January 1, 2013, January 7, 2013, and January 8, 2013; Appellant failed to report and or request permission for her absence from duty from on or about January 20, 2013 to the date of the charges, November 20, 2013; Appellant failed to report to duty from on or about January 20, 2013 through November 20, 2013, the date of the charges.

After a full hearing of the charges, Judge Miller concluded that Appellant was absent without authorization for the dates specified and was absent without authorization from January 20, 2013 to the date of the hearing. Judge Miller recommended termination based on the grounds that 1) the one call that Appellant was able to substantiate making to the Facility was apparently for the day prior to her first unscheduled absence; 2) Appellant could not recall whether she went to work or called the Facility about her absences on December 31, 2012, or January 1, 7, and 8, 2013 and the credible evidence was that she failed to report or call about those dates; and 3) Appellant did not report or request permission for her absence commencing January 20, 2013 and the credible evidence was that Appellant did not call her supervisor until July 25, 2013; and 4) Prior to the instant case, Appellant was disciplined three times. These disciplinary suspensions were: July 27, 2011 for five days for unauthorized absence, insubordination and profanity in September 2010, January 2011 and May 2011; nine days in January 2012 for unauthorized absence; and thirty days, with a six month probation, June 25 through July 25, 2012 for insubordination, leaving early without authorization and failing to perform duties.

At the hearing before the Board, Appellant reiterated that she called the Facility to request time off for December 30, 2012, that she had no memory of whether she called about the other dates, and that there was insufficient evidence to support the charge that she did not take sufficient action to remedy the long term absence without leave. The argument was that she did not respond in a timely way or take aggressive action to return to work, but that termination was not warranted.

## **DECISION AND ORDER**

After a hearing before the Board, and upon review of the record, the Board has no reason to overturn the Recommendation of Judge Miller and the decision of the Facility to terminate Appellant. Judge Miller saw and heard the testimony of the witnesses; she found the testimony of HHC's witnesses credible, and the meager testimony provided by Appellant not credible. Further, Appellant has been disciplined and suspended for incremental time periods on three prior occasions.

For all of the foregoing reasons, the Appeal is denied.

So Ordered.

Gayle A. Gavin  
Chair

Jonathan L. Kimmel  
Board Member

Pamela G. Ostrager  
Board Member