DOITT v. Anonymous

OATH Index No. 051/15 (May 6, 2015), *adopted*, Comm'r Dec. (Aug. 26, 2015), **appended**

Petitioner failed to demonstrate that call center representative was absent without leave. Charge should be dismissed.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF INFORMATION TECHNOLOGY
& TELECOMMUNICATIONS
Petitioner
- against -
ANONYMOUS
Respondent

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORGNIOTTI, *Administrative Law Judge*

This disciplinary proceeding was referred by the Department of Information Technology & Telecommunications ("DOITT"), pursuant to section 75 of the Civil Service Law. Petitioner alleges that respondent, an associate call center representative, was absent without leave ("AWOL") from April 8, 2009 through April 9, 2014 (ALJ Ex. 1).[1]

A hearing was conducted on April 16, 2015. Both parties presented documentary evidence. Petitioner called two DOITT employees who were familiar with respondent's time and leave status. Respondent testified on his own behalf and asserted that DOITT did not allow him to return to work following a medical leave of absence even though he had provided the requested documentation. The record was held open until April 22, 2015, to allow petitioner to review respondent's telephone records that were produced the morning of trial.

For the reasons below, the charge should be dismissed.

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[1] Because this report contains sensitive medical information about respondent, his name is being withheld. *See* 48 RCNY § 1-49(d) (Lexis 2014). *See also Admin. for Children's Services v. Anonymous*, OATH Index No. 212/12 at 1 (Dec. 15, 2011) (withholding respondent's name because the report discussed sensitive medical issues).

BACKGROUND

Respondent was hired by DOITT in 2003 as a call center representative. He was subsequently promoted to a provisional associate call center representative (Tr. 123). This case concerns respondent's return to work in 2009 following a series of leaves of absence in 2008 related to a psychiatric condition.

At all relevant times, Ms. Galarza has been the supervisor of leave and supplementary benefits. She is responsible for approving and supervising leave requests of DOITT employees. Mr. Driscoll, the former director of labor relations and current department advocate, has been in charge of handling employee discipline.

By a doctor's note dated July 15, 2008, respondent requested a medical leave of absence. According to the note, respondent was under psychiatric care and was diagnosed with panic/anxiety attacks. According to the note, respondent's condition did not permit him "to perform the activities of daily living" and his prognosis was "guarded" (Pet. Ex. 1).

By letter dated July 18, 2008, Ms. Galarza advised respondent that his leave had been approved under the Family Medical Leave Act ("FMLA") for July 10 through August 15, 2008. Ms. Galarza advised respondent to provide her with a certificate of clearance from his physician two weeks prior to returning to duty and that he was to report to her on August 18, 2008, to obtain clearance to return to his work site. Ms. Galarza further advised that if respondent failed to return to work as scheduled, he would be considered AWOL (Pet. Ex. 2).

By letter dated August 5, 2008, Ms. Galarza advised respondent that DOITT's records indicated that he was due to return to work on August 18, 2008, and that he was required to make an appointment to provide her with a certificate of clearance from his physician. Respondent was directed to immediately submit a written request if he was unable to return to work. Ms. Galarza warned respondent that if he did not return to work as scheduled, he would be considered AWOL and subject to discipline (Pet. Ex. 3).

Respondent provided Ms. Galarza with a doctor's note dated August 15, 2008, that stated while respondent's condition had improved he was, "still not able to perform the activities of daily living." The note indicated that respondent was also under the care of another psychiatrist and a psychologist, his prognosis was "guarded," and that pending reevaluation he was due to return to work on September 26, 2008 (Pet. Ex. 5).

By letter dated August 20, 2008, Ms. Galarza advised respondent that after reviewing the documentation submitted on August 15, his request to extend his FMLA leave was denied. Ms. Galarza further advised that because respondent did not return to work as scheduled, he was considered AWOL effective August 18, 2008. He was directed to resolve his employment status no later than August 25, 2008, or be subject to discipline (Pet. Ex. 4).

Ms. Galarza testified that because the August 15 doctor's note identified two other doctors that respondent was seeing, DOITT required information from them regarding respondent's status. Ms. Galarza spoke to respondent several times by telephone and told him to obtain additional information from them (Tr. 16-20).

By letter dated September 9, 2008, Ms. Galarza advised respondent that he was AWOL effective August 18, 2008, and that he must resolve his employment status no later than September 15, 2008. Ms. Galarza also noted that respondent had not yet provided the requested information from his other doctors indicting a prognosis and a return to work date. She directed respondent to file this information immediately to avoid discipline (Pet. Ex. 6).

Ms. Galarza testified that she received the requested information shortly thereafter. Based upon the information, respondent's AWOL status was resolved (Tr. 21-24).

On September 26, 2008, respondent provided Ms. Galarza with another doctor's note that stated he currently suffers from "severe anxiety" and that he would be able to return to work on November 4, 2008 (Pet. Ex. 7).

By letter dated October 22, 2008, Ms. Galarza advised respondent that his request for leave pursuant to FMLA, which permits employees up to 12 weeks of leave per year, was granted through October 6, 2008, and that respondent's request to have his leave extended to November 4, 2008, was under review (Pet. Ex. 8).

Ms. Galarza testified that, under the applicable union contract, respondent was eligible for another 30 days of unpaid leave which was subsequently granted and covered his absence through November 4, 2008. Ms. Galarza stated that she was in contact with respondent by telephone and advised him that the leave was approved (Tr. 26-28, 58-60, 146-47).

By letter dated November 12, 2008, Ms. Galarza advised respondent that he had failed to return to work on November 4, 2008, and that his status was AWOL. Ms. Galarza directed respondent to provide medical documentation including a diagnosis, a prognosis, and a

certificate of clearance from his doctor returning him back to work. She further warned that the failure to comply with this directive would result in respondent being considered AWOL and subject to disciplinary action (Pet. Ex. 9).

By an undated letter received by DOITT on November 21, 2008, respondent stated that he had been under a doctor's care since July 1, 2008, that he provided all necessary documentation for his FMLA which had been exhausted, and that he was requesting a personal leave of absence until February 1, 2009, to deal with "a family crisis" in Las Vegas, Nevada (Pet. Ex. 10).

By letter dated November 24, 2008, Ms. Galarza advised respondent that his request for personal leave was denied. Ms. Galarza stated that respondent's FMLA had expired on October 6, 2008, that he had failed to return to work on October 7, 2008, and that he was AWOL. She directed respondent to resolve his employment status by contacting her no later than November 28, 2008 (Pet. Ex. 11). Respondent testified that he did not receive the November 24 letter from Ms. Galarza (Tr. 146).

Ms. Galarza testified that it was an oversight to start respondent's AWOL on October 7, 2008, since he had been granted 30 days of unpaid leave until November 4, 2008 (Tr. 63).

By letter and disciplinary charges dated January 26, 2009, the deputy director of labor relations charged respondent with being AWOL since October 7, 2008. Respondent was advised, *inter alia*, that a Step One Conference would be held on February 10, 2009, and that he had the right to be represented by his union, Communication Workers of America Local 1180 ("CWA") or counsel (Pet. Ex. 1; Resp. Ex. A). CWA was copied on the letter.

Respondent did not appear for the Step One Conference but CWA did. By letter of determination dated February 11, 2009, the deputy director of labor relations notified respondent that the charges against him had been substantiated and that the recommended penalty was demotion. The letter stated that in order to avoid a trial at OATH, respondent could accept the penalty and sign a waiver of his hearing rights under section 75 of the Civil Service Law. The letter also advised that if respondent did not respond and/or accept the recommended penalty, DOITT could schedule a hearing at OATH or respondent could seek to proceed with the grievance procedures set forth in CWA's collective bargaining agreement. Respondent was

directed to respond by February 18, 2009, and was given a form to indicate how he wished to proceed (Pet. Ex. 15). CWA was copied on the letter.

By letter dated February 25, 2009, respondent was notified that he had been demoted from a provisional associate call center representative to his permanent title of call center representative. Ms. Galarza and Mr. Driscoll were copied on the letter, but CWA was not. OATH has no record of a hearing being held on the January 26, 2009 charges and there is no evidence that a grievance was filed by CWA.[2]

On March 31, 2009, respondent appeared at his work location stating he was returning to work. Since respondent had not provided a letter clearing him to return to work, he was directed to contact Ms. Galarza to seek further direction. E-mails dated March 31 and April 1, 2009, between various DOITT employees including Ms. Galarza and Mr. Driscoll, memorialize the directions given to respondent (Resp. Ex. B; Tr. 45-47).

Respondent testified that, when he returned to his work location, his supervisor stated he had not been medically cleared to return to work and to go to human resources. He reported immediately to Mr. Driscoll, who told him that he needed to get a medical note with a return to work date (Tr. 124-27). Mr. Driscoll could not recall whether he spoke to respondent. He acknowledged that respondent was told to get medical documentation and that if respondent had spoken to him that he would have told respondent to do so (Tr. 77, 88, 101-02).

Respondent testified that on April 7, 2009, he saw his doctor who cleared him to return to work. Respondent obtained a note stating that he was able to return to work on April 21, 2009 (Pet. Ex. 12). Respondent took the note directly to Mr. Driscoll who said that he would get back to respondent (Tr. 127-29). The note was stamped by timekeeping on June 2, 2008.

Ms. Galarza testified that the April 7 note was insufficient because it did not state whether respondent could return to work without restriction. Moreover, the doctor's stamp was a partial stamp. Ms. Galarza spoke to respondent and told him that a new note was needed (Tr. 32-33, 50-51). Mr. Driscoll testified that he also told respondent to get a new note (Tr. 91).

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[2] Whether DOITT violated section 75 of the Civil Service Law and/or the collective bargaining agreement with CWA is not before this tribunal.

Respondent denied speaking to Ms. Galarza about the need for a new note. Respondent testified that on June 4, 2009, Mr. Driscoll called him (Resp. Ex. F) and advised that he needed to get a new note (Tr. 129-32).

Respondent testified that the first available doctor's appointment he was able to schedule was June 23, 2009. He told his doctor that the note was insufficient because of the incomplete stamp and that DOITT required a statement about whether there were any work restrictions. The doctor gave him a note dated June 23, 2009, stating that respondent was able to return to work on June 30 without any restrictions. The doctor's stamp was fully visible (Pet. Ex. 13).

Respondent testified that he took the note immediately to Mr. Driscoll who stated that it would be evaluated and that he would get back to respondent. Mr. Driscoll never got back to respondent (Tr. 132-34).

Ms. Galarza testified that she spoke to respondent and advised him that the note had been received (Tr. 35). Respondent denied speaking to Ms. Galarza on June 23, 2009 (Tr. 134).

Ms. Galarza testified that respondent had been cleared to work. When she contacted respondent's work location on June 30, 2009, she was advised that he had not appeared (Tr. 36-37, 52). Mr. Driscoll testified that as of June 30, respondent had not been cleared to return to work. Mr. Driscoll needed further information from respondent's doctor to determine whether he was fit for duty (Tr. 92, 114).

By letter dated July 7, 2009, Mr. Driscoll wrote to respondent's doctor stating that he was unsure whether the June 23rd "letter sufficiently addressed the condition described in the July 2008 documentation." Mr. Driscoll stated there was concern whether respondent was "able to perform the duties of his somewhat pressure-filled job." Mr. Driscoll asked the doctor to please fax his response since respondent's "return to work is contingent on expedient response." Ms. Galarza was the only person copied on the letter (Resp. Ex. C). Mr. Driscoll testified that Ms. Galarza was copied because she is responsible for leave requests (Tr. 110-11).

Mr. Driscoll testified that he sent the letter because the 311 call center is a stressful environment and there was concern, given respondent's prior medical notes, that he would not be able to handle the work. Mr. Driscoll never heard from respondent's doctor (Tr. 78-80) and never notified respondent that he was waiting for an answer from the doctor (Tr. 94-95). Mr.

Driscoll testified that without a response from the doctor, respondent could not be cleared to return to work (Tr. 102-03).

Respondent testified that when he did not hear back from Mr. Driscoll, he called and left messages on July 1 and 2, 2009. Mr. Driscoll never called him back (Tr. 134; Resp. Ex. F at 55). When respondent went to see Mr. Driscoll in mid-July, Mr. Driscoll told him that he was still looking into the matter (Tr. 137). Respondent testified that no one ever called him about returning to work and that he never received a return to work letter (Tr. 135). Respondent went back several times to speak to Mr. Driscoll but nothing happened (Tr. 138). Mr. Driscoll testified on the occasions that he spoke to respondent, he never expressed a desire to return to work (Tr. 96, 104, 107-10).

Respondent testified that his difficulty in dealing with the situation was compounded by the fact that he had no assistance from a union because he was no longer in the CWA system since he had been demoted. Similarly, because respondent had not been restored to duty in his demoted title, he was not paying union dues and was not in the District Council 37 ("DC 37") system. Respondent testified that he tried for almost two years to get union representation but was unsuccessful (Tr. 138-39, 141).

Ms. Galarza and Mr. Driscoll testified that they spoke to respondent in 2010 when he called to advise that he had gotten married and wanted to place his spouse on his health insurance. Ms. Galarza provided him with the number of the agency that handles health benefits (Tr. 37-38, 54, 80). Mr. Driscoll explained that, he later surmised, when respondent was demoted, the wrong code was mostly likely put into the payroll system which allowed him to collect insurance even though he was not receiving any pay (Tr. 104-05). Respondent testified that since he was still waiting to get his job back, he assumed that he still had health coverage (Tr. 143).

Respondent testified that in October 2012, he spoke to a colleague from DOITT who told him that his picture was at the security desk at his work location. Respondent understood this to mean that he had been fired and was not allowed on the premises. He tried to hire an attorney to help him (Tr. 141).

Respondent testified that in January 2014, he received a job offer to work at the Department of Education ("DOE"). When DOE checked "NYCAPS," the city payroll system,

he was listed as AWOL from DOITT. DOE told respondent that he could not be hired under the circumstances. Respondent called Mr. Driscoll who agreed to speak to DOE and clear him. When that did not happen, respondent called Mr. Driscoll again. Mr. Driscoll told him to resign from DOITT. Respondent asked why he should resign and Mr. Driscoll asked whether he wanted to come back to work. Respondent said that he wanted to work. Mr. Driscoll said that respondent could come back to work at DOITT but that he was going to be brought up on disciplinary charges. Since the DOE job was no longer available respondent returned to work at DOITT (Tr. 135-37).

Mr. Driscoll testified that prior to this time there was no urgency to reach out to respondent because there are approximately 300 call center representatives and a lot of turnover amongst the staff (Tr. 106-07). Mr. Driscoll testified that respondent was permitted to return to work in 2014 solely so that DOITT could discipline him (Tr. 81).

On April 28, 2014, respondent was directed to report to Mr. Driscoll on May 5, 2014, so that he could be returned to work (Resp. Ex. D) and be served with the instant disciplinary charges (ALJ Ex. 1). Respondent has been working as a call center representative since then.

ANALYSIS

Petitioner alleges that respondent was AWOL from April 8, 2009 through April 9, 2014. The charge must be dismissed. The record supports a finding that, throughout the relevant time period, respondent attempted to resolve his employment status as directed and that his failure to return to work was not due to his misconduct but rather to DOITT's reservations about respondent's fitness to perform his job.

In order to sanction a civil service employee for misconduct, there must be some showing of fault on the employee's part, either that he acted intentionally or negligently. *Dep't of Sanitation v. Banton*, OATH Index No. 336/07 at 3 (Dec. 1, 2006). Petitioner "has the burden of proving its case by a fair preponderance of the credible evidence . . . ." *Dep't of Correction v. Hall,* OATH Index No. 400/08 at 2 (Oct. 18, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 08-33-SA (May 30, 2008) (citations omitted). Preponderance has been defined as "the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence." *Richardson on Evidence* § 3-206 (Lexis 2008) (citations omitted); s*ee also Dep't of*

Sanitation v. Figueroa, OATH Index No. 940/10 at 11 (Apr. 26, 2010) (citations omitted). Petitioner failed to sustain its burden.

To the extent resolution of these charges relied on a determination of witness credibility, this tribunal has looked to witness demeanor, the 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 in determining credibility. *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).

Respondent was a credible witness. His testimony made sense and was corroborated by documentary evidence and by Mr. Driscoll and Ms. Galarza. It seems likely that respondent would recall what happened over the last seven years because it directly impacted on his ability to earn a living. On the other hand, Mr. Driscoll and Ms. Galarza gave inconsistent testimony. Unless there was documentation to refresh their recollection, their memory was not reliable. This is not surprising given that these events occurred long ago and they have likely handled numerous leave requests and disciplinary actions in the interim.

Turning to the merits of the charge, it was undisputed that respondent provided a doctor's note dated April 7, 2009, as directed. When the note was deemed insufficient, because it had a partial doctor's stamp and did not say whether there were any work restrictions, respondent submitted a new note that provided the missing information.

Respondent credibly testified that, after he provided the June 23 note, he was never told to report to work by either Ms. Galarza or Mr. Driscoll and was never given further instruction about what to do. There was no documentary evidence, such as a return to work letter or an e-mail to respondent's supervisor that respondent had been cleared to work, to support Ms. Galarza's testimony that she told respondent to report to his work location on June 30, 2009. Ms. Galarza was also contradicted by Mr. Driscoll who stated that respondent was not cleared to work because he wanted to confer with respondent's doctor to determine whether respondent could handle the stressful environment of the 311 call center.

While Ms. Galarza is responsible for leave requests, Mr. Driscoll testified that he had the authority to override her and that he knew respondent from the 2008 disciplinary matter and took over the situation (Tr. 69, 116). I credit respondent's testimony that Mr. Driscoll stated he

needed to investigate the matter and would get back to respondent. Mr. Driscoll wrote to respondent's doctor on July 7, 2009, stating that respondent's return to work was "contingent" on an expedient response. It was undisputed Mr. Driscoll never notified respondent that he was seeking additional information from respondent's doctor and that the doctor never responded to Mr. Driscoll.

Respondent's testimony that he tried to contact Mr. Driscoll in July 2008, as corroborated by his phone records (Resp. Ex. F), and that he never heard back from Mr. Driscoll was credible. On the other hand, Mr. Driscoll's testimony that, on the occasions he spoke to respondent, respondent never expressed an interest in returning to work was not credible. Respondent had no other reason to call Mr. Driscoll and it makes sense that an employee who had provided the requested information to be restored to full duty would follow up when the return to work date had passed. Notably, in 2008, respondent received multiple notifications from Ms. Galarza that he was or was going to be considered AWOL and that he needed to resolve his employment status by a certain date. This never happened. As a result, respondent's employment status remained unresolved: he was not on approved leave nor was he considered AWOL.

It is also significant that respondent had no union to assist him in resolving this situation because he was no longer a member of CWA and had not yet started paying dues to DC 37. Similarly, while respondent was fit for work, it is likely that his prior diagnosed mental condition impacted his ability to deal with this situation. I further credit respondent's testimony that in 2010 he thought he would be going back to work because he was able to place his wife on his health insurance. It is curious that when respondent contacted Ms. Galarza and Mr. Driscoll about this, why neither of them investigated how respondent was getting insurance when he was not on the payroll. It is also reasonable that after speaking to a colleague in 2012 about his picture being posted at the security desk, respondent would think he had been terminated given DOITT demoted him without a hearing in 2009. Under the circumstances, it is understandable that respondent eventually gave up and started looking for another job.

The proof here demonstrates that respondent provided medical documentation as directed. He was told in 2009 that his return to work was being considered by and would be resolved by Mr. Driscoll. Since that time respondent has been ready, willing, and able to return to work. While respondent could have done more, including memorializing his communications

with Mr. Driscoll in writing, his failure to do is not misconduct. *Law Department v. Coachman*, OATH Index No. 1370/00 (June 13, 2000), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 01-13-SA (Apr. 11, 2001) (AWOL charge dismissed, respondent did not have an affirmative obligation to monitor timekeeper who failed to deliver leave request to the supervisor for signing prior to respondent taking leave).

Although DOITT had legitimate concerns about whether respondent was fit for duty, when respondent's doctor failed to respond to Mr. Driscoll's request for further information, DOITT had the right to order respondent to report for a fitness examination under section 72 of the Civil Service Law. This did not happen and respondent's employment status was left in an indeterminate state until he was offered a job at DOE and brought up on disciplinary charges in 2014. Notably, respondent was not asked to provide a medical clearance to be returned to work in 2014. Given the totality of the circumstances, a finding that respondent engaged in misconduct is unwarranted. *Dep't of Environmental Protection v. Basdeo*, OATH Index No. 987/03 (June 6, 2003) (AWOL dismissed where petitioner knew respondent was injured and filing for worker's compensation and where documentation, although submitted late, would have been sufficient to grant leave).

FINDING AND CONCLUSION

Petitioner failed to prove that respondent engaged in misconduct.

RECOMMENDATION

The charge should be dismissed.

Alessandra F. Zorgniotti
Administrative Law Judge

May 6, 2015

SUBMITTED TO:

ANNE ROEST
Commissioner

APPEARANCES:

AYANA BROOKS, ESQ.
Attorney for Petitioner

JAYE BALLARD, ESQ.
Attorney for Respondent

Commissioner's Decision (August 26, 2015)

Alessandra F. Zorgniotti,
Administrative Law Judge
The City of New York
Office of Administrative Trials and Hearings
100 Church Street
New York, NY 10007

August 26, 2015

Re: *Dep't* of *Information Technology* & *Telecommunications (DOITT) v. Anonymous,*
OATH Index No. 051-15

Dear ALJ Zorgniotti:

In the Report and Recommendation *for Dep't of Information Technology & Telecommunications (DOITI) v. Anonymous*, OATH Index No. 051-15, Administrative Law Judge Alessandra Zorgniotti found that Petitioner failed to prove that Respondent engaged in misconduct, and recommended that the charge be dismissed. Pursuant to *Fogel v. Board of Education*, 48 A.D.2d 925 (1st Dept 1975), Respondent's counsel was advised of Respondent's right to comment on the Report and Recommendation; Respondent declined to submit comments.

Although I disagree with the notion that Respondent had no responsibility to resolve his employment status, and though I do not find Respondent's testimony credible with regard to his understanding of his employment status and the fact that he was not entitled to receive health benefits, I concur with the conclusions of the Administrative Law Judge in that Petitioner was not able to provide documentation sufficient to meet the burden of proof to sustain the AWOL charge in an evidentiary hearing. Accordingly, the ALJ recommendation that the charge of AWOL be dismissed is hereby adopted.

Respectfully submitted,

Anne Roest
Commissioner