

# ***Human Resources Admin. v. Heras***

OATH Index No. 1114/15 (Mar. 11, 2015)

Petitioner's undisputed evidence established that respondent was AWOL from August 14 to October 13, 2013 and October 21, 2013 to January 8, 2014, and that he has been continuously AWOL since January 10, 2014. Petitioner further established that respondent defrauded HRA by authorizing the issuance of rental assistance checks to fictitious landlords who kicked back a portion of the funds, which totaled over \$690,000, to respondent. Termination of employment recommended.

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

*In the Matter of*  
**HUMAN RESOURCES ADMINISTRATION**  
*Petitioner*  
*- against -*  
**RAFAEL HERAS**  
*Respondent*

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### **REPORT AND RECOMMENDATION**

**ASTRID B. GLOADE**, *Administrative Law Judge*

Petitioner, the Human Resources Administration ("HRA"), brought this disciplinary proceeding pursuant to section 75 of the Civil Service Law. Petitioner alleges that respondent, Associate Job Opportunity Specialist Rafael Heras, was repeatedly absent without leave (AWOL), has not been to work since January 10, 2014, and defrauded HRA of approximately \$690,000 (ALJ Exs. 1, 2, 3, 4).

Respondent failed to appear for a pre-hearing conference or for the hearing on February 6, 2015. Petitioner presented sufficient proof to establish service of the charges and notice of the hearing, and respondent was found in default (Pet. Exs. 1, 2, 3, 4, 5). At the hearing, petitioner relied solely on documentary evidence.

For the proven charges, I recommend that respondent's employment be terminated.

**ANALYSIS**

***AWOL***

Petitioner alleges that between August 14, 2013 and November 29, 2013, respondent was AWOL for four hundred and eighty-three (483) hours without prior approval or subsequent authorization (ALJ Ex. 1, complaint 0377097-02). Petitioner further alleges that respondent was AWOL from October 21, 2013 to the present, and that he failed to resolve his employment status with HRA on or before December 10, 2013, as required (ALJ Ex. 2, complaint 0377097-03). In addition, respondent is charged with being continuously AWOL since January 10, 2014, and with failing to resolve his employment status by June 9, 2014, as required (ALJ Ex. 3, complaint 0377097-04).

Respondent submitted into evidence three affidavits signed by Mark George, an employee in HRA's employee discipline unit, who is familiar with respondent's attendance records (Pet. Exs. 6, 7, 8). According to Mr. George, respondent's attendance records reveal that he was AWOL from August 14 to October 13, 2013 (Pet. Ex. 6). By letter dated October 1, 2013, petitioner advised respondent that he was AWOL and to respond to the letter by October 9, 2013 or risk disciplinary action. A notice of resignation form was included in the letter. According to Mr. George, respondent remained AWOL and did not submit his resignation (Pet. Ex. 6).

In a separate affidavit, Mr. George stated that respondent was AWOL between October 21, 2013 and January 8, 2014 (Pet. Ex. 7). Petitioner notified respondent that he was AWOL by letter dated December 3, 2013, and advised him to reply to the letter by December 10, 2013, which respondent failed to do (Pet. Ex. 7).

Mr. George stated that respondent has been continuously absent since January 10, 2014 (Pet. Ex. 8). On June 2, 2014, petitioner mailed a letter to respondent regarding his AWOL status and advised him to respond to the letter by June 9, 2014, or risk disciplinary action. A notice of resignation form was included in the letter. Respondent has remained AWOL and has not submitted his resignation (Pet. Ex. 8).

There is a discrepancy between the AWOL period charged in complaint 0377097-02 and Mr. George's affidavits. The complaint alleges that respondent was AWOL from August 14 until November 29, 2013, while Mr. George's affidavits indicate that respondent was AWOL between August 14 and October 13, 2013, and again between October 21, 2013 and January 8,

2014 (ALJ Ex. 1; Pet. Exs. 6, 7). Mr. George's affidavits do not indicate that respondent was AWOL between October 14 and October 20, 2013, a period encompassed in complaint 0377097-02. Therefore, petitioner failed to prove that respondent was AWOL during that period.

Accordingly, the undisputed evidence establishes that respondent was AWOL between August 14 and October 13, 2013 and between October 21, 2013 and January 8, 2014. The evidence also proves that he has been continuously absent since January 10, 2014. Moreover, petitioner mailed respondent letters advising him that he was AWOL and instructing him to resolve his employment status, which he failed to do.

### ***Welfare Fraud***

Petitioner alleges that between April 2006 and August 2009, respondent abused his position by fraudulently issuing rental assistance checks to individuals who were not landlords for HRA clients and were not entitled to the funds. The scheme defrauded HRA of approximately \$690,000. Petitioner further alleges that the fictitious landlords gave respondent the amount of the issued checks and he, in return, gave them cash. Petitioner charged respondent with violating HRA's Code of Conduct, which prohibits stealing or misappropriating City property (HRA Code of Conduct section III-31); engaging in any act that constitutes an unauthorized and abusive exercise of official functions (HRA Code of Conduct section III-11); engaging in conduct detrimental to HRA (HRA Code of Conduct section III-37); making a false entry upon HRA or City records (HRA Code of Conduct section III-4); engaging in non-HRA activity during work hours (HRA Code of Conduct section III-12); permitting City property or premises to be used by unauthorized persons or for unauthorized purposes (HRA Code of Conduct section III-14); engaging in conduct prejudicial to good order and discipline (HRA Code of Conduct section III-1); conduct that reflects unfavorably on one's fitness or may bring discredit to the agency (HRA Code of Conduct section II-G); and using agency equipment for non-agency purposes (HRA Code of Conduct section V-B) (ALJ Ex. 4 specification I, charges I through IX).

Petitioner's undisputed evidence establishes that in December 2014, respondent pleaded guilty to welfare fraud in the second degree in violation of Penal Law section 158.20, a felony (Pet. Exs. 9, 10). In his affidavit of confession of judgment and plea agreement and his plea allocution, respondent admitted that between April 2006 and August 2009, while employed by

HRA, he engaged in a kickback scheme that resulted in his receipt of over half a million dollars of HRA's funds. Respondent described the scheme as one where, working in concert with others, he requested the issuance of rent checks to individuals who were not actual landlords for homeless families. Respondent requested issuance of the checks knowing that they contained false statements and false information and he did so without permission or authority (Pet. Ex. 9). Respondent specifically acknowledged that the total amount he stole from HRA was approximately \$691,750 (Pet. Exs. 9, 10). Respondent was sentenced to a six-month jail term and five years probation (Pet. Ex. 10). There is no evidence in the record as to whether respondent has commenced serving this sentence.

Therefore, specification I, charges 1 through IX in complaint 0377097-05 are sustained. However, these charges concern the same misconduct and will be treated as one charge for the purpose of penalty. *See Savello v. Frank*, 48 A.D.2d 699 (2d Dep't 1975) (petitioner should not receive two punishments for one offense when the two departmental rules cited covered identical conduct and were duplicative); *Human Resources Admin. v. Mays*, OATH Index No. 1299/11 at 2 fn. 1 (Mar. 16, 2011), *modified on penalty*, Comm'r Dec. (Apr. 19, 2011), *rev'd*, NYC Civ. Serv. Comm'n Item No. CD 12-8-R (Jan. 31, 2012) ("This tribunal has held that if the same conduct violates multiple provisions of petitioner's executive order, such conduct will only exact a single penalty").

Charges X through XIV allege violation of the conflicts of interest provisions of the New York City Charter, while charges XV through XXI allege violation of the penal law (ALJ Ex. 4). At the hearing, petitioner moved to amend complaint 0377097-05 (ALJ Ex. 4) to conform to the evidence that respondent entered a plea of guilty to welfare fraud in the second degree. Petitioner's application is granted. This tribunal has held that where, as here, a respondent's underlying conduct constitutes misconduct under the Civil Service Law, it is unnecessary to make additional findings, based on the same facts, that respondent violated the conflicts of interest law and the penal law. *See Human Resources Admin. v. Anonymous*, OATH Index No. 2596/10 at 6-7 (Jan. 31, 2011). Respondent pleaded guilty to welfare fraud in the second degree, in violation of Penal Law section 158.20 and is unnecessary to reach the issue of whether respondent's conduct violated the conflicts of interest law.

### **FINDINGS AND CONCLUSIONS**

1. Petitioner proved that respondent was AWOL from August 14 to October 13, 2013, a period encompassed by complaint 0377097-02.
2. Petitioner proved that respondent was AWOL from October 21, 2013 to January 8, 2014 a period encompassed by complaint 0377097-03.
3. Petitioner proved that respondent has been continuously AWOL from January 10, 2014 to present, as charged in complaint 0377097-04.
4. Petitioner established that respondent defrauded HRA of over \$690,000 by issuing rental assistance checks to fictitious landlords and getting a kick-back of a portion of the funds.

### **RECOMMENDATION**

Having made the above findings, I obtained a summary of respondent's personnel record. Respondent has been employed by HRA since October 1994. While there is no significant disciplinary history, respondent's overall rating in his most recent performance evaluations before he went AWOL were "marginal" and his attendance and punctuality were consistently "not satisfactory".

Petitioner seeks termination of respondent's employment, which is appropriate. Respondent has been AWOL for well over a year, and failed to resolve his employment status when told to do so. Such unauthorized absence is a fundamental form of misconduct that substantially impedes the agency's ability to fulfill its mission and merits termination. *See Human Resources Admin. v. Agakpe*, OATH Index No. 318/15 at 9 (Nov. 7, 2014); *Human Resources Admin. v. Turnage*, OATH Index No. 538/12 at 2 (Dec. 14, 2011); *Human Resources Admin. v. Vaughn*, OATH Index No. 1754/08 at 2 (Mar. 20, 2008). Accordingly, termination is the only appropriate penalty for respondent's protracted absence from his position.

The sustained and systematic fraud that respondent perpetrated on HRA is an independent basis for termination of his employment. Respondent admitted that he engaged in a scheme that defrauded the agency of over \$690,000 in funds intended to provide rental assistance to homeless families who were HRA's clients. Respondent's misconduct is especially egregious

because he abused the trust his employer placed in him and used his position to steal money intended to help a vulnerable segment of this City's population. Accordingly, respondent's misconduct warrants a severe penalty. See *Human Resources Admin. v. Battle-Black*, OATH Index No. 2272/13 (Sept. 10, 2013) (termination recommended where fraud investigator pleaded guilty to fraudulently obtaining Section 8 housing benefits); *Human Resources Admin. v. Morgan*, OATH Index No. 1512/96 (Apr. 19, 1996) (termination for food stamp fraud); *Human Resources Admin. v. Williams*, OATH Index No. 869/96 (Jan. 26, 1996) (termination for welfare fraud); *Human Resources Admin. v. Hudson*, OATH Index No. 868/90 (Aug. 20, 1990) (termination for engaging in a scheme to defraud employer).

Accordingly, for the proven misconduct, I recommend termination of respondent's employment.

Astrid B. Gloade  
Administrative Law Judge

March 11, 2015

SUBMITTED TO:

**STEVEN BANKS**  
*Commissioner*

APPEARANCES:

**CHARLES AGOOS, ESQ.**  
*Attorney for Petitioner*

*No Appearance by or for Respondent*