Dep't of Homeless Services v. Anonymous

OATH Index No. 1653/17 (Sept. 19, 2017)

Petitioner established that respondent was AWOL from January 20, 2016 to March 5, 2017. Termination of employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF HOMELESS SERVICES
Petitioner
- against -
ANONYMOUS
Respondent

REPORT AND RECOMMENDATION

ASTRID B. GLOADE, *Administrative Law Judge*

Petitioner, the Department of Homeless Services ("Department"),[1] brought this disciplinary proceeding pursuant to section 75 of the Civil Service Law. Petitioner alleges that respondent, an Agency Attorney in the Ethics and Employment Unit, was absent without leave ("AWOL") from January 20, 2016 to March 5, 2017, and seeks termination of respondent's employment.

At a two-day trial, petitioner relied on documentary evidence and the testimony of five witnesses. Respondent testified on her own behalf and presented documentary evidence and the testimony of an expert witness. After submission of closing briefs, the record closed on July 6, 2017.

For the reasons set forth below, I find that the charges should be sustained and recommend that respondent be terminated from employment.

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[1] In April 2016, the Department of Homeless Services, with the Human Resources Administration, was placed under the aegis of the New York City Department of Social Services. *Review of Homeless Service Agencies and Programs* (Apr. 11, 2016), http://www1.nyc.gov/assets/home/downloads/pdf/reports/2016/90-day-homeless-services-review.pdf. Respondent is presently considered an employee of the Department of Social Services (Tr. 145).

PRELIMINARY MATTERS

Respondent's Redaction Request

Pursuant to OATH Rule of Practice section 1-49(d), respondent has requested that her name be withheld from this decision (Tr. 171; Respondent's Closing Memorandum ("Resp. Br.") at 2-4). *See* 48 RCNY § 1-49(d) (Lexis 2017). Rule 1-49(d) provides for the publication of this tribunal's decisions without redaction "[u]nless the administrative law judge finds that legally recognized grounds exist to omit information from a decision." Under this rule, a respondent's name has been withheld from decisions that have included information about the respondent's mental health history. *See Admin. for Children's Services v. Anonymous,* OATH Index No. 2619/11 (Dec. 30, 2011) (employee's name withheld where report discussed her mental health history); *Human Resources Admin. v. Anonymous*, OATH Index No. 1242/10 (May 4, 2010), *modified on penalty*, Admin/Comm'r Determination (June 16, 2010), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-17-A (Apr. 29, 2011) (employee's name withheld where decision discussed extensive personal medical information relating to drug and alcohol addiction and mental health disorder). In the instant case, because this decision includes extensive discussions of respondent's mental health, respondent's request has been granted over petitioner's objection.

Petitioner's Request to Redact Trial Record

Additionally, at trial, respondent referred to a Department investigation, claiming that she was transferred in retaliation for her role in the investigation and that her transfer led to mental health issues that caused her to be AWOL. Petitioner requests that reference to this investigation be omitted from this decision and redacted from the record under the public interest privilege, a common law evidentiary privilege that shields certain confidential government information from discovery (Tr. 106-07; Petitioner's Letter Brief ("Pet. Br.") at 9). *Cirale v. 80 Pine St. Corp.*, 35 N.Y.2d 113 (1974). Specifically, petitioner requested that specified testimony be stricken from the record and documents admitted into evidence at respondent's request be removed or redacted because they concern an ongoing investigation being conducted by the Department (Pet. Br. at 10). Respondent opposed the application (Respondent's Reply Memorandum ("Resp. Reply") at 1-3).

As the Court of Appeals noted in *Cirale v. 80 Pine St. Corp.*, determination of what constitutes potential harm to the public interest sufficient to render the privilege applicable is a

judicial determination that must be made on a case-by-case basis. The governmental agency asserting the privilege must "come forward and show that the public interest would indeed be jeopardized by a disclosure of the information. Otherwise, the privilege could be easily abused." *Cirale*, 35 N.Y.2d at 118-119. In determining whether the public interest privilege applies, the harm to the public interest if the confidential information is disclosed must be balanced against the harm to the party seeking disclosure if the information is withheld. *Steering Comm. v. Port Auth. (In re World Trade Ctr. Bombing Litig*.), 93 N.Y.2d 1, 8-9 (1999).

Petitioner seeks protection of testimony regarding its investigation into allegations of financial misconduct, contending that testimony regarding respondent's role in the investigation, the process of the investigation, who was assigned to oversee it, and its status are confidential. However, petitioner failed to show that the allegations of malfeasance and existence of an investigation is confidential information that falls within the ambit of the public interest privilege. *See, e.g., Young v. Huntington*, 88 Misc.2d 632, 640 (Sup. Ct. Suffolk Co. 1976) (conclusory assertion of public interest privilege to protect records of ongoing investigation insufficient without specific facts to show that disclosure would harm public interest); *see also Dep't of Sanitation v, Boswell*, OATH Index No. 964/05 mem. dec. at 3 (Mar. 8, 2005) (documents that merely reveal steps taken in investigative process do not merit protection under the public interest privilege); *Bd. of Education v. Butler*, OATH Index No. 554/93, mem. dec. at 7 (Mar. 16, 1993) (public interest privilege not applied to "documents such as the investigation reports, which refer only to the existence and not to the identity of the informants").

Petitioner seeks to remove Respondent Exhibit D from the record. This document was already in respondent's possession, thus calling into question whether it is indeed a confidential communication as petitioner asserts. Petitioner made no claim that respondent's possession of the document was itself improper. Nonetheless, to the extent that Respondent Exhibit D identifies and provides contact information for the complainant in the matter petitioner contends is actively under investigation, it is appropriate to redact this information. Public disclosure of the complainant's identity, which is not relevant to this proceeding, could harm the public interest as it may jeopardize a source of information regarding alleged malfeasance relating to public funds. *See Dep't of Sanitation v. McKiernan*, OATH Index No. 1770/99 at 3 (Aug. 2, 2000) (investigative documents produced in discovery by the Department of Investigation redacted to conceal information relating to informants).

This tribunal's trials are presumptively open to the public and its decisions are generally published without redaction. *See* 48 RCNY §§ 1-49(a), (d); *see also Mosallem v. Berenson,* 76 A.D.3d 345, 348 (1st Dep't 2010) ("Under New York Law, there is a broad presumption that the public is entitled to access to judicial proceedings and court records"). Therefore, petitioner's request is denied, except that Respondent's Exhibit D will be redacted consistent with the foregoing.

ANALYSIS

Petitioner charges respondent with five separate violations of the Department's Code of Conduct, all stemming from respondent's continuous absence from work between January 20, 2016 and March 5, 2017 (ALJ Ex. 1; Pet. Br. at 1). Specifically, petitioner alleges violations of section 5.8 (absence without prior authorization); section 5.2 (excessive absence); section 5.4 (failure to timely submit leave request); section 1.2 (conduct prejudicial to good order); and section 5.1 (noncompliance with time and leave rules).

It is undisputed that respondent was absent from work from January 20, 2016 to March 5, 2017, and failed to communicate with the Department, disregarding multiple notices that were sent to her home. However, respondent argues that her absence was due to mental health issues (Resp. Br. at 13-15; Resp. Reply at 4). In particular, respondent claims that during the period at issue she experienced fear and anxiety following her transfer from the Department's headquarters in Manhattan to an intake center in the Bronx. She also asserts that she did not return to work because she was facing an unsafe and hostile work environment (Resp. Br. at 18). Finally, respondent suggests that the Department may be disciplining her in retaliation for her complaints about the Department's handling of an internal investigation of malfeasance (Resp. Br. at 18).

Respondent testified that she has worked for the Department since 2001 (Tr. 101). In 2009, respondent was promoted to Agency Attorney III in the disciplinary unit, where her duties included supervising investigators and attorneys, and prosecuting agency employees in disciplinary cases. She was promoted to Agency Attorney IV in 2012 (Tr. 102, 105). In this capacity, respondent supervised the investigation and litigation of matters referred to the Ethics and Employment Unit ("EEU") involving possible violations of the Department's Code of Conduct (Tr. 8-9, 101-02).

As Deputy General Counsel, Ms. Morgan was respondent's supervisor in the EEU (Tr. 8-9). Ms. Morgan testified that in late 2015, the agency sought to increase the number of employment attorneys at intake centers and, as a result, respondent was reassigned from EEU to Prevention Assistance and Temporary Housing ("PATH"), a Department intake center in the Bronx (Tr. 9-10). Respondent was selected for this position because she was a senior employment attorney who was familiar with PATH and had a "good rapport" with the assistant commissioner with whom she would be working (Tr. 11).

On September 25, 2015, Ms. Morgan and respondent met to discuss her reassignment and job responsibilities at PATH, which would include dealing with disciplinary matters on site (Tr. 11). During this meeting, respondent raised some safety concerns about her transfer to PATH (Tr. 27). Ms. Morgan testified that following this meeting, the Department assessed the safety protocol at PATH, including the presence of security, respondent's desk location, and the availability of a "panic" button (Tr. 31).

Similarly, Mr. Neal, the Department's General Counsel, testified that respondent raised concerns about her safety during discussions of her transfer to PATH because she had personally handled discipline cases against a number of employees at that site. To address these concerns, Mr. Neal contacted the Department's Deputy Commissioner of Security and Emergency Operations, who confirmed that there were safeguards in place at PATH, including uniformed Department officers, security guards, and panic buttons (Tr. 35-36, 47-49, 50-51).

Ms. Morgan notified respondent by e-mail that they would meet at PATH on respondent's first day there, October 13, 2015. However on that date, respondent did not report to work (Tr. 12, 13). Respondent sent Ms. Morgan an e-mail stating that she was out for medical reasons (Tr. 13-14).

In October 2015, respondent submitted a Family Medical Leave Act ("FMLA") request, which was approved for the period up until December 7, 2015 (Tr. 57, 58). On December 8, 2015, Mr. Neal's assistant sent respondent a letter asking for updated medical documentation in order to extend her FMLA leave (Pet. Ex. 1; Tr. 37). According to Mr. Neal, respondent never replied to this letter or provided any documentation (Tr. 41). Ms. Williams, Assistant Commissioner for Human Resources, explained that despite the lack of documentation, respondent's leave was extended, without pay, until January 19, 2016 because respondent had put the payroll and timekeeping unit "on notice" of her health issues (Tr. 57, 58; Pet. Ex. 3).

On January 12, 2016, the Department sent respondent a letter stating that she was to return to work on January 20, 2016 (Pet. Ex. 3). It further instructed her that if she required a reasonable accommodation upon her return, she was to contact the Office of Diversity and Equal Opportunity Affairs one week before her return date (Pet. Ex. 3). However, respondent did not reply to this letter, did not contact anyone at the Department, and did not return to work on January 20, 2016 (Tr. 43, 60).

Following her failure to return to work in January 2016, respondent was designated AWOL (Pet. Ex. 4; Tr. 61). On January 22, 2016, the Office of Diversity and Equal Opportunity Affairs sent respondent a notice indicating that she may be eligible for a reasonable accommodation for medical reasons and advising her to contact the office to facilitate her return to work (Pet. Ex. 5). A second notice containing the same information was sent on April 26, 2016, and directed respondent to contact the office on or before May 11, 2016 (Pet. Ex. 5). A third notice that was sent on July 12, 2016 directed respondent to contact the office on or before July 26, 2016 (Pet. Ex. 7). This notice stated that "[f]ailure to respond by the above date may be deemed as abandonment of your job" (Pet. Ex. 7). According to Ms. McBean, the Executive Director of Diversity and Equal Employment Opportunity at the Department, respondent did not reply to any of these notices (Tr. 73). At the end of this process, the Office of Diversity and Equal Opportunity Affairs notified respondent's program division that they did not make contact with respondent (Tr. 74). On August 9, 2016, Mr. Neal referred respondent to the Human Resources Administration's ("HRA's") Employment Law Unit for disciplinary action because she was AWOL and for time and leave issues (Pet. Ex. 2; Tr. 45, 46).[2]

Mr. Neal and Ms. Morgan testified that respondent's absence required cases to be reassigned and caused the Department to be unable to deliver on the services agreement reached with PATH (Neal: Tr. 42; Morgan: Tr. 14). According to Mr. Neal, he did not assign other attorneys to PATH in respondent's place because another attorney had recently left the EEU and the unit was short staffed (Tr. 43).

Respondent attributed her absence from her job to mental health issues that arose after she was transferred from the agency's headquarters on Beaver Street in Manhattan to the Bronx PATH center effective October 13, 2015. That transfer, she contended, was retaliation for her

[2] Mr. Neal testified that he referred the disciplinary case to HRA's Employment Law Unit for prosecution because respondent is a long-term employee of the Department's legal department and he wanted to avoid any potential conflict of interest (Tr. 45).

having pursued allegations of malfeasance in the Department, including by submitting a complaint to the Conflicts of Interest Board in March 2015 that implicated Ms. Morgan and Mr. Neal (Tr. 117, 122-23; Resp. Exs. E, G, I).

As evidence that her transfer was retaliatory and occurred under circumstances that caused mental health issues, respondent claimed that standard practices regarding workplace safety were not followed prior to her transfer (Tr. 123). In particular, respondent testified that after it was rumored that disciplinary unit staff would be transferred to PATH, affected staff members and their union representatives met with Mr. Neal, the Department's labor relations director, and Gilbert Taylor, the Department's Commissioner at the time, on August 5, 2015. During that meeting respondent raised her concerns about staff safety at PATH (Tr. 119-20; Resp. Ex. F). According to respondent, the Commissioner told the staff to document their concerns, which they were still doing when Ms. Morgan informed respondent that she would be transferred in a memorandum dated September 25, 2015 (Resp. Ex. G). Respondent claimed that standard workplace safety protocol had not been followed and that she asked Ms. Morgan to wait until the labor-management process was completed before the transfer became effective, but her request was denied (Tr. 124).

Respondent memorialized her concerns about her safety at the PATH location in an e-mail to Ms. Morgan dated October 8, 2015 (Resp. Ex. H). Respondent indicated that as a "high profile" disciplinary attorney, she had worked on cases involving violent employees based at PATH, and therefore was concerned about sharing a workspace with those same employees (Resp. Ex. H; Tr. 125-26). Respondent claims that Ms. Morgan never responded to this e-mail (Tr. 125). Respondent conceded, however, that Ms. Morgan informed her that the safety concerns respondent raised during their September 25, 2015 meeting had been assessed (Tr. 148).

In October, respondent did not report to the PATH worksite and instead took sick leave for respiratory issues from October 9, 2015 to October 26, 2015 (Tr. 147). On October 27, 2015, respondent submitted an FMLA leave request for one month of leave due to "hypertension and asthma" (Tr. 134-35; Resp. Ex. J). Around that same time, respondent claims that she became depressed, had trouble sleeping and eating, and experienced anxiety because of her proposed transfer to PATH (Tr. 135-36). Respondent indicated that she "was very afraid something

horrible was going to happen to [her]," that she feared she would be hurt or killed, and that she felt "targeted," "hopeless," and "shut down" (Tr. 136, 137).

On December 8, 2015, while respondent remained on FMLA leave, a New York City Council member and a member of the New York State Assembly jointly sent a letter to the HRA Commissioner on respondent's behalf (Resp. Ex. K; Tr. 144). The letter reiterated respondent's concerns about the PATH transfer and asked for an audit of the General Counsel's office. According to respondent, there was no response to this letter (Tr. 144).

Respondent admitted that during her AWOL period, she received multiple notices from the Department, and that as an employment attorney, she was aware of the Department's time and leave requirements (Tr. 149, 151). Respondent stated that she did not open any letters from the Department because she was "very afraid" (Tr. 139). Instead, her husband opened the January 12, 2016 notice, which directed her to return to work on January 20, 2016, the July 2016 notice indicating that she could lose her job, and the disciplinary charges (Tr. 140, 150, 152).

Respondent did not return to work until March 6, 2017, after disciplinary charges were filed against her (Tr. 140). She presently works as an attorney in the Department's child support enforcement unit in Family Court (Pet. Br. at 1; Tr. 141). Respondent testified that, as of the time of trial, she is seeing a therapist and doing well (Tr. 141). She indicated that she was capable of full time work, and if necessary, would be willing to work at PATH (Tr. 141-42).

To support her claims of anxiety and depression, respondent presented testimony of a forensic psychologist, Dr. Stephen Reich, Ph.D. (Tr. 85; Resp. Ex. A). Dr. Reich completed a forensic evaluation of respondent on April 5, 2017 (Tr. 88; Resp. Ex. B). In his assessment, Dr. Reich noted that respondent showed signs of depression and anxiety, and that there was a "nexus between [these symptoms] and the extended conflict that she has had with her employer" (Resp. Ex. B at 6; Tr. 90, 92). At trial, he noted that she was "too frightened to engage in . . . therapy . . . or . . . to engage the reality of her situation" (Tr. 95). He diagnosed her with "adjustment disorder with mixed anxiety and depressed mood" (Resp. Ex. B at 4). Dr. Reich's report recounted respondent's own summary of the dispute with her employer, the transfer to PATH, and that during her absence, she had trouble sleeping, concentrating, and was "very sad and nervous with persistent crying spells" (Resp. Ex. B at 4; Tr. 90). However, Dr. Reich did not make any of these observations contemporaneously during respondent's AWOL period (Tr. 96). Respondent told Dr. Reich that before his evaluation, she had never undergone therapy (Tr. 97).

On behalf of the Department, Dr. Azaria Eshkenazi, a psychiatrist, completed an independent evaluation of respondent on May 2, 2017 (Pet. Ex. 8; Tr. 161). Prior to the evaluation, Dr. Eshkenazi reviewed Dr. Reich's report (Pet. Ex. 8 at 4). In his assessment, Dr. Eshkenazi found that there was "no evidence of depression or severe anxiety," and that there was "no psychiatric diagnosis" (Pet. Ex. 8 at 6). Respondent told him that she stayed out of work after January 2016 because she was concerned about her transfer to a unit where she had investigated employees. She indicated that she had been back at work for about six weeks and was working in Family Court. She reported no psychiatric issues and that she feels "quite comfortable" with her current work (Pet. Ex. 8 at 5). Dr. Eshkenazi noted that in his opinion, "at this time, [respondent] is able to continue and perform her duties" (Pet. Ex. 8 at 6).

Respondent's contention that her protracted absence from work should be excused because it was medically justified is not persuasive. Indeed, besides respondent's self-serving testimony and her statements to Dr. Reich in April 2017, there is no credible proof that a medical condition prevented respondent from reporting to work from January 2016 to March 2017.

At trial, respondent described general symptoms of anxiety and depression during her 13-month absence, including trouble sleeping and eating, yet she did not seek therapy or take any medication. Nor did she offer any other evidence, such as testimony of family members or friends, that would establish that she displayed symptoms of anxiety and depression sufficient to prevent her from reporting to work or even contacting her employer. Respondent also stated that she felt "hopeless" and "targeted," and "very afraid something bad would happen," while she was absent from work. However, these reactions appeared tied to her frustration about being transferred to the PATH center against her wishes, rather than her purported mental health issues. Overall, respondent's evidence that her mental health deteriorated to such an extent that she was incapable of responding to the Department's notices or returning to work was not convincing.

Notably, neither of the medical evaluations introduced at trial were completed during respondent's AWOL period, and thus, are of minimal value in assessing her mental health at that time. *See Admin. for Children's Services v. Goodman*, OATH Index Nos. 986/05 and 1082/05 at 3 (Aug. 12, 2005) (finding "no reliable evidence" of respondent's alleged mental health problems during acts of misconduct where diagnosis of anxiety and depression was made the year after the misconduct took place); *Human Resources Admin. v. Thomas*, OATH Index No. 190/05, mem. dec. at 4 (Dec. 8, 2004) (evidence concerning diagnosis made in May 2004 did not

rebut charge that employee was AWOL in January 2004). While Dr. Reich attempted to tie respondent's present descriptions of stress and anxiety to the "extended conflict" with her employer, his assessment was drawn from respondent's own depictions of her past state of mind and was conjecture at best. Similarly, his account at trial that she was "too frightened" to engage in therapy or respond to her employer during her absence was based only on respondent's self-report. The fact that Dr. Reich's assessment was made at respondent's request in the context of pending disciplinary charges for her AWOL further undermines Dr. Reich's attenuated conclusion that this absence was medically justified. Additionally, Dr. Eshkenazi presented much different medical conclusions than Dr. Reich and did not diagnose respondent with anxiety or depression. In fact, Dr. Eshkenazi reported no connection between her mental health and her absence.

In sum, these conflicting medical evaluations, based solely on respondent's descriptions of her state of mind during her absence, do not establish that her absence was medically justified. *See, e.g., Triborough Bridge & Tunnel Auth. v. Beverley*, OATH Index No. 2238/15 at 8 (Nov. 30, 2015), *adopted*, Auth. Dec. (Dec. 28, 2015), *aff'd*, NYC Civ. Serv. Comm'n Item No. 2016-0060 (May 2, 2016) (respondent's "self-serving testimony" and conflicting accounts from doctors did not constitute "objective proof" of respondent's unfitness and that he could not report to work); *Admin. for Children's Services v. Brown*, OATH Index No. 1701/02 (Dec. 13, 2002) (vague, subjective psychiatric diagnosis insufficient to show disability); *Health and Hospitals Corp. (Kings County Hospital Center) v. Justin*, OATH Index No. 1513/02 (Nov. 20, 2002) (unproven claims that absences were caused by depression did not establish a defense to misconduct).

Further, even crediting respondent's testimony that she was too anxious and depressed to report to work, respondent committed misconduct by failing to contemporaneously document her medical condition or respond in any way to the multiple Department notices that she received. *See Human Resources Admin. v. Taylor*, OATH Index No. 474/99 at 4 (Jan 12, 1999), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD01-38-SA (Apr. 12, 2001) (even if respondent's medical condition prevented him from reporting to work, "it would not excuse [his] failure to document his injury and to seek authorization for his absence"). Respondent's explanation that she was too afraid to open these letters defies common sense. As an experienced employment attorney who has prosecuted disciplinary matters in the Department for several years, respondent, by her own

admission, was well aware of the time and leave protocols and consequences for noncompliance. It is apparent then that respondent willfully disregarded the Department's notices, including its attempt to engage in a reasonable accommodation process from January 2016 to July 2016. Nonetheless, respondent testified that her husband opened the January 2016 notice and tried to apprise her of its contents (Tr. 150). Thus, at a very minimum, respondent became aware in January 2016 that her employer was seeking to resolve her employment status. Respondent's failure to respond to the Department in any way, including with medical documentation or explanation for her absence, seriously undercuts her claim that her absence should not be considered misconduct.

Finally, even assuming that respondent's absence was due to mental health issues, an employee may be disciplined for excessive, medically excused absences because of the burden they pose to the employer. *See*, *e.g.*, *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); *Beverley*, OATH 2238/15 at 7 (noting that "even if an employee's absences are caused by a physical or mental disability, the employer may discipline … the employee for incompetence under CSL section 75 when the absences are excessive and they have a burdensome effect upon the employer"); *Triborough Bridge and Tunnel Auth. v. Rodriguez*, OATH Index No. 729/04 (May 28, 2004), *aff'd*, President's Dec. (June 29, 2004) (employee with 48.3% absentee rate over a 15-month period found incompetent; respondent's depression not a defense). Petitioner established that respondent's protracted absence was burdensome to her unit because cases had to be reassigned and the Department was unable to deliver on the PATH services agreement.

Respondent also intimates that her failure to return to work was justified because the PATH site was an unsafe and hostile work environment (Resp. Br. at 18). Under certain circumstances, an employee may disobey her employer's order if it poses a threat to her health or safety. This affirmative defense requires that respondent show that compliance "posed an imminent threat to [the employee's] health or safety or to that of his co-worker" and "was objectively demonstrable and reasonable and was the actual reason for his refusal." *Dep't of Sanitation v. Cunningham*, OATH Index No. 1332/02 at 19 (Nov. 4, 2002).

Here, respondent presented no evidence to establish that her transfer to PATH threatened her safety. While respondent argued that she feared working amongst employees whom she had

disciplined, both Mr. Neal and Ms. Morgan confirmed that there were security measures in place at PATH, including security guards, on site Department police officers, and panic buttons (Morgan: Tr. 31; Neal: Tr. 51). In sum, respondent's subjective description of the safety concerns at PATH center in the Bronx were insufficient to substantiate her defense, where petitioner presented objective evidence that in her new location, reliable workplace safeguards would be readily available.

Finally, respondent contends that her absence was due to her anxiety and fear of retaliation after her complaints against Ms. Morgan and Mr. Neal (Resp. Br. at 8-10). To the extent that respondent suggests that the present misconduct charges were made in retaliation for her complaints, such an argument is unavailing as there is no proof of such retaliation. More importantly, respondent's lengthy absence and complete failure to communicate with the Department for over one year provide an independent basis for the disciplinary charges. *See Dep't of Transportation v. Hung,* OATH Index No. 1515/06 at 5 (Aug. 30, 2006), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD07-51-SA (May 9, 2007) ("It is well-settled that the whistleblower defense will not be established if the employer has a separate and independent basis for the disciplinary action taken."); *see also Fire Dep't v. McAllan*, OATH Index No. 120/04 (Mar. 4, 2004); *Dep't of Health and Mental Hygiene v. Henderson*, OATH Index No. 1797/02 (Oct. 17, 2002), *modified on penalty*, Comm'r Dec. (Oct. 31, 2002).

In sum, petitioner's credible evidence established that respondent was absent without prior authorization, in violation of Code of Conduct Section 5.8. After respondent's extended FMLA leave ended in on January 19, 2016, she was required to return to work or provide additional documentation to continue her leave. Respondent failed to do so and thus remained absent without authorization until March 5, 2017.

Respondent's absence was also excessive, in violation of section 5.2 of the Code of Conduct. *See, e.g., Dep't of Environmental Protection v. Smith*, OATH Index No. 2534/17 (Aug. 10, 2017) (continuous absence for more than nine months excessive); *Dep't of Environmental Protection v. Post*, OATH Index No. 1420/12 at 13 (Aug. 21, 2012), *adopted*, Comm'r Dec. (Sept. 4, 2012) (absenteeism rate of 73% deemed excessive); *Admin. for Children's Services v. Scipio*, OATH Index No. 2144/11 at 5 (June 21, 2011) (170 absences in one year were *per se* excessive).

The evidence here further shows that respondent failed to submit leave requests, or any documentation or response, during her absence period, and therefore did not adhere to the Department's time and leave rules, violating both sections 5.4 and 5.1 of the Code of Conduct. Finally, under section 1.2, petitioner established that respondent's conduct was prejudicial to good order.

FINDINGS AND CONCLUSIONS

Petitioner proved that respondent was AWOL from January 20, 2016 until March 5, 2017, in violation of sections 1.2, 5.1, 5.2, 5.4, and 5.8 of the Department's Code of Conduct.

RECOMMENDATION

Having made the above findings, I obtained a summary of respondent's personnel record. In over 15 years of work with the Department, this is respondent's first instance of misconduct.

Despite respondent's unblemished record, there is no doubt that she engaged in a particularly serious form of misconduct by being AWOL for over a year and failing to communicate at all with the Department, in flagrant disregard of the Department's time and leave rules. This misconduct is especially troubling because respondent was an employment attorney tasked with enforcing the very same rules that she violated. Further, the Department demonstrated that respondent, a senior attorney, burdened other attorneys in her unit with an increased workload during her extended absence, and prevented the Department from fulfilling its obligations (Neal: Tr. 42; Morgan: Tr. 14). I find that respondent's excessive, unexcused absence warrants termination.

Respondent's claim that she was so debilitated by mental health issues that she was unable to report to work for over 13 months is not supported by the evidence. Nor did her self-reported safety concerns seem reasonable. It is worthy of note that the disciplinary cases involving employees at the Bronx PATH center that respondent handled had been referred to respondent's office by an associate commissioner who worked at that location (Tr. 153-54). There is no evidence that this Department employee, who worked at the PATH location and was involved in disciplining its employees, faced any heightened safety risks as a result. In addition, respondent testified that she handled disciplinary cases involving employees who worked at the agency's headquarters on Beaver Street, where respondent had been assigned before she was

transferred to PATH (Tr. 148). Yet she did not report being fearful of her work at that location. Rather, it would appear that respondent thought her transfer from the Department's headquarters on Beaver Street in Manhattan to the PATH center in the Bronx did not comport with her title and seniority (Resp. Ex. H; Tr. 104). So, rather than reporting to her new work location, respondent effectively abandoned her job for 13 months.

Respondent's long-term absence merits termination. *See, e.g., Smith*, OATH 2534/17 at 3 (termination recommend for respondent who was continuously absent without leave for more than nine months); *Beverley*, OATH 2238/15 at 9-11 (termination recommended for respondent's excessive absences, including failure to report to work for an 11-month period); *Fire Dep't v. A.G.*, OATH Index No. 771/12 at 28-29 (July 5, 2012), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 13-02-SA (Feb. 6, 2013) (termination of employment upheld where employee absent more than 50% of the time in two years); *Dep't of Correction v. Purcell*, OATH Index No. 1336/96 at 19 (July 8, 1996), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 97-106-SA (Nov. 21, 1997) (termination of employment the "only appropriate penalty" where employee used 90 sick days in 12 months).

Respondent suggests that her long career and the fact that she has returned to work should mitigate the penalty here. However, under similar circumstances, this tribunal has recommended termination, given the gravity of a lengthy, unexcused AWOL. *See, e.g., Admin. for Children's Services v. Gordon,* OATH Index No. 175/01 at 4(Nov. 8, 2000), *remanded on procedural grounds*, *Gordon v. City of New York*, Sup. Ct. N.Y. Co. Index No. 108087/01 (Nov. 20, 2001) (noting that "unauthorized absence over a period of three months is a fundamental form of misconduct which substantially impedes the agency's ability to fulfill its mission. Notwithstanding respondent's tenure and employment history, the appropriate penalty for this misconduct is termination"); *Human Resources Admin. v. Richardson*, OATH Index No. 976/93 at 4-5 (July 7, 1993) (finding respondent guilty of eight-month AWOL, ALJ recommended termination even though respondent had belatedly returned to position, had a long tenure and superior performance evaluations); *see also Dep't of Sanitation v. Moore,* OATH Index No. 1035/10 (Feb. 2, 2010) (termination of employment recommended for long-term AWOL, notwithstanding respondent's return to work.) Respondent identified no extraordinary mitigating circumstances that would justify departure from the penalty imposed under similar circumstances. *Cf. Dep't of Sanitation v. Anonymous,* OATH Index No. 181/11 (Dec. 9, 2010)

(in light of the extraordinary mitigating circumstances, including respondent's health problems, her teenage daughter's attempted suicide and multiple psychiatric hospitalizations, and her son's arrest and murder conviction, 60-day suspension recommended for respondent who was absent without authorization for nearly one year but who called in sick on a weekly basis during that period).

In short, respondent's serious misconduct renders her an unreliable employee. For the proven misconduct, termination of her employment is appropriate.

Astrid B. Gloade
Administrative Law Judge

September 19, 2017

SUBMITTED TO:

STEVEN BANKS
Commissioner

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