Health & Hospitals Corp. (Harlem Hospital Ctr.) v. Walker

OATH Index No. 1099/16 (Mar. 14, 2016)

Petitioner proved that respondent, an assistant coordinating manager, made verbal threats to two supervisors over the phone. Petitioner did not establish that respondent failed to follow a directive to report directly to human resources the next day. A suspension of 30 days is recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
HEALTH AND HOSPITALS CORPORATION (HARLEM HOSPITAL CENTER)
Petitioner
- against -
TIMISHA WALKER
Respondent

REPORT AND RECOMMENDATION

NOEL R. GARCIA, *Administrative Law Judge*

This employee disciplinary proceeding was referred by petitioner, the New York City Health and Hospitals Corporation, under section 7:5 of the Personnel Rules and Regulations of the Corporation. Petitioner charged respondent, Assistant Coordinating Manager Timisha Walker, with making verbal threats to two supervisors over the phone, and failing to follow a directive to report directly to the Assistant Personnel Director at the human resources office the day after the alleged verbal threats were made. Respondent denied making such threats, and denied receiving the directive.

At the trial, held on February 5, 2016, petitioner relied on testimony from three witnesses and documentary evidence. Respondent testified in her own behalf, and also offered documentary evidence.

For the reasons provided below, petitioner established that respondent made verbal threats, but not the charge of failure to follow a directive. A suspension of 30 days is recommended.

ANALYSIS

Verbal threats

Respondent is an Assistant Coordinating Manager for the pharmacy department of Harlem Hospital (Tr. 63). Respondent has worked for Harlem Hospital for 15 years, and has been with the pharmacy department for 10 years (Tr. 63). Sometime prior to the events at issue, respondent had requested a transfer (Tr. 52-53). Petitioner alleges that on April 15, 2015, during two different phone calls, respondent made verbal threats to Pharmacy Director Dr. Hinnah Farooqi and Assistant Personnel Director David Nadal (Pet. Ex. 1).

At trial, Dr. Farooqi testified that she was respondent's supervisor (Tr. 16). On the day in question, Dr. Farooqi was off-site attending a training course when she received a call from respondent at around 4:20 p.m. (Tr. 16-17). During the call, respondent "seemed agitated" and "very upset." Respondent stated that something was "stolen from her locker," that "this is the reason why" she wanted a transfer, and that she wanted things "escalated" (Tr. 17-19). While respondent mentioned the name of Elizabeth Martinez, a co-worker at the pharmacy, respondent was "talking very fast" and Dr. Farooqi "wasn't really sure about exactly what [respondent] was saying" (Tr. 20). Towards the end of the call, Dr. Farooqi heard respondent state "would she have to get physical?" and "would fists have to fly?" (Tr. 19). Dr. Farooqi testified that during the phone call she attempted to calm respondent down, and agreed to "escalate" the matter by calling a superior. In all, the call with respondent was not "more than a minute or two minutes." After the call, Dr. Farooqi contacted her supervisor, and was then connected to hospital police (Tr. 17-19).

On the same day, Dr. Farooqi used a workplace violence incident reporting form to memorialize the conversation (Pet. Ex. 6). On April 20, 2015, Dr. Farooqi used a request for disciplinary action form to describe the conversation with respondent (Pet. Ex. 5). Both reports substantially corroborate Dr. Farooqi's testimony. The reports identically state that respondent demanded to speak to a "higher-up because no one has followed through with her request to be transferred," that if this did not happen "she would have to get physical," and "something to the effect of would fists have to fly before anything would happen." The reports also state that when Dr. Farooqi told respondent that getting physical would not resolve this matter, respondent went "into an outburst" concerning Ms. Martinez, although her statements were "unclear and difficult to follow" (Pet. Exs. 5, 6).

The evidence establishes that after respondent "hung up with [Dr.] Farooqi, [she] called Mr. Nadal" (Tr. 67). Mr. Nadal testified that during the call, respondent told him that "human resources was not handling her transfer request and now it has led to theft" (Tr. 37). Respondent indicated that $30 was taken from her pocketbook, and that there was a second incident where $600 was taken from her locker, and "because of that she has no choice but to get physical in the department." Mr. Nadal, who had never previously received any complaints of theft from respondent, advised her that she could not make "that type of threatening statement." Respondent answered that "she couldn't deal with it anymore" and "this is why she has to do what she has to do" (Tr. 37-38).

As the conversation continued, Mr. Nadal again stated to respondent that "she cannot make that kind of statement of threatening people." Respondent answered that she was not threatening Mr. Nadal. When Mr. Nadal retorted that respondent was threatening to "harm somebody in the pharmacy department," respondent answered "I have no choice; this is what I have to do," and continued to repeat this comment. Mr. Nadal then ascertained that respondent had left the building, and instructed respondent to report to human resources the next day at 9:00 a.m. (Tr. 38-39).

Petitioner submitted into evidence a workplace violence incident reporting form authored by Mr. Nadal on the date of the incident, immediately after the phone call (Tr. 41-42; Pet. Ex. 7). The report substantially corroborates Mr. Nadal's testimony, and contains direct quotes, including respondent stating "I have no choice but to get physical in here" and "you have left me no choice I have to get physical now so you can understand" (Pet. Ex. 7).

Respondent testified as follows. On the day in question, respondent found money missing from her wallet that was in her locker. Specifically, respondent had a $50 bill in her wallet, but when she looked in her wallet at about 4:00 p.m., she found only a $20 bill and a $10 bill, for a deficit of $20 (Tr. 63-64). Respondent's locker did not a have a lock (Tr. 74). Respondent left her job and went to her college, and then called Dr. Farooqi (Tr. 65). Respondent confirmed she told Dr. Farooqi that money was missing, that she had repeatedly asked for a transfer, and that she wanted to speak to higher-level supervisors in order to get a transfer expedited (Tr. 65-66). Respondent did mention Ms. Martinez's name during the call, but only in response to Dr. Farooqi's question regarding who was in the office when respondent left

the work site (Tr. 80). Respondent denied stating that she would "get physical," or making any threatening remarks during the phone call (Tr. 66, 75, 81).

Respondent then called Mr. Nadal, whom she had spoken with previously about her transfer request (Tr. 67, 70-71). Respondent informed Mr. Nadal about the missing money, and that she wanted a meeting in order to expedite her transfer (Tr. 68-71). In response to questions by Mr. Nadal, she stated that she left her work location without asking any co-workers if they took her money, so as not to make anyone uncomfortable (Tr. 68-70). Mr. Nadal suggested respondent contact Ms. Williams, a union representative, and told respondent to come to human resources at 9:00 a.m. the next day (Tr. 71-72). Respondent denied stating that she would "get physical," or making any threatening remarks during that phone call as well (Tr. 75, 81).

A credibility determination is required where, as here, the parties have presented conflicting testimony on relevant facts. In making a credibility determination, this tribunal may consider such factors as witness demeanor; consistency of the witness's testimony; supporting or corroborating evidence; witness motivation, bias, or prejudice; and the degree to which a witness's testimony comports with common sense and human experience. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998).

Petitioner's evidence is credible, especially Dr. Farooqi's and Mr. Nadal's detailed reports written on the date of the incident (Pet. Exs. 5-7). *Transit Auth. v. Victor*, OATH Index No. 799/11 at 4 (Mar. 3, 2011), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD-11-52-A (Aug. 9, 2011) ("contemporaneous statements evince reliability"). Further, while respondent accused both Dr. Farooqi and Mr. Nadal of lying when they testified that she made verbal threats, respondent provided no persuasive reason why they would do so (Tr. 75). Indeed, respondent admitted that she had a positive relationship with Dr. Farooqi, and that they ate breakfast together in the mornings, sometimes taking turns buying breakfast or splitting "the breakfast half and half" (Tr. 78-79). While respondent believed that Dr. Farooqi did not want her to transfer, and, based on mere suspicion, believed Dr. Farooqi was once involved in a prank against her, I find it unlikely that such reasons, even if true, provided motive for Dr. Farooqi to falsely accuse respondent of making verbal threats (Tr. 65-66, 70).

Even more, respondent provided no reason as to why Mr. Nadal would falsely testify against her. Instead, respondent admitted that she became familiar with Mr. Nadal, in part,

because Dr. Farooqi took respondent "to her meetings with Mr. Nadal," that she communicated with him regularly, and that she was comfortable going to him with any issues (Tr. 67, 79). Additionally, respondent testified that after she hung up with Dr. Farooqi, she then called Mr. Nadal (Tr. 67). Both Dr. Farooqi and Mr. Nadal wrote in their contemporaneous reports that respondent alleged that her money was stolen, requested that a transfer be expedited, and made verbal threats, including using the phrase that she would "have to get physical" (Pet. Exs. 5-7). There is no evidence of collusion. Dr. Farooqi and Mr. Nadal wrote their reports independently based on their separate conversations with respondent. Accordingly, the similarity in the reports supports the conclusion that respondent did make verbal threats when she called them, one after the other, to complain about the alleged theft that she discovered 20 minutes prior, and not that Dr. Farooqi and Mr. Nadal misheard respondent, or that they conspired against her.

Respondent, on the other hand, has a compelling motive to deny any wrongdoing and avoid being penalized. Further, respondent provided inconsistent statements about key facts. For instance, it is apparent that respondent called Dr. Farooqi and Mr. Nadal, in part, to request an expedited transfer. To Dr. Farooqi, respondent claimed she needed a transfer because someone had stolen her money and locker keys (Pet. Exs. 5, 6). To Mr. Nadal, respondent stated that because she did not receive a transfer, as previously requested, someone "took my locker key and put a whole [*sic*] in my pocketbook and stole $30" (Pet. Ex. 7). At trial, respondent then claimed that someone went into her locker, which was new and did not have a lock, and stole $20 from her by removing from her wallet a $50 bill, and putting back $30, with no mention of any stolen keys (Tr. 64-65).

Also, Mr. Nadal noted that respondent claimed that $600 in rent money was stolen from her locker. However, it is unclear if this alleged theft occurred on the same day of the alleged verbal threats by respondent, or on some earlier date (Tr. 37, Pet. Ex. 7). If it occurred on the same day, respondent's omission from her trial testimony of a theft of $600, while detailing the theft of $20, would be striking. If the alleged theft of $600 from respondent's locker occurred at some earlier date, it would contradict her testimony that she did not report the theft of the $20 before she left her office for the day because this was "the first time" she ever "encountered this," and her further testimony that money being taken from her locker was "not something that ever occurred" (Tr. 69-70, 74). This part of respondent's testimony was not credible.

The evidence supports the conclusion that on April 15, 2015, respondent told Dr. Farooqi that "she would have to get physical" and "would fists have to fly before anything would happen," as charged by petitioner in Specifications 1-2. On the same day, respondent stated to Mr. Nadal that she had "no choice but to get physical in here" and "I have to get physical now so you can understand," as charged by petitioner in Specifications 3-4 (Pet. Ex. 1).

These statements constituted misconduct. An employee has the right to disagree with a co-worker or supervisor, so long as any disagreement does not become profane, threatening, or disruptive to office operations. *See Dep't of Environmental Protection v. Butcher,* OATH Index Nos. 297/15 & 299/15 at 6 (Feb. 9, 2015); *Dep't of Correction v. Peterson*, OATH Index No. 2095/12 at 7 (Jan. 11, 2013). However, a threat to physically harm others, even if not stated directly to the intended victim, or that it would be done immediately, has been deemed misconduct. *See Human Resources Admin. v. Lawrence*, OATH Index No. 707/00 at 4-5, 11 (Apr. 13, 2000) (finding that respondent made a verbal threat by stating to one supervisor, in regards to her immediate supervisor, "I tell you one thing, if you don't take me from under that bitch, I'm going to punch her in the face with my hole puncher"); *Health & Hospitals Corp. (Elmhurst Hosp. Ctr.) v. Smith*, OATH Index No. 1398/98 at 3-4 (May 19, 1998) (finding that respondent made a verbal threat constituting serious misconduct when he was overheard by co-workers telling a union representative that if his supervisor "fucks with me, I'll have people waiting outside to fuck him up"); *see also Butcher*, OATH 297/15 & 299/15 at 5-6 (finding respondent guilty of misconduct when he threatened co-worker by saying "[i]f we were out on the street, I'd beat you like a dog").

Here, both Dr. Farooqi and Mr. Nadal understood that respondent was threatening to physically harm someone in the pharmacy department, where the alleged theft took place, if she did not get a transfer (Tr. 19-20; Pet. Ex. 7). Pursuant to his report, Mr. Nadal specifically warned respondent not to make such threatening statements, but respondent continued to do so. Indeed, when Mr. Nadal told respondent that she was threatening to "get physical with someone in pharmacy," she did not deny it, but instead responded "well you all have left me no other choice I have to get physical now so you can understand" (Pet. Ex. 7). In her reports, Dr. Farooqi wrote that when she told respondent that getting physical would not resolve this matter, respondent went into an unclear "outburst" concerning Ms. Martinez, a pharmacy co-worker

(Pet. Exs. 5, 6). Dr. Farooqi also testified that after the phone call, she was concerned about a potential incident occurring in the pharmacy department (Tr. 19-20).

After their respective conversations with respondent, both Dr. Farooqi and Mr. Nadal were alarmed enough to contact hospital police (Tr. 19, 39-40). Accordingly, the statements made by respondent, as detailed in Specifications 1-4, were verbal threats that constitute misconduct.

Failing to follow a directive

Petitioner alleges that on April 16, 2015, respondent, by attempting to enter the pharmacy, failed to follow a directive not to report to her work location, but instead to report directly to Mr. Nadal at the human resources office (Pet. Ex. 1).

Mr. Nadal testified that he instructed respondent, during the aforementioned April 15, 2015 phone call, to "report to human resources the next day at 9:00 o'clock." Respondent's usual start time is 8:00 a.m. (Tr. 71-72). When respondent questioned whether she should use annual or sick leave, Mr. Nadal answered "[n]o, just report to HR at 9:00 o'clock" (Tr. 39). Mr. Nadal's report corroborates this part of his testimony. The report also adds that Mr. Nadal told respondent "I am directing you not to report to work tomorrow" (Pet. Ex. 7). After speaking with respondent, Mr. Nadal told a captain from the hospital police force to "have his officers on alert" because respondent "has to report to HR but there's a possibility she may come through the main entrance," and to please "escort her over to HR" (Tr. 39-40). The next day, Mr. Nadal was informed by the head of hospital police that respondent "was intercepted" in the main building and that "they were escorting her over to human resources" (Tr. 40).

Detective Marty, from the hospital police force, testified that on the morning of April 16, 2015, he was instructed to walk respondent "over to HR" (Tr. 60). Detective Marty stated that at 7:50 a.m., he was stationed between the pharmacy and the elevators. Thereafter, he saw respondent come out of the elevators and "instructed her to walk with [him] to HR." Respondent complied, apparently without incident. However, Detective Marty had "no idea" if respondent was supposed to be at the pharmacy department that morning (Tr. 61).

Respondent testified that during the April 15, 2016 phone call, Mr. Nadal instructed her to "go to work" the next day, but to report to the human resources office at 9:00 a.m., the time

when he arrives at work. Respondent was surprised to be intercepted by hospital police when she arrived at 8:00 a.m. (Tr. 71-72).

In effect, a charge for failure to follow a directive is a charge of insubordination. In order to establish insubordination, the petitioner must prove, by a preponderance of the credible evidence, three elements: first, that an order was communicated to respondent; second, that the order was clear and unambiguous in its content; and, third, that having heard a clear and unambiguous order, the respondent willfully refused to obey. *See Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Muniz*, OATH Index No. 1666/05 at 8 (Oct. 17, 2005); *see also Dep't of Sanitation v. Smyth*, OATH Index No. 2178/05 at 7 (Feb. 14, 2006), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-122-SA (Nov. 14, 2006). Though the directive need not be in the form of a command, the language used should be clear and unambiguous. *Transit Authority v. Wong*, OATH Index No. 1866/08 at 16 (Aug. 28, 2008).

Here, Specification 5 states that respondent "failed to follow a directive when she attempted to enter the Pharmacy despite having been directed . . . not to report to her work *location*, and to report to Human Resources instead" (Pet. Ex. 1) (emphasis added). However, Mr. Nadal's report states respondent was instructed "not to report to work," a statement Mr. Nadal did not testify to at trial (Pet. Ex. 7). Respondent was never told during the phone call that she was specifically barred from entering the pharmacy, the place that contained her work locker, or even the main hospital building, where the pharmacy is located, or from using the main hospital entrance. Respondent was also not told of any suspension during the phone call with Mr. Nadal (Tr. 37-39).

As respondent was directed to report to human resources at 9:00 a.m., when she was scheduled to be working, Mr. Nadal stated that respondent expressed concerned about how any missed work time would be credited. Yet, Mr. Nadal did not answer respondent's question, and simply repeated his instruction that she report to human resources at 9:00 a.m. (Tr. 39). I also note that Mr. Nadal never testified that he was aware that respondent's work shift began at 8:00 a.m., and not 9:00 a.m., which may help explain the misunderstanding between the parties. In any event, there is no indication that respondent did not intend to report to human resources at the appointed time, and I credit respondent's testimony that she believed she was to report to work at her regular time, and then report to human resources.

Under these set of facts, I find that petitioner's instruction to respondent was ambiguous and that respondent did not willfully refuse to obey. *Dep't of Environmental Protection v. Moriates*, OATH Index No. 1633/14 at 7-8 (July 8, 2014) (dismissal of insubordination charges recommended where there was some miscommunication between management and respondent, and where respondent made an honest mistake by arriving for a hearing at 10:00 a.m., instead of 2:00 p.m.); *Wong*, OATH 1866/08 at 17 (holding that "respondent who reasonably believed that he was not given an order is not guilty of insubordination, because he lacked the intent necessary to disobey an order"). Accordingly, the charge of insubordination, as described in Specification 5, should be dismissed.

Petitioner's application to present rebuttal evidence

At the close of respondent's case, petitioner sought leave to recall Mr. Nadal to present rebuttal testimony.[1] Mr. Nadal was to "clarify" the directive he gave respondent, and to rebut respondent's claim she was allowed to report to work at 8:00 a.m. (Tr. 90-91).

Rebuttal evidence is not permitted as a matter of right, but lies within the discretion of the trial judge. 48 RCNY § 1-46(b) (Lexis 2015); *Dep't of Sanitation v. Ambrosino*, OATH Index No. 208/01 at 13 (May 30, 2001) ("use of rebuttal witnesses is at the discretion of the ALJ"). This tribunal has stated that while rebuttal evidence is permitted to counter new facts affirmatively asserted by an opposing party, it is "not allowed where it is offered against an adversary's 'mere denial.'" *Dep't of Correction v. Bacchi,* OATH Index Nos. 265-66/90 at 12 (Mar. 29, 1990) (disallowing rebuttal evidence that was offered solely to contradict respondents' denials of facts the Department sought to prove in its direct case) (quoting *Marshall v. Davies*, 78 N.Y. 414, 420 (1879)).

Here, petitioner failed to establish a basis for the proposed evidence. It should have come as no surprise to petitioner that someone who is charged with failing to follow a directive would deny ever receiving such a directive. Also, petitioner's concern that its witness did not testify clearly on a particular point is not a proper reason to recall the witness (Tr. 90-92). Petitioner conducted both a direct examination and re-direct examination of Mr. Nadal (Tr. 35-51, 53-57). As Mr. Nadal's report and testimony addressed the content of the directive he issued respondent,

[1] Petitioner's request to recall Dr. Farooqi was withdrawn when certain documents were admitted by stipulation (Tr. 87-90).

the request to have Mr. Nadal testify again on this point, and to rebut respondent's testimony, was denied.

FINDINGS AND CONCLUSIONS

1. Petitioner established by a preponderance of the credible evidence that respondent made verbal threats to Pharmacy Director Dr. Hinnah Farooqi, as charged in Specifications 1 & 2.

2. Petitioner established by a preponderance of the credible evidence that respondent made verbal threats to Assistant Personnel Director David Nadal, as charged in Specifications 3 & 4.

3. Petitioner did not establish by a preponderance of the credible evidence that respondent failed to follow a directive not to report to her work location, and instead to report to the human resources office, as charged in Specification 5.

RECOMMENDATION

Upon making the above findings, I requested and reviewed a copy of relevant portions of respondent's personnel file, including her disciplinary history and work evaluations for the last five years.

The personnel abstract provided shows that respondent began employment with petitioner on January 2, 2001. She has no history of discipline, warnings, or counseling. Respondent has been rated "outstanding" on her last two performance evaluations. Prior to that, from most recent to oldest, respondent had one rating of "satisfactory," one rating of "unable to evaluate," and one rating of "needs improvement" on her performance evaluations.

Here, respondent has been found guilty of making verbal threats to two hospital administrators. Penalties for threatening or intimidating behavior toward co-workers and supervisors vary depending on the severity of the misconduct. *See Health & Hospitals Corp. (Jacobi Medical Ctr.) v. Khan*, OATH Index No. 2060/09 (Nov. 10, 2009) (45-day suspension recommended for respondent found guilty of threatening a hospital administrator by stating "you don't tell me what to do. I'll fuck you up. You don't know who you are messing with"); *Health & Hospitals Corp. v. Rivera*, OATH Index No. 2063/08 (Oct. 23, 2008) (45-day suspension recommended for respondent found guilty of threatening a supervisor and being excessively

late); *Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Johnson*, OATH Index No. 1513/03 (Sept. 8, 2003) (15-day suspension recommended for employee who threatened a hospital police officer by stating "Fuck you . . . I'm going to fuck you up when you get off"); *Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Alexis*, OATH Index No. 1373/03 (July 11, 2003) (25-day suspension recommended for employee with substantial disciplinary history who intimidated her supervisor); *Kings County Hospital v. Miller*, OATH Index No. 503/02 (Jan. 31, 2002) (60-day suspension recommended, in part, because respondent threatened a hospital administrator); *Health & Hospitals Corp. (Metropolitan Hospital Ctr.) v. Williams*, OATH Index No. 386/98 (Dec. 8, 1997), *aff'd*, HHC Personnel Review Bd., Dec. No. 923 (Oct. 26, 1998) (40-day suspension recommended where respondent told a co-worker that he would "get him" and made a gesture with his hand and finger as if firing a gun, among other misconduct).

Without suggesting that respondent's threatening remarks were justified in any respect, the content and context of those remarks do not warrant imposition of the extreme penalty of dismissal, as requested by petitioner. It is apparent respondent made the remarks in a misguided attempt to expedite a transfer, frustration that a transfer had not yet occurred, and anger because money was possibly missing from her wallet. There was no evidence that respondent intended to carry out the threats, and I do not believe that she did so intend. Respondent also did not make any direct threats to anyone she suspected of taking her money in the pharmacy department.

Respondent was rated "outstanding" in her two most recent evaluations. Both of these evaluations stated that respondent was "[c]ourteous and responsive to patients and public." As respondent has no disciplinary history in her 15 years of employment with petitioner, a recommendation of termination does not comport with progressive discipline.

Given the factors set forth above, and the above-cited OATH precedent, I recommend that respondent be suspended for 30 days, but with credit for any pre-trial suspension that she may have already served, as permitted by Personnel Rules and Regulations, section 7:5:5 (pre-trial suspension "may be considered as part of the [post-trial] penalty").

Noel R. Garcia
Administrative Law Judge

March 14, 2016

SUBMITTED TO:

EBONE CARRINGTON
Acting Executive Director

APPEARANCES:

ANDREA CHILAKA, ESQ.
Attorney for Petitioner

CWA LOCAL 1180
Representatives for Respondent
BY: JOSEPH DIESSO