Triborough Bridge & Tunnel Auth. v. Beverley

OATH Index No. 2238/15 (Nov. 30, 2015), *adopted*, Auth. Dec. (Dec. 28, 2015), **appended,** *aff'd*, NYC Civ. Serv. Comm'n Case No. 2016-0060 (May 2, 2016), **appended**

Petitioner demonstrated that respondent's excessive absenteeism constitutes incompetence *per se*. Respondent is not entitled to a disability leave. Termination from employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
TRIBOROUGH BRIDGE & TUNNEL AUTHORITY
Petitioner
- against -
BRUCE BEVERLEY
Respondent

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORGNIOTTI, *Administrative Law Judge*

Petitioner, the Triborough Bridge and Tunnel Authority ("TBTA"), brought this proceeding pursuant to Civil Service Law ("CSL") section 75. Respondent Bruce Beverley, a Bridge and Tunnel Officer ("BTO"), is charged with excessive absenteeism since December 20, 2013, and with failing to attend four medical appointments on February 6, 17, and 23, and April 10, 2015 (ALJ Ex. 1).

A hearing was conducted on October 2, 2015. Petitioner presented three TBTA witnesses and documentary evidence. Respondent testified on his own behalf and alleged that two of his long-term absences were caused by a disability and that he did not receive notice for the April medical evaluation. Respondent seeks a disability leave. The record closed on October 30, 2015, with the filing of closing statements addressing whether CSL sections 75 or 72 apply.

For the reasons below, petitioner demonstrated that respondent's excessive absenteeism constitutes incompetence *per se* and that he failed to appear for his rescheduled medical appointment as directed. Respondent is not entitled to a one-year disability leave under CSL section 72. Termination from employment recommended.

ANALYSIS

Respondent has been employed by the TBTA as a BTO since 2006 and is assigned to the Throgs Neck Bridge. A BTO is a peace officer whose duties include taking tolls, providing security, issuing summonses, arresting people, and driving vehicles including wreckers and snow removal trucks (Tr. 74-75, 77). Respondent's regular tour is 7:00 a.m. to 3:00 p.m.

Mr. Pascaul, the operations superintendent at the Throgs Neck Bridge, testified that when a BTO is absent there is a financial impact on the TBTA because the absent BTO is replaced by another BTO on overtime or by a temporary toll collector. Moreover, Mr. Pascaul testified that there is a reduction in services provided when temporary toll collectors are used because they can only collect tolls and not perform the other duties of a BTO (Tr. 75, 78; Pet. Ex. 5).

Since December 2013, respondent has been absent for more than 400 days. It was undisputed that respondent was out sick between December 20 and 31, 2013, and was late once by a half hour on October 15, 2013.[1] Between March 31 and July 30, 2014, respondent was continually absent due to respiratory issues. In 2014, respondent also was out sick for approximately 44 additional days allegedly due to a variety of medical issues. He was late on four occasions for a total of four hours. He also used eight emergency personal business ("EPB") leaves for a total of 40.5 hours, three of which were not approved.

In 2014 respondent exhausted of all his sick leave and was carried as absent without pay. Since December 29, 2014, to the present, respondent has been continuously absent without leave allegedly due to back problems. As of December 29, 2014, he has been off payroll (Tr. 19-21; Pet. Ex. 1). Respondent is currently on long-term disability (Tr. 121-22).

The following is a chart of the charged unscheduled leave uses. The chart is based on the charges as amended (Tr. 31-34), the post-hearing chart provided by petitioner, and documents in the record (* denotes the absence preceded or followed a holiday or regular day off). Charges relating to six occasions of personal business leave in 2014 totaling 17 hours have been excluded from consideration because they were pre-approved uses of annual leave.

[1] Charges relating to the period May 4 through July 15, 2013, were withdrawn as they are barred by the 18 month statute of limitations (Tr. 6).

Date	Category	Hours	Reason
10/15/2013	Late	0.5	
12/20/2013-12/31/2013*	Sick	80	Respiratory Issues
02/03/2014-02/10/2014*	Sick	40	Unable to travel due to illness
02/12/14-02/14/2014*	Sick	24	Unable to travel due to illness
2/15/2014	EPB	1	Authorized EPB
02/28/2014-03/07/2014*	Sick	48	Unable to travel due to illness
03/31/2014-07/30/2014*	Sick	784	Unable to travel due to illness
8/3/2014	EPB	8	Authorized EPB
8/13/2014	Sick	8	
9/14/2014*	EPB	1	Unauthorized EPB
9/20/2014-09/21/2014*	Sick	16	Unable to travel due to illness
9/26/2014-09/28/2014*	Sick	18	Unable to travel due to illness
9/30/2014-10/03/2014*	Sick	24	Unable to travel due to illness
10/17/2014	Late	1.5	At doctor's office
10/17/2014	EPB	6.5	Authorized EPB
10/20/2014*	Sick	3	Doctor orders to be out of work/Chest Pain
10/21/2014*	Sick	8	Doctor orders to be out of work/Chest Pain
10/22/2014*	Late	0.5	
11/7/2014*	EPB	2	Authorized EPB
11/11/2014	Sick	8	At doctor
11/16/2014	Late	1	
11/17/2014*	Sick	8	Unable to travel due to illness
11/18/2014*	Sick	8	Unable to travel due to illness
11/27/2014*	Sick	8	Medical examination appointment
11/30/2014	EPB	4	Authorized EPB
12/01/2014-12/02/2014*	Sick	16	Unable to travel due to illness
12/06/2014-12/07/2014*	Sick	16	Unable to travel due to illness
12/09/2014-12/11/2014*	Sick	24	Unable to travel due to illness
12/12/2014*	EPB	8	Unauthorized EPB
12/16/2014-12/17/2014*	Sick	16	Unable to travel due to illness
12/19/2014-12/21/2014*	Sick	24	Unable to travel due to illness
12/24/2014*	EPB	2	Unauthorized EPB
12/25/2014-12/26/2014*	Sick	16	Medical examination appointment
12/29/2014	Late	1	
12/29/2014	Sick	3	Doctor orders to be out of work
12/30/2014- to present	Sick	2,200+	Doctor orders to be out of work

Respondent testified that he was out of work from March 31 until July 30, 2014, because he had pneumonia with a partial collapsed lung and two broken ribs. He was under the care of his primary physician as well as a pulmonologist. He had to rest and use a nebulizer every four hours. It was undisputed that his doctor and the TBTA's doctor agreed that, during this period, respondent was unable to come to work (Tr. 104-06; Pet. Ex. 1; Resp. Ex. G).

Respondent admitted that he has been absent since December 29, 2014. He testified that in December he had influenza with excruciating back pain. He immediately saw his doctor and a chiropractor. He could not walk, stand, or sit. He was given an MRI and was diagnosed with spinal stenosis of L4-L5. Initially, he went for pain management which included facet and epidural injections. He also had radio-frequency ablation to block the nerve endings. Because the pain would not subside he had surgery in July 2015. He is currently in physical therapy and has not been cleared by his doctor to return to work (Tr. 107-09, 111; Resp. Exs. H, F).

On December 29, 2014, respondent got a doctor's note saying that he could not work or travel and that he can return to work on January 2, 2014 [sic] (Resp. Ex. H). Respondent did not return to work on January 2. On January 5, 2015, respondent faxed a doctor's note to Human Resource Director, Ms. Day, stating that he was out of work on January 2, that he should not travel, and that he can return to work on January 6 (Resp. Ex. A). Respondent did not return to work on January 6.

Respondent was directed to see the TBTA's doctor at Beth Israel Medical Center on January 15, 2015. The doctor found that respondent's back pain was stable and that he was fit for duty (Pet. Ex. 3). Respondent testified that when the TBTA's doctor told him to return to work, he was unable to do so because he was in too much pain to travel. According to respondent, his doctor agreed that he was unable to travel (Tr. 127-30). Respondent did not return to work as directed by the TBTA doctor on January 15.

Respondent also asserted that when the TBTA scheduled a follow-up medical appointment for February 6, 2015, he called and rescheduled the appointment to February 23 because he was unable travel. Respondent admitted that he did not go to the rescheduled appointment and stated it was because he was still unable to travel. That day respondent faxed medical documentation to Ms. Day stating that due to "Sciatic Neuritis Lumbar Intervertebral Disc Degeneration" he is "to restrict his travelling i.e. prolonged sitting since this has been shown to aggravate his condition" and that he can return to work on February 28, 2015 (Resp.

Ex. B; Tr. 128-30, 132). It was unclear from the record whether respondent travelled to see his doctor to obtain this note. Respondent did not return to work on February 28. Respondent also asserted that he never heard from the TBTA about a follow-up medical appointment (Tr. 111, 130-33).

Petitioner submitted a package of e-mails sent in January and April 2015 between various TBTA personnel, including Ms. Day, about respondent's absence, his need to be seen by a TBTA doctor, his contention that he was too ill to travel, and his failure to appear for an appointment on April 10, 2015 (Pet. Ex. 4). Ms. Day testified that the facility notifies the employee about medical appointments and acknowledged that there was no proof that respondent was notified about the April appointment (Tr. 47-55, 70). Ms. Day also acknowledged that under the parties' Collective Bargaining Agreement ("CBA"), respondent has a contractual right to assert one time per year that he is too ill to travel (Tr. 54; ALJ Ex. 5 at 3).

Respondent also submitted into evidence medical documentation (Resp. Ex. F) which includes a note from his doctor dated May 27, 2015, stating that he is being treated for "Sciatic Neuritis Lumbar Intervertebral Disc Degeneration," he has been advised to be out of work from January 5 to May 27, 2015, and that after this time he will be reevaluated to determine his work status. According to additional medical documentation from September 9, 2015, respondent had surgery for "L4-5 laminecties" six weeks earlier. The doctor also checked boxes on a form indicating that respondent "cannot return to work due to the aforementioned injury and diagnosis" and that it was "Unknown at this time" how long this limitation would apply (Resp. Ex. F). It is unclear whether this documentation was provided to the TBTA when it was generated.

With regard to the other charged sick leave absences in 2014, respondent testified that he always provided the TBTA with medical documentation including when he had upper respiratory infections, viruses, ear infections, influenza, and bronchitis. However, the notes submitted into evidence do not cover many of these absences (Resp. Ex. H). Moreover, respondent was seen by the TBTA's doctor on October 20, November 11, 18, 27, December 6, 9 and 25, 2014 and was always found fit for duty (Pet. Ex. 3). However, respondent called in sick on October 21, December 7, 8, 9, 10, 11, and 27, 2014 (Pet. Ex. 1).

Petitioner alleges that respondent's absenteeism is incompetence *per se* under CSL section 75. Respondent argues that his two extended absences were due to two disabilities,

pneumonia and spinal stenosis, and that he should be placed on a disability leave pursuant to CSL section 72. He further asserts that the remaining absences are insufficient to warrant termination, that under the CBA he is entitled to use leave for EPBs and that he complied with the procedures for taking them, and that, except for the February 6 medical appointment that he had a contractual right to change, he was never notified of the other appointments.

CSL section 75 allows an employer to discipline an employee for misconduct or incompetency "after a hearing upon stated charges." CSL § 75(1). To sanction an employee for misconduct, there must be some showing of fault on the employee's part, either that he acted willfully or intentionally. *Reisig v. Kirby*, 62 Misc.2d 632, 635 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008 (2d Dep't 1969). However, "a finding of incompetence . . . only requires evidence of some dereliction or neglect of duty." *Dickinson v. NYS Unified Ct. Sys.*, 99 A.D.3d 569, 570 (1st Dep't 2012).

CSL section 72 allows an employer to place an employee on an involuntary leave, after a hearing, when the employee is unfit to perform the duties of his job due to a non-work related disability. The disability may be physical or mental. CSL § 72(1). The focus of the section 72 proceeding is on the employee's current fitness and ability to perform his job duties, not on his past condition or work performance. *Admin. for Children's Services v. J.M.*, OATH Index No. 3350/09 at 4 (Apr. 5, 2010). Contrary to petitioner's assertion, an employer does not need to wait one year until the on-set of the disability to commence a section 72 proceeding. Rather, if a finding of unfitness is made, the employee is given a one-year leave of absence. CSL § 72(1).

At issue is whether respondent's unplanned absences since December 20, 2013, constitute incompetence under CSL section 75 or whether respondent is entitled to a disability leave under CSL section 72.

In *Brockman v. Skidmore*, 39 N.Y.2d 1045 (1976) *rev'g*, 43 A.D. 2d 572 (2d Dep't 1973), the Court of Appeals reversed a finding that a government agency must treat an employee's time-and-leave violations, when there is evidence of a disability, under CSL section 72 as opposed to a disciplinary matter under CSL section 75. Based on this authority, the New York City Civil Service Commission in *Clark v. NYC Housing Auth.*, NYC Civ. Serv. Comm'n Item No. CD 95-150 (Dec. 29, 1995), found that agencies do not abuse their discretion by proceeding under section 75 against employees with medical conditions. The Commission also expressed doubt that it had the authority to order an agency to proceed under section 72, rather

than section 75, without the agency's consent. The Second Department confirmed this principle in *Garayua v. Board of Education*, 248 A.D.2d 714 (2d Dep't 1998). In that case, the Court rejected an assistant custodian's claim that her physical incapacity and "nonwillful absenteeism" entitled her to a proceeding under section 72, and not a disciplinary hearing under section 75. *See also Romano v. Town Board of Colonie*, 200 A.D.2d 934 (3d Dep't 1994) (agency may terminate employee for excessive absence regardless of whether valid reasons existed for the absences or whether they were authorized).

Thus, even if an employee's absences are caused by a physical or mental disability, the employer may discipline and, if appropriate, terminate the employee for incompetence under CSL section 75 when the absences are excessive and they have a burdensome effect upon the employer. *See e.g. Wallis v. Sandy Creek Central School Dist. Bd. of Educ.*, 79 A.D.3d 1813 (4th Dep't 2010) (respondent who had an 60% absentee rate in 18-month period found incompetent even though absences were authorized due to work related injury); *Considine v. Pirro*, 38 A.D.3d 773 (2nd Dep't 2007) (employee who failed to return to work after a four month leave of absence found incompetent despite claim that she was physically unable to work because of carpal tunnel syndrome); *Triborough Bridge and Tunnel Auth. v. Lewis*, OATH Index No. 1592/03 (Feb. 10, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 05-19-SA (Apr. 25, 2005) (employee who was absent 92% of the time in 19 month period found incompetent despite claims that she suffered from numerous physical and mental illnesses); *Cicero v. Triborough Bridge and Tunnel Auth.*, 264 A.D.2d 334 (1st Dep't 1999) (employee who had an 80% absentee rate in 21-month period found incompetent even though absences were authorized due to work related injury); *Triborough Bridge and Tunnel Auth. v. Rodriguez*, OATH Index No. 729/04 (May 28, 2004) (employee's 48.3% absentee rate over a 15 month period found incompetent; respondent's depression not a defense).

This tribunal has in some cases recommended that, when unfitness for work is caused by a disability, even if manifested by "misconduct" or "incompetence," it should be dealt with under CSL section 72, and not section 75. *See e.g. Health & Hospitals Corp. (Lincoln Medical & Mental Health Ctr.) v. Bruce*, OATH Index No. 138/10 at 4-5 (Dec. 4, 2009) (employee's AWOL most likely due to a mental disability, misconduct charges dismissed); *Human Resources Admin. v. Barnes*, OATH Index No. 228/08 at 5-7 (Nov. 15, 2007) *adopted and remanded*, Administrator's Determination (Jan. 29, 2008) (employee's erratic behavior in work place likely

caused by mental illness, charges dismissed); *Dep't of Correction v. Mason*, OATH Index No. 2162/96 (Nov. 27, 1996) (employee's AWOL and other time and leave violations related to a disability, alcoholism, and was not disciplinable under CSL section 75); *Dep't of Correction v. Ervin*, OATH Index No. 1603/96 (Sept. 26, 1996) (work-related disability sufficient to convert disciplinary proceeding to disability proceeding and recommend leave of absence under CSL section 71).

Notably, these cases all had persuasive evidence that the employees' misconduct or incompetence was caused by an existing disability. In the instant case, there was insufficient proof that respondent is currently unfit to perform the duties of his position because of a disability. Except for respondent's self-serving testimony and some scant medical information, the most recent being a status update in September stating that respondent cannot return to work for an indefinite period of time (Resp. Ex. F), there was no objective proof that respondent is currently unfit. Moreover, in January 2015 there were conflicting opinions from the TBTA's and respondent's doctors regarding his fitness for work. Respondent was allowed to reschedule his February 6, 2015, medical appointment but failed to attend the February 23 examination. Respondent's claim that he was not allowed to contact the TBTA to make a new medical appointment was not credible (Tr. 111). Thus, the charge that respondent failed to attend the February 23 appointment as directed should be sustained. However, there was no proof that respondent had notice of the February 27 or April 10, 2015, medical appointments. The charges related to respondent's failure to appear on these dates as well as the February 6 appointment, which was rescheduled pursuant to the CBA, should be dismissed.

Even if respondent's current absence since December 29, 2014, is caused by a disability, as discussed above, court case law makes clear that the fact an employee has valid reasons for an absence is not dispositive of the ultimate issue whether the employee's unavailability, and its disruptive and burdensome effect on the employer, renders him incompetent to continue his employment.

TBTA's Rules and Regulations section I, paragraph 168, provides that excessive absence "will be cause for dismissal, in the manner prescribed by civil service procedure" (ALJ Ex. 3). Where it is not specifically defined by agency rules, this tribunal has considered whether the employee's absences are so numerous that they are excessive *per se. See Triborough Bridge & Tunnel Auth. v. Christiano,* OATH Index No. 493/12 at 12 (Mar. 21, 2012), *aff'd,* NYC Civ.

Serv. Comm'n Item No. CD 12-34-SA (July 24, 2012); *Admin. for Children's Services v. Hoffman*, OATH Index No. 1616/02 at 9 (Dec. 20, 2002). Absences that approximate 50% of the work days in the period under review have been found to be excessive *per se*. *Christiano*, OATH 493/12 at 12; *Triborough Bridge & Tunnel Auth. v. Davi*, OATH Index No. 339/01 at 7 (June 18, 2001); *Dep't of Parks and Recreation v. Guerin*, OATH Index No. 1711/99 at 13 (Aug. 3, 1999), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 00-97-SA (Nov. 14, 2000); *Dep't of Parks & Recreation v. Lenoble*, OATH Index No. 823/91 (Apr. 30, 1991), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 92-43 (Apr. 9, 1992) (69 unauthorized absences in a 15-month period excessive). This formula was affirmed by the First Department in *Cicero*, 264 A.D.2d at 334.

It was undisputed that since January 1, 2015, to the present respondent has missed every day of work and thus has a 100% absentee rate over an 11-month period. In 2014 respondent had approximately 142 days of unplanned absences related to EPBs and sick leave. There are 261 work days in a calendar year.[2] This means that in 2014 respondent had an absentee rate of approximately 54%.

Respondent's unscheduled absences since December 2013 are excessive *per se*. Indeed, far fewer absences from the workplace have been deemed excessive. *See Health & Hospitals Corp. (Harlem Hospital Ctr.) v. Rhines*, OATH Index No. 1888/10 at 3 (June 4, 2010) (14 unscheduled absences in 13 months excessive *per se*); *Health and Hospitals Corp. (Harlem Hospital Ctr.) v. Pabon*, OATH Index No. 270/04 (Oct. 29, 2003) (finding 57 absences over a 13-month period excessive); *Health and Hospitals Corp. (Metropolitan Hospital Ctr.) v. Coley*, OATH Index No. 2044/96 (Sept. 11, 1996) (finding 21 absences in a nine month period, including 12 approved absences, to be excessive); *Lenoble*, OATH 823/91 (Apr. 30, 1991) (69 unauthorized absences in a 15-month period excessive).

Petitioner also demonstrated that respondent's unreliable attendance has a negative operational and financial impact on the TBTA in that other BTOs must cover his absence on overtime and/or temporary toll collectors must be used who cannot perform all of the duties of a BTO. Since respondent's excessive absenteeism over the past two years has rendered him unable to perform the duties of his position, the charges under CSL section 75 should be sustained.

[2] http://www.nyc.gov/html/opa/html/getting_paid/payrate_calculator.shtml

FINDINGS AND CONCLUSIONS

1. Petitioner demonstrated that respondent's 100% absenteeism rate in 2015 and his 54% absenteeism rate in 2014, rises to the level of incompetence under CSL section 75.

2. Petitioner demonstrated that respondent was allowed to reschedule his February 6, 2015, medical appointment to February 23, 2015, but that he failed to attend his rescheduled appointment as directed. However, petitioner failed to show respondent had notice of appointments on February 27 or April 10, 2015 and these charges should be dismissed.

RECOMMENDATION

Upon making these findings, I obtained and reviewed an abstract of respondent's work history for purposes of recommending an appropriate penalty. Respondent was employed by the TBTA on October 23, 2006. He has no formal disciplinary history.

Petitioner seeks respondent's termination from employment. This is appropriate. Respondent's unauthorized absence is a fundamental form of misconduct which substantially impedes the agency's ability to fulfill its mission. This is particularly true here where respondent's failure to appear for his scheduled tour reduces services offered by the TBTA and causes additional expenditures by way of overtime and the hiring of temporary employees.

Respondent seems to have taken little to no action since the start of his unauthorized absence to resolve his status with the TBTA. In addition to failing to appear for a scheduled medical examination, he never sought a leave of absence under the Family Medical Leave Act or a reasonable accommodation under the Americans with Disabilities Act. Instead, respondent waited until after disciplinary charges were filed to claim that he is physically disabled.

Notably, respondent has essentially had the benefit of the one-year leave that he would have had under CSL section 72. After being absent for some 11 months, there is no evidence that respondent wants to or is able to return to work or that he will be any time soon. Had he been placed on a leave at the end of December 2014, he would be subject to termination pursuant to CSL section 73 at the end of this year. CSL § 72(4); *Prue v. Hunt*, 78 N.Y.2d 364 (1991). The TBTA should not be required to hold respondent's job open for another year on the possibility that he may return to work.

Respondent's egregiously poor attendance over the past two years leaves no room for a penalty short of termination. Accordingly, respondent should be terminated from his position.

Alessandra F. Zorgniotti
Administrative Law Judge

November 30, 2015

SUBMITTED TO:

DONALD SPERO
Acting President

APPEARANCES:

CHRISTOPHER BEERMANN, ESQ.
Attorney for Petitioner

PITTA & GIBLIN, LLC
Attorneys for Respondent
BY: JOSEPH BONOMO, ESQ.

THE CITY OF NEW YORK
OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS
----------}(
In the Matter of
TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,
Petitioner,

PRESIDENT'S
DECISION

-against-

BRUCE BEVERLEY,
Respondent.
----------}(

I received and reviewed the Report and Recommendation (OATH Index No. 2238/15) dated November 30, 2015, issued by the Honorable Alessandra F. Zorgniotti, Administrative Law Judge ("ALJ") of the City of New York, Office of Administrative Trials and Hearings ("OATH"), the transcript of the hearing held before the ALJ and the exhibits introduced at the hearing. I have also reviewed the comments on the report submitted by Joseph Bonomo, Esq., counsel for Bridge and Tunnel Officer ("BTO") Bruce Beverley ("Respondent").

In the Report and Recommendation, the ALJ concluded the following:

1. Petitioner demonstrated that Respondent's 100% absenteeism rate in 2015 and his 54% absenteeism rate in 2014, rises to the level of incompetence under New York Civil Service Law ("CSL") Section 75.
2. Petitioner demonstrated that Respondent was allowed to reschedule his February 6, 2015 medical appointment with the Triborough Bridge and Tunnel Authority ("TBTA" or "Authority") doctor to February 23, 2015, but that he failed to attend his rescheduled appointment as directed. The charges regarding the Respondent's failure to attend appointments on February 27, 2015 or April 10, 2015 were dismissed.

ALJ Zorgniotti recommended that Respondent be terminated from his employment for the misconduct proven at the hearing.

The hearing at OATH on the charges against the Respondent was held on October 2, 2015. The record closed on October 30, 2015 with the filing of written closing briefs.

In determining the Respondent's guilt and the appropriate penalty to recommend, the ALJ carefully analyzed the evidence presented at the hearing and then reviewed prior precedential cases. The ALJ determined that Respondent's absences since December, 2013 were excessive *per se,* while noting that in other cases "... far fewer absences from the workplace have been deemed excessive." In making such a finding the ALJ noted that Respondent's 100% absence rate from January 1, 2015 to the present was undisputed. Furthermore, the ALJ found that the Respondent had an approximate 54% absentee rate in 2014. In total, since December

2013, Respondent has been absent for more than 400 days. Respondent was also found guilty of failing to attend a medical appointment with the Authority doctor on February 23, 2015. The ALJ took into consideration, among other things, that Respondent has been employed by the TBTA since 2006, as well as his lack of prior formal discipline.

The Respondent argued that two of his longer term absences were due to two disabilities and that he should be placed on a disability leave pursuant to CSL Section 72. The ALJ considered whether Respondent's absences since December, 2013 constituted incompetence under CSL Section 75 or whether Respondent is entitled to a disability leave under CSL Section 72. In analyzing the relevant law and decisions, the ALJ concluded that even if an employee's absences are caused by a physical or mental disability, the employer may discipline the employee under CSL Section 75.

The ALJ summarized her analysis as follows:

> In *Brockman v. Skidmore*, 39 N.Y. 2d 1045 (1976) *rev'g*, 43 A.D. 572 (2d Dep't 1973), the Court of Appeals reversed a finding that a government agency must treat an employee's time and-leave violations, when there is evidence of a disability, under CSL section 72 as opposed to a disciplinary matter under CSL section 75. Based on this authority, the New York City Civil Service Commission in *Clark v. NYC Housing Auth.*, NYC Civ. Serv. Comm'n Item No. CD 95-150 (Dec. 29, 1995), found that agencies do not abuse their discretion by proceeding under section 75 against employees with medical conditions. The Commission also expressed doubt that it had the authority to order an agency to proceed under section 72, rather than section 75, without the agency's consent. The Second Department confirmed this principle in *Garayua v. Board of Education*, 248 A.D.2d 714 (2d Dep't 1998). In that case, the Court rejected an assistant custodian's claim that her physical incapacity and "nonwillful absenteeism" entitled her to a proceeding under section 72, and not a disciplinary hearing under section 75. *See also Romano v. Town Board of Colonie*, 200 A.D.2d 934 (3d Dep't 1994) (agency may terminate employee for excessive absence regardless of whether valid reasons existed for the absences or whether they were authorized).
>
> Thus, even if an employee's absences are due to a mental or physical disability, the employer may discipline and, if appropriate, terminate the employee for incompetence under CSL section 75 when the absences are excessive and they have a burdensome effect on the employer. *See e.g. Wallis v. Sandy Creek Central School Dist. Bd. Of Educ.*, 79 A.D.3d 1813 (4th Dep't 2010) (respondent who had a 60% absentee rate in 18-month period found incompetent even though absences were due to work related injury); *Considine v. Pirro*, 38 A.D.3d 773 (2d Dep't 2007) (employee who failed to return to work after a four month leave of absence found incompetent despite claim that she was physically unable to work because of carpal tunnel syndrome); *Triborough Bridge and Tunnel Auth. v. Lewis*, OATH Index No. 1592/03 (Feb. 10, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 05-19-SA (Apr. 25, 2005) (employee who was absent 92% of the time in 19 month period found incompetent despite claims that

> she suffered from numerous physical and mental illnesses); *Cicero v. Triborough Bridge and Tunnel Auth.*, 264 A.D. 334 (1st Dep't 1999) employee who had an 80% absentee rate in 21-month period found incompetent even though absences were authorized due to work related injury); *Triborough Bridge and Tunnel Authority v. Rodriguez,* OATH Index No. 729/04 (May 28, 2004) (employee's 48.3% absentee rate over a 15 month period found incompetent; respondent's depression not a defense).

Report and Recommendation, pp. 6-7.

The ALJ noted that the OATH tribunal has in some cases recommended that, when unfitness for work is caused by a disability even if manifested by "misconduct" or "incompetence," it should be dealt with under CSL section 72, and not section 75.

Significantly, the ALJ distinguished those cases from the Respondent's case as follows:

> Notably, these cases all had persuasive evidence that the employees' misconduct or incompetence was caused by an existing disability. In the instant case, there was insufficient proof that respondent is currently unfit to perform the duties of his position because of a disability. Except for Respondent's self-serving testimony and some scant medical information, the most recent being a status update in September stating the respondent cannot return to work for an indefinite period of time (Resp. Ex. F), there was no objective proof that respondent is currently unfit.
>
> ….
>
> Even if Respondent's current absence since December 29, 2014, is caused by a disability, as discussed above, court case law makes clear that the fact an employee has valid reasons for an absence is not dispositive of the ultimate issue whether the employee's unavailability, and its disruptive and burdensome effect on the employer, renders him incompetent to continue his employment.

Report and Recommendation, p.8.

In evaluating the excessiveness of the Respondent's absenteeism, the ALJ applied the formula that was affirmed by the First Department in *Cicero v. Triborough Bridge and Tunnel Authority,* 264 A.D.2d 334 (1st Dep't I999). Absences that approximate 50% of the Work days in the period under review have been found to be excessive *per se.* Respondent's absenteeism was clearly excessive as evidenced by a 100% absentee rate over an 11 month period in 2015 and a 54% absentee rate in 20I4.

On November 30, 20I5, the ALJ sent a letter to the Authority and to Respondent's counsel, Joseph Bonomo, Esq., instructing that Respondent's counsel is entitled to comment on the OATH Report and Recommendation prior to my final action, and that the Authority should notify Mr. Bonomo of the time period permitted for such comment. The Authority complied in a

letter to Mr. Bonomo dated November 30, 2015 in which he was advised to submit any comments by the close of business on December 14, 2015. On December 14, 2015, Mr. Bonomo submitted a typewritten, 3-page letter with comments for my consideration. I reviewed the submission by Respondent's counsel wherein it is urged that I reject the findings of ALJ Zorgniotti and place the Respondent on disability leave pursuant to CSL 72.

In that letter, Respondent's counsel requested that I reject the determinations and recommendations made by the ALJ who heard witness testimony, assessed witness credibility and weighed the documentary evidence, and instead find that the ALJ erred on both the facts and the law, and place the Respondent on disability leave pursuant to CSL section 72.

With respect to Respondent counsel's claim that the ALJ erred, nothing in counsel's letter dated December 14, 2015, the hearing record or the Report and Recommendation persuades me that counsel's argument is sound or correct. Respondent claims that a lung ailment for 98 days in in 2014 and back ailments beginning on December 29, 2014 and running through the date of the trial, are disabilities that should be excluded from the calculations made by the ALJ. Besides the fact that, as quoted from the Report and Recommendation above, the ALJ found Respondent's testimony was self-serving and that the record is otherwise bereft of medical evidence of a current disability, the precedents cited by the ALJ are clear. Regardless of the reason for the extensive absences from the workplace, even if found to be legitimate, it is the absences themselves that led to the ALJ's finding of excessive absences constituting incompetence *per se* and the recommendation that the respondent be terminated from his employment. The ALJ found that the hearing record contained no objective proof that the Respondent was currently unfit, as Respondent claimed. Respondent had a full and fair opportunity to present all of the evidence and arguments that he wished to present at the hearing and in closing briefs. Any claim by counsel that periods of absence should be excluded from the attendance charges because the Respondent was truly sick is simply urging me to substitute my judgment for that of the fact finder who heard all of the evidence and assessed the credibility of the witnesses who testified. For this reason, I cannot adopt the position argued by Respondent's counsel in his letter dated December 14, 2015. Most significantly, however, is that the issue at hand is not the Respondent's alleged current state of well-being, but rather what the evidentiary record reflects regarding his excessive absence from his job with the Authority. Nothing in the document attached to Respondent's counsel's letter addresses this issue. Counsel's recitations of the ALJ's claimed errors of law read as if counsel were still making factual arguments, albeit outside of the record. I do not accept counsel's claims that the ALJ erred in this regard. Any consideration of these unfounded self-serving statements is irrelevant.

I have also examined counsel's representations in the December 14, 2015 letter that the Respondent has been cleared to return to work on December 12, 2015, based on a document attached to the December 14, 2015 letter purporting to be an update of Respondent's work/impairment status and dated November 25, 2015. I note that the attached document was not a part of the record. As stated above, the record closed on October 30, 2015 with the submission of post hearing briefs. Thus, the document attached to the December 14, 2015 letter was never a part of the record, or subject to examination or scrutiny that was available during the hearing process. Therefore, I cannot consider counsel's assertions regarding this claim.

Furthermore, I have considered the claim that the ALJ erred in finding that the Respondent did not attempt to resolve his status with the Authority by applying for FMLA leave. Respondent's counsel's claim is wholly conclusory with no basis in the factual record of this case. Therefore, I cannot accept counsel's assertions regarding this claim.

As the Acting President of the Triborough Bridge and Tunnel Authority I have the authority, pursuant to CSL Section 75, to accept or reject the recommendation of the OATH ALJ. In rendering my decision, I reviewed the Report and Recommendation issued by ALJ Zorgniotti, the hearing transcript and the evidentiary exhibits in this case. Furthermore, I note that the ALJ had the opportunity to make credibility determinations regarding the witnesses who testified and that she did so. I gave careful consideration to the written comments dated December 14, 2015 that were offered by Respondent's counsel.

I find that based upon my review of the record, there exists substantial evidence for me to accept the findings and recommendation of the OATH ALJ that the Respondent be terminated from his employment with the TBTA. I accept the ALI's conclusions as they were supported by the record developed during the hearing.

I concur with the ALJ that the hearing record amply proves the charges for which the ALJ found Respondent guilty. I also concur with the ALJ's sound reasoning in her determination that a penalty of termination is warranted under these facts.

At a minimum, it is expected that a Bridge and Tunnel Officer ("BTO"), as with any employee, report for work as scheduled. As the ALJ noted, and the uncontroverted testimony and evidence reflects, a BTO's failure to report to work results in difficulties in running a smooth operation and additional expense in the form of overtime when other employees are necessary to meet the needs of the facility. I concur with the ALJ that an employee who is absent 54% of the time in 2014, and 100% of the time in an 11 month period in 2015 is unable to perform the duties of his position as a BTO. Further I concur with the ALJ that Respondent's unauthorized absence from his employment is a fundamental form of misconduct which substantially impedes the Authority's ability to perform its mission.

Therefore, it is my determination, given the substantial evidence to support a finding that the Respondent's excessive absenteeism constitutes incompetence *per se*, that the penalty of termination from his employment is appropriate and not shocking to one's sense of fairness. ·

I direct that Respondent be terminated from his employment with the TBTA effective immediately.

Under the provisions of Section 75 of the Civil Service Law, the Respondent is entitled to appeal from this determination by application either to the Civil Service Commission or to a court in accordance with the provisions of Article 78 of the Civil Practice Law and Rules. If Respondent elects to appeal to the Commission; such appeal must be filed in writing within twenty (20) days of receipt of this determination. A decision of the Commission is final and conclusive.

Dated: December 28, 2015
New York, New York

Donald Spero
Acting President, TBTA

THE CITY OF NEW YORK
CITY CIVIL SERVICE COMMISSION

In the Matter of the Appeal of
BRUCE BEVERLEY
Appellant
-against-
TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY
Respondent
Pursuant to Section 76 of the New York
State Civil Service Law
CSC Index No: 2016-0060

DECISION

BRUCE BEVERLEY ("Appellant") appealed from a determination of the Triborough Bridge and Tunnel Authority ("TBT") finding Appellant guilty of incompetency and/or misconduct and imposing a penalty of Termination following disciplinary proceedings conducted pursuant to Civil Service Law Section 75.

The Civil Service Commission ("Commission") heard arguments from the parties on Thursday April 14, 2016.

The Commission has considered the arguments presented on this appeal, and reviewed the record of the disciplinary proceeding. Based on this review, the Commission concludes that there is sufficient evidence in the record to support the findings of fact and the conclusions of law, and that the penalty is appropriate.

Therefore, the final decision and penalty imposed are hereby affirmed.

Nancy G. Chaffetz, Commissioner, Chair
Rudy Washington, Commissioner, Vice Chair
Charles D. McFaul, Commissioner
May 2, 2016