Dep't of Environmental Protection v. A.M.

OATH Index No. 1410/16 (July 6, 2016)

Petitioner established that respondent's absenteeism was excessive. Termination of employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Petitioner
- against -
A.M.
Respondent

REPORT AND RECOMMENDATION

KARA J. MILLER, *Administrative Law Judge*

This employee disciplinary proceeding was referred by the Department of Environmental Protection ("Department" or "petitioner") pursuant to section 75 of the Civil Service Law. The Department alleges that respondent,[1] a clerical associate, has been excessively absent since 2014 and is, therefore, incompetent to hold her position (ALJ Ex. 1).

This matter was scheduled for trial on April 25, 2016, but was adjourned to May 9, 2016, at respondent's request due to an undocumented family emergency. On May 9, 2016, respondent's counsel appeared, but respondent did not. In the presence of Administrative Law Judge Astrid Gloade, respondent's counsel attempted to call respondent. After speaking with respondent's husband, respondent's counsel requested another adjournment because respondent was allegedly too sick to come to the telephone, let alone attend the trial. As the matter had been previously adjourned and there was no medical documentation to support respondent's inability to appear, I denied the request (Tr. 7). The trial proceeded in respondent's absence on May 9, 2016, but was continued on May 17, 2016, to provide respondent with an opportunity to appear. On May 17, 2016, respondent appeared and testified on her own behalf.

[1] Although neither party requested that I withhold respondent's name, I have elected to do so because this report and recommendation contains sensitive medical information. *See* 48 RCNY § 1-49(d) (Lexis 2015). *See also Dep't of Environmental Protection v. Anonymous*, OATH Index No. 2443/14 (Aug. 20, 2014) (withholding respondent's name because the report discussed sensitive medical issues).

Following the two-day trial, I find the Department established that respondent has been excessively absent and recommend that respondent's employment be terminated.

PRELIMINARY MATTER

The charges allege that respondent was excessively absent from January 3, 2014, through June 10, 2014;[2] January 5, 2015, through June 10, 2015; and July 9, 2015, through December 11, 2015 (ALJ Ex. 1). At trial, the Department made a motion to conform the charges to the evidence presented by including respondent's absences through April 15, 2016 (Tr. 21). Respondent's counsel objected to the motion solely on the basis that it should be submitted in writing (Tr. 21). Motions to amend the petition to conform to the proof are not required to be in writing and may be granted absent prejudice to the respondent. *See Dep't of Sanitation v. Davis,* OATH Index No. 1523/02 at 5-6 n.2 (July 2, 2002) ("the general rule is that pleadings 'may be amended to conform to the proof at any time, provided that no prejudice is shown'" (citing *Miles v. City of New York,* 251 A.D.2d 667, 667 (2d Dep't 1998)).

There is no prejudice to respondent as the motion was made at the beginning of trial, which allowed the issue to be fully litigated and gave respondent the opportunity to cross-examine the Department's witnesses. *See generally Dep't of Correction v. Bovell,* OATH Index No. 1910/99 at 2 n.1 (Aug. 13, 1999) (petitioner's motion made at the close of the hearing to conform the charges to the proof was granted because the events underlying the new charge were fully litigated at the hearing; respondent had the opportunity to cross-examine petitioner's witness and was previously on notice of critical aspects of the new charges). Accordingly, I granted petitioner's motion on the record (Tr. 22).

ANALYSIS

Respondent, a clerical associate in the scheduling unit of the connections and permitting section of the Department's Bureau of Water and Sewer Operations ("BWSO"), has been employed by the Department for almost 20 years (Tr. 12-13, 34, 55). The scheduling unit is comprised of six employees, including respondent. Her duties consist of answering telephone

[2] In the charges submitted by the Department, the first time period the Department alleged that respondent was excessively absent was from January 3, 2014, through June 10, 2015. The end date of "2015" appears to be a typographical error since the next time period the Department has alleged that respondent was excessively absent is from January 5, 2015, through June 10, 2015. Consequently, I have conformed the charges to correct this error.

calls from plumbers or contractors seeking a permit to install taps or wet connections, scheduling inspections, inputting information in the computer system, and performing paperwork such as creating certificates for plumbers that have self-certified their work (Tr. 33-39, 55).

Darlene Rosario, a personnel coordinator in BWSO, oversees the timekeeping and personnel units (Tr. 11-12). Ms. Rosario testified that Department employees submit leave requests by logging into CityTime, a web-based program that monitors timekeeping for the City (Tr. 13). The Department submitted a printout from CityTime, which reflects a breakdown of respondent's leave (Pet. Ex. 1; Tr. 14-15). While the requested dates on respondent's CityTime report are from October 1, 2014, through April 15, 2016, the last date on the Deprtment's timekeeping report documenting respondent's leave is February 19, 2016 (Pet. Ex. 1). Ms. Rosario explained that after a certain period of time an employee gets "dropped" from CityTime and the Department must manually calculate her absences. In respondent's case, she was dropped from CityTime on February 20, 2016, requiring the remaining absences to be calculated manually (Tr. 19).

Respondent's absences were calculated as follows: 24 days of annual leave, 99 days of leave without pay, two floating holiday leave days, and 61 days of sick leave, which equals 186 days while her time and leave were still tracked in CityTime. In addition, respondent took 40 days of leave without pay after she was removed from CityTime, for a total of 226 days absent from work during a 31-month period. Accordingly, from October 1, 2014, through April 15, 2016, respondent was scheduled to work 395 days, but took a total of 226 days of leave. In other words, during that time period, respondent was absent 57.22% of the time (Pet. Ex. 2; Tr. 23-24).

Respondent's supervisor, Mark Safari, the chief of the water and sewer connections and the permitting unit in BWSO, testified that respondent has been absent since Thanksgiving. He described her attendance during the last year and a half as "not too good" (Tr. 32-34, 39). Respondent has called in and left a message once or twice a week since Thanksgiving to say that she was sick (Tr. 40). She has a "routine" where she calls on Monday to say that she does not feel well and that she will return to work on Wednesday, but then on Wednesday she calls to say she would be at work on Friday (Tr. 40). Each time respondent leaves a message she alleges a different illness, such as an ear infection, stomach virus, and injured ankle (Tr. 42). Mr. Safari testified that "any member of the body . . . you name it, she mentions [it]" (Tr. 42).

Respondent did not dispute the evidence submitted by the Department documenting her absences. She acknowledged that during 2015, she was "out quite a bit," and claimed that it was because of an unfair distribution of work. Respondent, who is diabetic, said that the added pressure of her increased workload caused her blood sugar levels to fluctuate, making her sick (Tr. 57). Respondent further acknowledged that she has not been at work since Thanksgiving of last year (Tr. 66). She testified that in 2015 and this past winter she has been sick with bronchitis, asthma, and pneumonia, and that it is "ten times worse" because of her diabetes it takes her "a little longer" to recover than a healthy person (Tr. 57-58, 78-80).

Respondent testified that she called Mr. Safari "every single day" she was absent from work and left messages on his voicemail. She would inform him that she had been to the doctor and had asthma or bronchitis, for example, and the doctor recommended she stay home (Tr. 58). Even though she was physically unable to go to work, she went to the doctor, as evidenced by the notes she submitted to the timekeeper (Tr. 58).

Respondent presented numerous doctors' notes dating from September 2014 to May 2016[3] to support her absences (Resp. Exs. A, B, C). The notes corroborate Mr. Safari's testimony and reveal a pattern in which respondent visited a different doctor every few days for a different illness and the doctor excused respondent from work for a short period of time. For example, on December 1, 2015, respondent was seen at CityMD, a walk-in urgent care facility in Lynbrook, New York. The note submitted indicated that respondent was seen for "a medical concern" and could return to work on Thursday, December 3, 2015. Instead of reporting to work on December 3, respondent went to another urgent care facility, Rapid Response, in Franklin Square, New York. The note from Rapid Response stated that respondent could return to work on Monday, December 7, 2015. On December 7, 2015, respondent was treated at a different urgent care facility, ProHealth ERDOX in Massapequa Park, New York. The medical note indicated that respondent could return to work three days later on Thursday, December 10, 2015. Respondent, however, did not return to work. Instead, she went back to Rapid Response Urgent Care on December 10, and received a medical note stating that she was unable to return to work until Monday, December 14, 2015. On December 14, 2015, respondent returned to ProHealth ERDOX in Massapequa Park, where she was evaluated and treated. The note from the

[3] I have only considered the doctors' notes that correspond with the dates included in the charges.

December 14 visit indicated that respondent could return to work on Wednesday, December 16, 2015. Nevertheless, respondent did not return to work. Indeed, on December 16, 2015, respondent was seen by Dr. Cooperman at Franklin Immediate Medical Care in Franklin Square, New York. She received a note from Dr. Cooperman stating that she could return to work on Monday, December 21, 2015. On December 21, 2015, however, respondent went to CityMD Urgent Care in Lynbrook, and received a medical note indicating that respondent could return to work on Friday, December 25, 2015, which was an official City holiday. On Monday, December 28, 2015, respondent went to a new urgent care facility called Urgent MD in Hewlett, New York, and was given a note excusing her from work until December 30, 2015. On Wednesday, December 30, 2015, respondent went to Dr. Leeman in Valley Stream, New York, who provided her with a note indicating that she can return to work on Friday, January 1, 2016, which was an official City holiday (Resp. Ex. A).

During the month of December 2015, respondent went to seven different urgent care centers, two of which she visited twice, and received nine notes excusing her absences from work in two- and three-day increments. As a consequence, respondent did not report to work for the entire month. It is apparent that respondent's routine of visiting several different doctors, often at urgent care providers was an effort to avoid returning to work.

While respondent may in fact suffer from ongoing health issues, which she maintained prevented her from going to work, she acknowledged that it did not interfere with her taking a vacation. Mr. Safari testified that sometime in February of this year respondent called and left a message to inform him that she was going on vacation, but she had not requested or received approval to take annual leave (Tr. 41). Respondent did not dispute that she never requested leave to take a vacation. According to respondent, she had told Mr. Safari about her plans to take a vacation a couple months prior, but then became ill so she did not submit a leave request in CityTime (Tr. 71-74). Instead, she called Mr. Safari to tell him she was sick with the stomach flu, would not be at work, and that she would be on vacation in Florida the following week (Tr. 71-72). She claimed that she did not know she needed permission to take vacation (Tr. 74). Respondent's assertion that she did not know she was required to request and receive permission to take vacation greatly undermined her credibility, especially since she has been an employee of the City for almost 20 years.

In prior cases where excessive absence has been charged, but not specifically defined by agency rules, this tribunal has noted three circumstances which give rise to discipline: (i) absences which are so extensive in number that they are excessive *per se*; (ii) absences which are excessive because of the disruption they cause to the workplace and the adverse impact they have on workplace efficiency and operations; and (iii) absences which are excessive based on other factors surrounding the missed days of work. *See Health & Hospitals Corp. (Harlem Hospital Ctr.) v. Pabon*, OATH Index No. 270/04 at 3 (Oct. 29, 2003).

Relevant factors to consider in determining whether respondent's absences were excessive include available leave balances, the lack of advanced notice, the timing of such absences in relation to weekends and holidays, the legitimacy of the need for the absences, and whether respondent was previously warned about her attendance. *See Health & Hospitals Corp. (Harlem Hospital Ctr.) v. Rhines*, OATH Index No. 1888/10 at 2-3 (June 4, 2010); *see also Human Resources Admin. v. McCaskill-Bourdeau*, OATH Index No. 164/11 at 16-17 (Oct. 22, 2010) (20 absences over nine-month period were excessive where employee had a large number of unauthorized absences, never gave advance notice of her absences, and her absences had a negative impact on the workplace).

Respondent gave little notice that she would be absent and exhausted all of her leave balances. Indeed, she was removed from CityTime due to her continual absence. Respondent has met with the Department on two occasions to discuss her absenteeism and was therefore on notice that her absences were excessive. She also works in a small unit with only five other employees and Mr. Safari testified that managing the unit has become more difficult due to respondent's absences. The other five employees have taken on respondent's workload and this has protracted the time it takes the unit to respond to phone calls and to issue certificates of inspections. The unit's delayed response time has caused an increase in the number of complaints that Mr. Safari has received about the unit (Tr. 39-40).

Moreover, the Department has proven that from October 1, 2014, through April 15, 2016, respondent was absent 226 days out of the 395 days she was scheduled to work and her absence percentage was 57.22% (Pet. Ex. 2). In addition, it is undisputed that respondent has been absent from work 100% since Thanksgiving of 2015. This tribunal has found that where "an agency does not have a specific policy, an absenteeism rate exceeding 50% of the total work days in the

period under review may be deemed excessive *per se*." *Triborough Bridge & Tunnel Auth. v. Lewis*, OATH Index No. 1592/03 at 8 (Feb. 10, 2004), *aff'd*, Labor Relation Pres. Dec. (Feb. 27, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 05-19-SA (Apr. 25, 2005); *see also Fire Dep't v. A. G.*, OATH Index No. 771/12 at 26 (July 5, 2012), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 13-02-SA (Feb. 6, 2013) (respondent's absences found to be excessive *per se* where her absent rate was 51.6% in 2010 and 65.7% in 2011); *Triborough Bridge & Tunnel Auth. v. Christiano*, OATH Index No. 493/12 at 12 (Mar. 21, 2012), *aff'd*, Comm'r Dec. (Apr. 11, 2012), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 12-34-SA (July 24, 2012) ("The number of absences found to be excessive *per se* has been found to be roughly 50% of all work days in the period under review."); *see also Cicero v. Triborough Bridge and Tunnel Auth.*, 264 A.D.2d 334 (1st Dep't 1999). Accordingly, I find that respondent has been excessively absent.

At trial, respondent testified that for about the past 15 years she has been part of the "55-a program" (Tr. 56). According to respondent, the program was "established for people that have serious medical issues" or "chronic diseases." Respondent testified that she was eligible for the 55-a program because she is diabetic, which she believes qualifies her for accommodations and protections because she is sick (Tr. 56, 76, 78). Respondent asserted that the Department is aware that she is diabetic and needs to use the bathroom more often when her blood sugar is high (Tr. 56, 78). The Department has not accommodated her and has also taken away her medical benefits, which she needs because she has to take several shots and measure her blood multiple times each day (Tr. 56, 60-61). Respondent acknowledged that she has never requested an accommodation and alleged that she was not aware she had to do so (Tr. 78).

Contrary to respondent's assertions, there is nothing in section 55-a of the Civil Service Law that affords protections such as accommodations or medical benefits to employees appointed pursuant to section 55-a. Rather, section 55-a provides municipal civil commissions with the ability to appoint persons with physical or mental disabilities to competitive civil service positions without requiring that the appointee take a civil service exam, if the appointee is qualified to perform the duties of the position. Civ. Serv. Law §§ 55-a(1),(2) (Lexis 2016). Section 55-a further provides that when an individual is appointed she is treated as a noncompetitive employee. Civ. Serv. Law § 55-a(2). Although noncompetitive employees are not usually afforded the rights under section 75 of the Civil Service Law, which include the right

to a hearing before removal or other discipline, since respondent has completed more than five years of service she was entitled to a hearing on the charges. Civ. Serv. Law § 75(1)(c). Respondent's assertion that she was hired pursuant to section 55-a of the Civil Service Law, however, has no bearing on this proceeding because section 55-a is not a defense for excessive absenteeism.

FINDING AND CONCLUSION

Respondent was excessively absent between October 1, 2014, and April 15, 2016.

RECOMMENDATION

Upon making the above finding, I obtained and reviewed an abstract of respondent's personnel record provided by the Department. Respondent's employment with the Department began in 1996 as a seasonal aide. She transitioned into a provisional clerical associate position in 1998. During her tenure with the Department, she has never been formally disciplined. Her performance evaluation for 2015, however, provides that her attendance was "very poor and problematic for the unit" and her overall rating was "unsatisfactory." Respondent's 2014 evaluation similarly provides that her "attendance record is very problematic" and her absences were "posing operational problems for the unit." She was marked "unratable due to excessive AWOL."

The Department has requested that respondent be terminated from her position as a clerical associate due to her excessive absenteeism. That request is appropriate under the circumstances. Excessive absenteeism routinely results in termination of employment. *See A. G.*, OATH 771/12 (termination of employment where respondent, who had a 15-year tenure and no prior formal disciplinary record, was found to be excessively absent); *Dep't of Education v. Medina*, OATH Index No. 1865/11 (July 22, 2011), *adopted*, Chancellor's Dec. (Aug. 25, 2011) (employee of almost 30 years with no prior disciplinary record terminated where she was absent 109 work days in 16 months); *Dep't of Correction v. Peters*, OATH Index No. 1118/03 (Sept. 24, 2003) (termination of employment where employee used 69 sick days in 12 months and her only prior discipline was the loss of one vacation day during her almost 17-year tenure).

Even if respondent believes that her absences were medically justified and documented, excessive absenteeism may result in discipline despite the absences being due to verified illnesses where the absences were disruptive and burdensome on the employer. *See Cicero*, 264 A.D.2d at 336 ("Petitioner's argument that his absences were approved and medically justified misperceives the nature of the charges. Petitioner was dismissed on the sole ground that his excessive absenteeism constituted incompetence under Civil Service Law § 75."); *Romano v. Town Bd. of the Town of Colonie*, 200 A.D.2d 934, 934 (3d Dep't 1994) (in upholding termination of employee who was absent from work 41 days in five months, finding that "[t]he fact that petitioner may have had a 'valid' reason for each one of the individual absences is irrelevant to . . . whether his unreliability and its disruptive and burdensome effect on the employer rendered him incompetent to continue his employment"); *see also Dep't of Correction v. Duclet*, OATH Index No. 972/09 at 2 (May 19, 2009).

Although never formally disciplined, respondent was on notice that her absences were problematic in both her 2014 and 2015 evaluations. Moreover, she met with the Department in 2015 and 2016 regarding her attendance and was warned of the potential consequences of not coming to work. *See Medina*, OATH 1865/11 at 4-5 (termination recommended where respondent had no prior formal disciplinary record but her personnel file contained five letters warning that her excessive absenteeism could result in termination). This tribunal has found that progressive discipline is not required where the misconduct is extensive and egregious. *See Dep't of Education v. Brust*, OATH Index No. 2280/07 at 86-87 (Sept. 29, 2008), *adopted*, Chancellor's Dec. (Oct. 22, 2008); *see also A. G.*, OATH 771/12 (CSC finds that the Department should have progressively disciplined employee earlier in her tenure for excessive absences, but affirms termination where employee's absences were excessive *per se* and she worked in a small unit, exhausted her leave balances, received warnings about her attendance, and the absences were unplanned and negatively affected her unit); *Board of Education v. Gomez*, OATH Index No. 228/84 (Nov. 13, 1984), *modified*, Bd. Determination (Jan. 10, 1985), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 88-64 (May 12, 1988) (CSC upholds Board's termination of employee for excessive absences and lateness, finding that the failure to follow the principle of progressive discipline in this case was not reversible error). Here, respondent's absences were so excessive and negatively impacted the Department that termination is the only appropriate penalty.

Accordingly, I recommend that respondent be terminated from her employment.

Kara J. Miller
Administrative Law Judge

July 6, 2016

SUBMITTED TO:

EMILY LLOYD
Commissioner

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