Admin. for Children's Services v. Berrios

OATH Index No. 124/16 (Feb. 11, 2016)

Petitioner established that respondent failed to timely appear for a scheduled Family Court proceeding regarding a case under her supervision and that she was discourteous to the agency attorney handling the case. 55-day suspension without pay recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
ADMINISTRATION FOR CHILDREN'S SERVICES
Petitioner
-against-
GISELLE BERRIOS
Respondent

REPORT AND RECOMMENDATION

ASTRID B. GLOADE, *Administrative Law Judge*

This disciplinary proceeding was referred by the petitioner, the Administration for Children's Services ("ACS"), pursuant to section 75 of the Civil Service Law. Petitioner alleges that respondent, Child Protective Specialist Giselle Berrios, failed to timely appear in court regarding one of her cases as directed by a Manhattan Family Court judge and an attorney who was representing petitioner, was discourteous to the attorney, failed to perform her duties, engaged in conduct detrimental to ACS, and conducted herself in a manner prejudicial to good order and discipline (ALJ Ex. 1).

At a hearing conducted before me on December 17, 2015, petitioner presented the testimony of two witnesses and offered documentary evidence. Respondent testified on her own behalf. For the reasons stated below, I find that the charge is sustained and recommend that respondent be suspended for 55 days.

ANALYSIS

Respondent has been employed by petitioner as a Child Protective Specialist in the Family Service Unit for eight years (Tr. 60-61). The charge arises from respondent's failure to

timely appear for a Manhattan Family Court proceeding regarding a family under her supervision and her interaction with an agency attorney once she arrived at court.

Failure to Appear in Family Court at 9:30 a.m. on February 18, 2015

The facts are largely undisputed. Families within the Family Service Unit are under court-ordered supervision, meaning that there has been a neglect petition filed against a family member and the unit has to supervise the family to ensure that its members are getting services (Tr. 46-47). ACS had initiated child neglect proceedings against the mother of several children, one of whom has special needs (the "Roseangela R. case"). The case, which was complicated by the mother's cognitive impairments and mental health issues, required close monitoring (Tr. 10-11).

Respondent was responsible for the court-ordered supervision of the Roseangela R. family, which entailed visiting the family, usually every two weeks or more frequently if necessary; making referrals for the mother and children to obtain services relating to their medical issues; and coordinating the provision of services to the family. ACS case workers had referred the family to New Alternatives for Children ("New Alternatives"), a social work agency, which assigned a preventative worker to coordinate the provision of services to the family and to assist the ACS case worker. The preventative worker advised respondent about services New Alternatives could provide to the family and respondent was responsible for making referrals for those services. She was also responsible for monitoring the services that were provided through the agency to ensure that the family was obtaining necessary treatment (Tr. 11-13, 43, 46-47).

Melissa Zeigler, who was then an ACS attorney in petitioner's Family Court Legal Services Division, represented petitioner in Manhattan Family Court proceedings before Judge Clark Richardson in the Roseangela R. case. In February 2015, the case had been on the court's calendar almost every week because the judge was closely monitoring ACS's response to numerous concerns that had been raised about the family's well-being. The case was on the court's February 18, 2015 calendar for a status update to address concerns that had been raised in prior proceedings about possible child abuse and domestic violence, whether a child had sufficient epilepsy medication, and whether the mother was complying with mental health services (Tr. 14-16). According to Zeigler, Judge Richardson had directed that respondent, the assigned case worker, be present at February 18th proceeding (Tr. 37).

The Roseangla R. case was on the Family Court's calendar for a 9:30 a.m. calendar call, which meant that all the parties were required to be present at that time. Prior to the scheduled date, Zeigler told respondent it was important for her to appear at court on February 18th and to be prepared to address the court's concerns about the family. She told respondent to arrive at court a few minutes early to prepare for the appearance (Tr. 17-18). Zeigler testified that she hoped respondent would bring a case report to provide an update as to what had happened since the last court appearance. According to Zeigler, an ACS case worker is supposed to prepare a case report for every court appearance, especially where the proceeding is a status update appearance as was the case here (Tr. 26).

On February 18, 2015, Ziegler arrived at Manhattan Family Court at about 9:00 a.m. and waited for respondent. Between 9:15 and 9:30 a.m., when respondent failed to appeared, Zeigler tried to reach respondent at her office and on her cell phone. She also tried to reach respondent's supervisors by telephone, without success. Zeigler eventually asked the court officers to delay calling the case while she tried to contact respondent (Tr. 18-19). Zeigler e-mailed respondent and her supervisors at 12:24 p.m. on February 18th, seeking information as to respondent's whereabouts (Tr. 18; Pet. Ex. 1).

Josephine Veloz, respondent's supervisor, has been an ACS employee for 14 years, the last two and a half of which have been as a Child Protective Manager in the Family Service Unit (Tr. 40-41). In an e-mail dated February 17, 2015, at 4:52 p.m., Veloz notified respondent and others workers of a meeting Veloz had scheduled for February 18th at 11:00 a.m. She advised the e-mail recipients to attend the meeting "unless you have court" (Pet. Ex. 3). Respondent attended the meeting on February 18th (Tr. 44). Later that day, Veloz received an e-mail from Zeigler inquiring of respondent's whereabouts. Veloz spoke to respondent, who confirmed that she had been scheduled to appear in court on the Roseangela R. case and indicated that she had not prepared a court report for the appearance (Tr. 49-51). Veloz asked Zeigler to request that the case be placed on the afternoon calendar (Tr. 49).

Respondent admitted that she failed to appear in court and contends that she simply forgot about the court appearance (Tr. 64). She also acknowledged that she forgot the court appearance in an e-mail she sent to Zeigler on February 18th in which she stated that "I informed Ms. R. of the court date and unfortunately totally forgot about it" (Pet. Ex. 2).

Respondent's claim that she forgot the court appearance is questionable. First, the case was a complicated one in which there had been several prior court appearances, some of which respondent attended, and the attorney responsible for the case reminded respondent of the need to attend and be prepared for the February 18th proceeding. Second, respondent testified that the day before the court appearance, she telephoned the parents in the case to remind them that they had to be in court the following day (Tr. 64). Therefore, only a few hours before the scheduled hearing, respondent was aware of the date and its importance to the family. Third, respondent's supervisor sent her an e-mail late in the afternoon before the court date in which she excused employees who were scheduled to appear in court from a meeting that conflicted with respondent's scheduled court case. It would be odd if this e-mail did not trigger respondent's memory that she was scheduled to be in court and would thus be unavailable for the meeting with her supervisor. Finally, and perhaps most significant, is the fact that respondent was unprepared for the Family Court proceeding: she had not written a report that should have addressed the concerns raised by the judge and parties during prior court appearances. Under all the circumstances, it is more plausible that respondent did not forget the court date so much as she chose to ignore it.

Nonetheless, even were I to credit respondent's explanation, her forgetfulness does not excuse her failure to appear in court. *See Dep't of Correction v. Lewis*, OATH Index No. 715/92 at 11 (Dec. 31, 1992) (respondent's admitted memory lapse did not justify or excuse her failure to log in with the Department of Correction as required).

Accordingly, petitioner established that respondent failed to timely appear for a scheduled Family Court proceeding as directed by the court.

Discourtesy

The parties' accounts of respondent's conduct after she arrived at court are quite different.

Zeigler testified that she managed to get the case placed on the 2:30 p.m. calendar. Respondent arrived at Family Court between 2:00 p.m. and 2:30 p.m. which left very little time for Zeigler to prepare respondent for the proceeding (Tr. 22). Zeigler went over the case with respondent in an open area outside the courtroom where parties wait for their cases to be called (Tr. 22). She identified for respondent the issues that she anticipated would be the focus of the

afternoon's proceedings, including concern about why a child with epilepsy had not been to the doctor in six months to one year (Tr. 24). According to Zeigler, respondent was evasive during their discussion. Moreover, respondent sought to change the subject when Zeigler tried to discuss specific concerns about the case. Her responses to Zeigler's questions were "jumbled and very confusing" (Tr. 25). When Zeigler tried to steer the conversation back to the specific concerns, respondent became angry and started to raise her voice and yell "what's wrong with you?" Respondent yelled so loudly that others in the area started looking at them (Tr. 25). Zeigler testified that she became so concerned about preparing for the hearing that she asked her supervisor to talk to respondent in an effort to get some information from her. However, her supervisor was not able to get answers from respondent (Tr. 25). Zeigler testified that the incident lasted for five to ten minutes (Tr. 38).

During the court proceedings, which lasted about 20 minutes, the judge and an attorney for one of the children indicated that ACS had not addressed their concerns and the judge scheduled another conference (Tr. 27-28). Zeigler testified that because respondent failed to prepare a case report for the proceeding, which she maintains respondent was required to do, Zeigler had to rely on a report prepared by New Alternatives (Tr. 25-26).

After the status hearing, Zeigler tried to meet with respondent outside of the courtroom to discuss the issues that had to be addressed at the next court appearance (Tr. 28, 30). She testified that respondent started yelling at her again. Respondent screamed that the children should have never been sent home and that the Family Service Unit cannot remove children (Tr. 28-29). According to Zeigler, respondent shouted: "what do you want me to say? What do you want me to say? I don't care." When Zeigler pressed respondent about whether she was saying that she did not care about the children, she responded: "I don't care about the kids" (Tr. 28-29). Zeigler described respondent as angry, yet indifferent about the children in her care (Tr. 30). Zeigler testified that respondent had her coat on as they spoke and seemed to be trying to walk away from Zeigler towards the elevators. Because of respondent's behavior outside the courtroom, Zeigler decided it best to end the encounter, which had lasted about five minutes, and to report it to respondent's supervisors (Tr. 30, 38).

Veloz received a call from Zeigler between 3:00 and 4:00 p.m. on February 18th, in which Zeigler reported that respondent had appeared for the proceeding, but had been rude and disrespectful (Tr. 52-53). In an e-mail to Veloz, sent about three hours after her meeting with

respondent outside the courtroom, Zeigler reported that respondent had been "raising her voice" and "was very volatile" even before they entered the courtroom. She also reported that respondent cut her off and yelled at her after the proceeding, shouted that the children should never had been sent home, and walked away from her while she was still trying to discuss next steps in the case (Pet. Ex. 2).

Respondent denied having been belligerent towards Zeigler during their encounter. According to respondent, she arrived at court between 2:00 and 2:30 p.m. and immediately apologized to Zeigler for having forgotten the morning calendar call (Tr. 64-65). Zeigler asked respondent if she had read the New Alternatives report and respondent replied that she had not read the entire report and did not care what the New Alternatives case planner wrote (Tr. 65). Zeigler asked her if she did not care about the children, and respondent tried to explain that it was not about the children, but about their mother's inability to travel to appointments because of recent surgery (Tr. 66). Respondent stated that Zeigler became combative and "wouldn't let me speak. She just kept cutting me off" (Tr. 66). Zeigler asked respondent several times whether she cared about the children and respondent "looked at her and . . . said no because there is nothing for me to care about. They're fine" (Tr. 67). Respondent testified that Zeigler then got up and walked away from her (Tr. 67).

Respondent denied specifically stating that that she did not care about the children (Tr. 69). According to respondent, she had no particular concerns about the family that afternoon and tried to explain this to Zeigler. Respondent maintained that the issue was the preventative agency, which reported that an epileptic child in the household had not been to the doctor and did not have enough medication. Respondent testified that during a joint visit to the family's household in January 2015 with a New Alternatives preventive worker, she told the mother to cancel her appointments because of the mother's medical condition. Respondent noted that the New Alternatives report failed to account for those cancelled appointments. However, respondent admitted that she had not read the entire report (Tr. 67-69, 71-72).

Respondent also denied having walked away from Zeigler as she tried to discuss concerns about the children after the hearing. Respondent testified that when she and Zeigler left the courtroom, they were discussing whether the Family Service Unit could remove the children from the household. According to respondent, she advised Zeigler that removal is not the unit's objective, as they first try to work with the family. Respondent stated, however, that "at that

point [Zeigler] was speaking and I turned around because I left my scarf and I ran back to get it from [Zeigler's] supervisor" (Tr. 69).

Given the starkly different versions of the events of February 18, 2015, resolution of the charges rests on a determination of the witnesses' credibility. In making credibility determinations, this tribunal may consider such factors as witness demeanor; consistency of 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 (Feb. 5, 1998), *aff'd,* NYC Civ. Serv. Comm'n, Item No. CD 98-101-A (Sept. 9, 1998). I found Zeigler to be a credible witness, with plausible and detailed testimony that was corroborated by her contemporaneous telephone complaint to respondent's supervisor and her detailed e-mail a few hours after the incident.

Respondent, on the other hand, was less than convincing. I do not credit her suggestion that she was the victim and Zeigler was the aggressor. Instead, I find it more plausible that respondent was agitated when she arrived at court several hours late and unprepared for the proceedings. Respondent was defensive about the New Alternatives report, which seemed to suggest that she may not have been adequately monitoring the family's needs. When Zeigler tried to discuss the report in preparation for their court appearance, respondent became hostile and argumentative. While I have little doubt that Zeigler was frustrated by respondent's late arrival and lack of preparation, which likely exacerbated tensions between them, I believe that respondent became more perturbed during their encounter and shouted at Zeigler before the court proceeding. I credit Zeigler's testimony that respondent's voice was so loud that others in the public area outside the courtroom turned to look at them.

Furthermore, petitioner has established by a preponderance of the credible evidence that respondent yelled at Zeigler, stated that she did not care about the children, and walked away from Zeigler after the court appearance. Although respondent denied stating "I don't care about the kids" as is charged (Tr. 69; ALJ Ex. 1), I do not credit respondent's denial. Moreover, respondent testified that when Zeigler asked her if she cared about the children she responded "no because there is nothing for me to care about. They're fine" (Tr. 67). I was unconvinced by respondent's efforts to qualify her statement by suggesting that she was merely seeking to convey that there was no cause to worry about the children. Indeed, respondent's explanation is

ludicrous given that petitioner, the Family Court judge, and a guardian for one of the children were concerned about the children's well-being.

In addition, respondent's claim that she walked away while Zeigler was speaking to retrieve a scarf from Zeigler's supervisor is absurd. Given the serious issues to be addressed and the already tense interaction with Zeigler, it is difficult to believe that respondent walked away mid-sentence to retrieve a scarf. There was no suggestion of circumstances that required respondent to retrieve her scarf quickly, such as Zeigler's supervisor trying to abscond with the scarf. Moreover, respondent's claim that she merely turned away from Zeigler to retrieve a scarf (Tr. 69) is at odds with her earlier testimony that it was Zeigler who walked away from her (Tr. 67). It is more plausible that respondent wanted to end what had already been a frustrating encounter with Zeigler and she walked away while the attorney was trying to discuss preparations for their next court appearance.

"Whether an expression of disagreement amounts to sanctionable misconduct in any given case is a factual determination to be made in light of the totality of the circumstances." *Health and Hospitals Corp. (Woodhull Medical and Mental Health Ctr.) v. McMillian*, OATH Index No. 1402/06 at 6 (July 24, 2006); *see also Human Resources Admin. v. Bichai*, OATH Index No. 211/90 (Nov. 21, 1989), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 90-54 (June 15, 1990). Factors to be considered in making this assessment include: the substance of a disagreement; the words and tone used within the context of the conversation; whether threats, insolence, or profanity were used; disruption to the workplace caused by the disagreement; and whether it occurred in front of coworkers and/or members of the public. *See McMillian*, OATH 1402/06 at 6-7; *Transit Auth. v. Victor*, OATH Index No. 799/11 at 5 (Mar. 3, 2011), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-52-A (Aug. 9, 2011). Here, in two separate incidents, respondent shouted at an attorney in a public area outside of a courtroom for over five minutes. She was so loud that she attracted the attention of other people in the waiting area and caused the attorney to seek assistance from her supervisor. Respondent was dismissive of the needs of the agency's clients and, she later walked away from a discussion with the attorney. Under the circumstances, respondent's behavior constitutes sanctionable misconduct.

In sum, petitioner has established that respondent was discourteous to a fellow employee in violation of section II(B) of the ACS Code of Conduct; failed to perform her duties in violation of section III(B)(25) of the Code of Conduct; engaged in conduct that was detrimental

to ACS or undermined her effectiveness in performing her duties in violation of section III(B)(42); and engaged in conduct that was prejudicial to good order and discipline and/or failed to conduct herself in a manner that reflects favorably on respondent, ACS, and the City, in violation of section III(B)(1) of the Code of Conduct.

FINDINGS AND CONCLUSIONS

1. Respondent failed to timely appear in Manhattan Family Court as charged in charge 1, specification 1.

2. Petitioner established that respondent raised her voice at an agency attorney and failed to respond to the attorney's questions about a case under respondent's supervision, as alleged in charge 1, specification 2a.

3. Petitioner established that when asked about services that were being provided to children under her supervision, respondent shouted at an agency attorney and stated that she did not care about the children, as alleged in charge 1, specification 2b.

4. Petitioner established that respondent yelled at an agency attorney who was discussing a case respondent supervised, stated that the children should not have been sent home, and walked away from the attorney while the attorney was speaking to her, as alleged in charge 1, specification 2c.

RECOMMENDATION

Upon making the above findings and conclusions, I obtained and reviewed an abstract of respondent's personnel record for purposes of recommending an appropriate penalty.

Respondent has been employed with ACS since March 2007. Respondent has served two prior suspensions: In 2012, respondent agreed to a penalty of 15 days suspension without pay for multiple counts of rudeness and insubordination. In 2013, she was suspended without pay for 30 days for rudeness and insubordination. Respondent's performance evaluations between April 2010 and March 2015 reveal overall ratings of "good" or "conditional," and one rating of "very good." Petitioner seeks a recommended penalty of a 60-day suspension, allocated as 15 days for

her failure to timely appear in court and 45 days for respondent's discourteous conduct after she arrived at court.

During her relatively brief tenure, respondent amassed a significant disciplinary history that concerns misconduct similar to that for which respondent has been found liable here. Those prior penalties should have put respondent on notice that her discourteous behavior is inappropriate and will subject her to sanctions. Under the principle of progressive discipline, an employee who is disciplined for particular behavior should correct that behavior, or face increasing penalties for repeated or similar conduct. *See Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Ford*, OATH Index No. 2383/09 at 11 (July 10, 2009); *Health & Hospitals Corp. (Kings Co. Hospital Ctr.) v. Meyers*, OATH Index No. 1487/09 at 8 (Jan. 26, 2009), *aff'd*, NYC HHC Pers. Rev. Bd. Dec. No. 1349 (July 31, 2009); *Human Resources Admin. v. Beauford*, OATH Index No. 1517/03 at 18 (Dec. 5, 2003), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-15-SA (Jan. 9, 2006). Respondent served a 30-day penalty for discourteous and insubordinate conduct in 2013, yet her behavior did not improve. A more serious penalty will impress upon respondent that her conduct is unacceptable and must cease.

Respondent engaged in two separate incidents of shouting and other discourteous behavior on February 18th: the first occurred before the court proceedings and the second immediately after. It is troubling that she was unable to collect herself and calm down during the 20-minute court proceedings that took place between the two incidents. Her outbursts are even more disturbing because they occurred in a public area of a courthouse and were directed towards someone with whom respondent should have collaborated to ensure that a vulnerable family under her supervision received appropriate services. Accordingly, given respondent's disciplinary history and the nature of the proven misconduct, a 45-day suspension without pay is appropriate.

Petitioner also requested a 15-day suspension for respondent's failure to timely appear in court regarding a case that she supervised. This was a serious breach of respondent's obligations as a Child Protective Specialist, especially given the sensitive and complicated issues raised in the Roseangela R. case. However, respondent has never before been disciplined for neglecting her duties, which provides some mitigation. Thus, a penalty of a 10-day suspension is appropriate.

In sum, for the proven misconduct, I recommend that respondent be suspended for 55 days.

Astrid B. Gloade
Administrative Law Judge

February 11, 2016

SUBMITTED TO:

GLADYS CARRIÓN
Commissioner

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