Office of the Comptroller v. Gonzalez

OATH Index No. 1883/17 (Apr. 13, 2018)

Petitioner proved that respondent was excessively absent, failed to comply with time and leave procedures on 14 occasions, made a false entry on a timesheet, made false statements in documents related to the employment hiring process, engaged in conduct prejudicial to good order and discipline and tending to bring the Comptroller into disrepute, and engaged in an instance of insubordination. Retaliation defense not established. Termination of employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
OFFICE OF THE COMPTROLLER
Petitioner
-against-
EMILIO GONZALEZ
Respondent

REPORT AND RECOMMENDATION

NOEL R. GARCIA, *Administrative Law Judge*

This employee disciplinary proceeding was referred by petitioner, the Office of the Comptroller ("Comptroller"), pursuant to section 75 of the Civil Service Law. Respondent Emilio Gonzalez, an administrative claims examiner, is charged with excessive absenteeism, failing to comply with time and leave procedures, making false statements on his timesheet and on documents related to the employment hiring and promotion process, engaging in conduct tending to bring the Comptroller into disrepute, engaging in conduct prejudicial to good order and discipline, and insubordination (ALJ Ex. 1).

Over a two-day trial, petitioner relied on documentary evidence and the testimony of two witnesses: respondent's supervisor Ms. Maglio-Scotti, and Investigator Camacho, an investigator with the Comptroller's general counsel's office. Respondent testified on his own behalf, offered documentary evidence, and presented the testimony of a former supervisor, Ms. Canagata, and of an employee he previously supervised, Mr. Ford.

Respondent also submitted a post-trial memorandum of law in which he argued that the charges should be dismissed in accordance with the "whistleblower" defense provided under

Civil Service Law Section 75-b, which prohibits a public employer from taking disciplinary action to retaliate against an employee for reporting "improper governmental action."[1]

For the reasons below, I find that petitioner proved most of the charges, that respondent did not establish a "whistleblower" defense, and recommend that respondent be terminated from his employment.

ANALYSIS

Respondent began his employment with the Comptroller in 2002, in the position of court representative (Tr. 183, 186-87). In 2011, he was promoted to senior court representative and in 2015, respondent was promoted to division chief of the property damage division (Tr. 187, 197, 199; Resp. Ex. I).

On January 15, 2016, respondent was demoted and reassigned to the title of administrative claim examiner for the motor vehicle claims division (Tr. 214-15; Resp. Ex. M). According to the statement of charges, respondent engaged in most of the conduct at issue after his demotion, including the main charges of being excessively absent, and failing to comply with time and leave procedures.

On September 20 and 21, 2016, respondent submitted to the Comptroller an internal grievance and an EEO complaint, respectively. Respondent submitted a federal EEOC complaint on November 7, 2016, and a complaint to the NYC Department of Investigation ("DOI") on January 13, 2017. Respondent testified that he submitted these complaints because he believed he was wrongfully demoted (Tr. 220-21). Respondent argues that all the charges against him should be dismissed because they were brought solely in retaliation for the complaints he submitted. Accordingly, his "whistleblower" defense shall be addressed first.

"Whistleblower" Defense

Section 75-b(2)(a) of the Civil Service Law prohibits a public employer from dismissing or taking other disciplinary or adverse personnel action "against a public employee . . . because the employee discloses to a governmental body information: . . . (ii) which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action." "Improper governmental action" is defined as "any action by a public employer or employee, or an agent of such employer or employee, which is undertaken in the performance of

[1] I previously reserved decision on respondent's motion to dismiss based on the "whistleblower defense" until the conclusion of trial.

such agent's official duties . . . which is in violation of any federal, state or local law, rule or regulation." Civ. Serv. Law § 75-b(2)(a) (Lexis 2018).

Under section 75-b(3)(a), where an employee is subject to dismissal or other disciplinary action and the employee

> reasonably believes such action would not have been taken but for the conduct protected under subdivision two of this section, he or she may assert such as a defense before the designated arbitrator or hearing officer. The merits of such defense shall be considered as part of the arbitration award or hearing officer decision of the matter. If there is a finding that the dismissal or other disciplinary action is based *solely* on a violation by the employer of such subdivision, the arbitrator or hearing officer shall dismiss or recommend dismissal of the disciplinary proceeding, as appropriate . . .

Civ. Serv. Law §75-b(3)(a) (emphasis added).

Respondent also relies on *Matter of Kowaleski (New York State Dept. of Correctional Servs.)*, 16 N.Y.3d 85 (2010). In *Kowaleski*, an arbitrator determined that he lacked authority to consider the retaliation defense provided by Civil Service Law Section 75-b. On appeal, the Court of Appeals held that "the arbitrator not only had authority to consider Kowaleski's retaliation defense, but was required to do so." *Kowaleski*, 16 N.Y.3d at 90. The Court explained that

> [a] disciplinary action may be retaliatory even where an employee is guilty of the alleged infraction. Under Civil Service Law § 75-b (3), an arbitrator is required to dismiss a disciplinary action based solely on retaliatory motive, regardless of the employee's guilt or innocence . . . This separate retaliation inquiry is critical. In order to be effective, whistleblower protections like those embodied in Civil Service Law § 75-b must shield employees from being retaliated against by an employer's selective application of theoretically neutral rules. Thus, a separate determination regarding the employer's motivation in bringing the action is necessary . . .

Therefore, to establish a "whistleblower" defense, respondent must show that the *sole* motivation for petitioner's charges was to retaliate against him for the several complaints that he had filed.

As chief of the property damage division, respondent reported to Mr. Cox, Ms. Riley, and Mr. Kim, an assistant comptroller. Upon entering the division, respondent believed he discovered problems with how examiners were settling cases (Tr. 203-07). Some of the

problems that he allegedly discovered included: examiners paying 100% of a claimant's repair estimate to avoid angry callers; automatically deducting 20% of a claimant's repair estimate and paying the remaining 80%; or paying any amount presented in a bill that was purportedly paid by a claimant (Resp. Ex. K). According to respondent and his witness, Mr. Ford, examiners would "speed" settle cases in order to expeditiously resolve the claims, resulting in settlements being made in cases where claimants did not provide any photographs to support a damage claim, where claimants failed to establish standing, or where claimants' estimates went beyond the scope of the alleged damage (Tr. 177-78, 206-08). In his complaints, respondent generally asserted that settling claims in this manner was a breach of the Comptroller's fiduciary duty.

Respondent decided to end the practice of "speed" settling. He advised all of the examiners that they could no longer settle cases without photographs depicting the alleged damage and urged at least one claim examiner to meet with him so he could demonstrate how to determine liability (Tr. 206; Resp. Ex. K). Respondent admitted that thereafter the rate of case settlement fell, but argued that he was "demanding quality over quantity" (Tr. 207).

Respondent alleges that Mr. Cox spoke to him regarding this issue and told him that he was "not getting it," that he needed to "[r]ead between the lines," that it was "a political year" and that respondent needed to "make everybody happy" because "[t]he Comptroller is not looking good when people post things on social media complaining about the cases not moving" (Tr. 207). Respondent answered that the changes he was making were necessary in order to justify claim payments if audited (Tr. 206-07). Respondent alleges that Mr. Cox answered that "it's small money . . . all under the radar," but respondent replied that "$1,000 at a time, it amounts to several million dollars" (Tr. 207-08).

Within a year, respondent was demoted and reassigned (Tr. 214-15; Resp. Ex. M). Respondent stated that Mr. Kim, and another supervisor, Mr. D'Angelo, were the individuals who demoted him (Tr. 256).

In September 2016, respondent submitted to the Comptroller an internal grievance (Resp. Ex. N), and an EEO complaint (Resp. Ex. P). In November 2016 and January 2017, respondent submitted a federal EEOC complaint (Resp. Ex. Q), and a complaint to DOI (Resp. Ex. R), respectively. The main subjects of his complaints are Mr. Kim, Mr. Cox, and Ms. Riley. Respondent alleged that he was wrongfully demoted because he refused to "settle claims without proper investigation and [he] refused to move cases for the . . . political and career gain of Seunghwan Kim, of Jim Cox, [] and of Katherine Riley" (Tr. 220-21). In his internal grievance

to the Comptroller, respondent briefly mentions that after his demotion, his new supervisor, Ms. Maglio-Scotti, made his work environment "intolerable" and that she exhibited preferential treatment "with the white colleagues," but without much elaboration (Resp. Ex. R at 3).

Respondent also testified that upon being promoted to chief, Mr. Kim told him that the first thing he needed to do was to "get rid of a black guy," a lawyer within the division, because he was black and made more money than everyone else (Tr. 201-02). Respondent stated that his refusal to do so was "when all the adverse action . . . started against me" (Tr. 255). However, respondent admitted that Mr. Kim never spoke to him again regarding this matter, and that he did not include this allegation in any of the complaints he filed (Tr. 249).

Respondent argues that all of the charges should be dismissed because they would not have been brought but for him "blowing the whistle on his superiors" (Resp. Br. at 2-3). However, the evidence does not support that the charges against respondent were brought solely in retaliation for the submitted complaints.

Petitioner presented the testimony of Ms. Maglio-Scotti, respondent's supervisor after his demotion and transfer to the motor vehicle claims division on January 15, 2016. Ms. Maglio-Scotti's testimony was credible and largely unrebutted. She testified that she was told by her supervisor, Mr. Eronson, that respondent was being assigned to her team because "it didn't work out in the property damage job" due to "differences of opinion on how to run the office" (Tr. 124). On cross-examination, she stated that Mr. Kim never spoke with her regarding the reason respondent was demoted, and that she never heard that Mr. Kim had allegedly instructed respondent to fire another employee due to his race and salary level (Tr. 129, 138).

Instead, Ms. Maglio-Scotti stated that after respondent was assigned to her team, his attendance immediately became a matter of concern due to excessive absenteeism, which she discussed several times with Mr. Eronson. On April 22, 2016, she sent an e-mail to the Comptroller's general counsel's office reporting that "[i]n the first 60-some odd working days that [respondent] was working on our team, he was out, like, 30-something days" (Tr. 104-05; Pet. Ex. 20 at 283).

Thereafter, Investigator Camacho, an investigator for the general counsel's office, began tracking respondent's attendance record. Investigator Camacho's credible and consistent testimony establishes that she mostly communicated with Ms. Maglio-Scotti, and sometimes with Ms. Maglio-Scotti's subsequent supervisor, Mr. Carp, regarding her investigation into respondent (Tr. 92).

Investigator Camacho also stated that other than Ms. Maglio-Scotti, Mr. Carp, and petitioner's counsel, Ms. Injeski, no one else ever asked her "to look into anything that touched on [respondent]" (Tr. 94). She further specified that Mr. Kim did not ask her to "look into anything concerning [respondent]" (Tr. 93-94).

As discussed below in Charges 1 and 2, Investigator Camacho's investigation found that respondent was absent for 108 full days and 6 partial days in 2016, and continuously absent for 180 days in 2017, up to the first day of trial, which was on September 19, 2017 (Tr. 47). Further, respondent failed to follow the required time and leave procedures and was absent without official leave ("AWOL") on the following dates: August 16-19, 2016; August 22-26, 2016; November 25, 2016; January 10, 2017; January 12, 2017; and January 19-20, 2017 (ALJ Ex. 1). Respondent did not contest the alleged number of absences or his AWOL status for the dates specified (Tr. 273-75; Resp. Br. at 2).

Investigator Camacho explained that while investigating respondent's attendance, she discovered that on June 26, 2016, he was issued a violation for operating a personal watercraft "on a well-posted slow speed/manatee zone" in Miami Dade County, Florida, while he was on leave pursuant to the Family and Medical Leave Act ("FMLA") (Tr. 63-67).

On September 23, 2016, Ms. Maglio-Scotti asked Investigator Camacho to look into whether respondent was actually at work on September 14, 2016 (Tr. 48; Pet. Ex. 8). According to Ms. Maglio-Scotti's records, respondent had called out sick that day, but he submitted a timesheet showing that he had worked the entire day (Tr. 48, 53; Pet. Exs. 9, 20 at 291). Her investigation revealed no evidence that respondent was present at work on that date.

Further investigation by Investigator Camacho revealed an instance where respondent was allegedly insubordinate towards Ms. Maglio-Scotti in October 2016, and that he allegedly made false statements on employment applications to the Comptroller (Tr. 29).

In sum, all the charges here stem from Ms. Maglio-Scotti's initial complaint regarding respondent's excessive absenteeism, which respondent does not contest, and the subsequent investigation by Investigator Camacho. It is uncontested that the investigation began before respondent filed any of his complaints. There is no evidence that Ms. Maglio-Scotti or Investigator Camacho ever knew before the filing of the charges on February 13, 2017, that respondent had submitted four complaints alleging that he was wrongly demoted, or that respondent had complained about Ms. Maglio-Scotti in his internal grievance to the Comptroller. There is no evidence that Mr. Kim, Mr. Cox and Ms. Riley, the main subjects of respondent's

complaints, ever attempted to influence Ms. Maglio-Scotti, Investigator Camacho or petitioner's counsel regarding the investigation into respondent's conduct or the filing of the charges.

While it is true that the charges against respondent were filed approximately one month after he submitted the last of his four complaints, this fact alone is insufficient to establish that petitioner filed disciplinary charges solely in retaliation. Instead, the evidence shows that the individuals involved with the investigation and prosecution of this disciplinary matter had an independent and good faith basis for the charges filed. Accordingly, respondent failed to establish the "whistleblower" defense as provided by Civil Service Law § 75-b.

Excessive Absenteeism and Failure to Comply with Time and Leave Procedures (Charges 1 & 2)

Charge 1, Specifications 1 and 2, alleges that respondent has been unable to perform the duties of his position due to excessive absenteeism. Specification 1 alleges that respondent was absent 43 full workdays and 2 partial workdays between February 1, 2016 and May 6, 2016, totaling 310.75 hours. Specification 2 alleges that respondent was absent for 94 full workdays and 4 partial workdays due to claimed illness, between August 2, 2016 and February 13, 2017. With no objection from respondent, Specification 2 was amended to conform to the evidence to include respondent's unauthorized absences through the first day of trial, September 19, 2017 (Tr. 8-9).

Petitioner introduced respondent's timesheets for the period encompassing February 6, 2016 through May 7, 2016, September 3, 2016 through September 23, 2017, and a spreadsheet summarizing respondent's absences from February 1, 2016 onward (Pet. Exs. 1, 2, 7).

Based on the timesheets and Investigator Camacho's credible and unrebutted testimony, petitioner established that respondent was absent for 108 full days and 6 partial days in 2016. This does not include respondent's uncharged absences from May 9, 2016 through August 1, 2016, when he was absent based on approved FMLA leave. The documentation further establishes that respondent was absent from August 2, 2016, to December 31, 2016, and for all work days in 2017 up to the first day of trial, for a total of 180 work days. Respondent did not dispute these absences (Tr. 273-75; Resp. Br. at 2).

Respondent's failure to report to work for 108 full days and 6 partial days in 2016, and for more than eight consecutive months in 2017, is excessive absenteeism. Therefore Charge 1 should be sustained. *See Triborough Bridge & Tunnel Auth. v. Beverley*, OATH Index No, 2238/15 (Nov. 30, 2015), *adopted*, Auth. Dec. (Dec. 28, 2015), *aff'd*, NYC Civ. Serv. Comm'n

Case No. 2016-0060 (May 2, 2016) (where employee had 54% absentee rate in 2014 and 100% absentee rate over 11-month period in 2015, employee's excessive absenteeism constituted incompetence *per se); Dep't of Environmental Protection v. A.M.*, OATH Index No. 1410/16 (July 6, 2016) (employee who was absent for 226 out of 395 scheduled work days, for an absentee rate of 57.22% deemed excessively absent).

Charge 2, Specifications 10 through 25,[2] alleges that respondent failed to comply with the Comptroller's time and leave procedures, in violation of Rule 8(A) of the Comptroller's rules, by failing to notify his supervisor on a number of occasions that he would be unable to report to work and being absent without prior or subsequent approval. The alleged AWOL dates are: August 15-19, 2016; August 22-26, 2016; November 25, 2016; December 21, 2016; January 10, 2017; January 12, 2017; and January 19-20, 2017.

Ms. Maglio-Scotti explained that an employee must obtain prior approval before taking annual leave. To request a sick day, the employee must call and speak to their supervisor within an hour of their scheduled start time (Tr. 105-06; Pet. Ex. 24 at 28). The employee manual states that "[e]mployees unable to report to work must contact and directly speak to their supervisor each day within one hour of their normal starting time . . . to receive verbal approval. When an employee fails to call in, he or she will be considered AWOL . . ." (Pet. Ex. 24 at 28).

Ms. Maglio-Scotti testified that she created e-mail records for every time respondent informed her that he would be absent from work (Tr. 106; Pet. Ex. 20). Therefore, for the days respondent failed to call in, an e-mail record was not created. A review of Ms. Maglio-Scotti's e-mail records show that e-mails were not created for any of the AWOL dates alleged in Charge 2, Specifications 10 through 25, but not including Specification 21. The last e-mail Ms. Maglio-Scotti created for this matter was on March 8, 2017, which she testified was an accurate reflection of the last time respondent notified her that he would be absent from work (Tr. 112).

Specification 10 alleges that respondent was AWOL on August 15, 2016. While respondent did not contest the AWOL charges, a review of the evidence shows that an approved "special leave" form granted respondent leave from August 2, 2016 to August 15, 2016 (Pet. Ex. 4). Therefore, Specification 10 should be dismissed.

Specification 21 alleges that respondent was AWOL on December 21, 2016. However, a review of Ms. Maglio-Scotti's e-mail records revealed an e-mail that she sent at 9:11 a.m. on December 21, 2016, that states, "Good morning, Emilio called in sick today. Thank you" (Pet.

[2] Charge 2, Specifications 1-9, were withdrawn at trial.

Ex. 20 at 313). Accordingly, because the e-mail demonstrates that respondent called and notified his supervisor that he would be absent, Specification 21 should be dismissed.

Nevertheless, based on Ms. Maglio-Scotti's credible and unrebutted testimony, and the supporting e-mails, petitioner established that respondent failed to follow its time and leave procedures and was AWOL for all the dates specified in Charge 2, Specifications 11 through 25, but not for the dates noted in Specifications 10 and 21.

False Entry on Timesheet (Charge 3)

Respondent is charged with making a false entry on his timesheet for the week ending September 17, 2016. Ms. Maglio-Scotti testified that pursuant to her e-mail records, respondent called out sick on September 14, 2016 (Tr. 112-13; Pet. Ex. 20 at 291). On September 22, 2016, respondent submitted a timesheet that stated that he had worked on September 14 from 8:30 a.m. to 4:30 p.m. (Pet. Ex. 9).

Ms. Maglio-Scotti told respondent that she could not approve his timesheet as submitted because her records indicated that he was absent on the day in question. Respondent did not promptly correct his timesheet, but instead argued to Ms. Maglio-Scotti that he was at work on September 14 and that she would need to show him proof that he was not present (Tr. 113, 118).[3]

To ascertain if respondent was present at work, Investigator Camacho contacted DCAS, who is the custodian of the building records. DCAS informed her that respondent had not used his ID to enter into the building since May 2016 and that the ID's ability to grant access was deactivated after 30 days of non-use (Tr. 53). However, an employee may still enter the building without an active ID card by passing through security and signing the building's logbook (Tr. 54). A review of the relevant logbook did not contain respondent's signature for September 14, 2016 (Pet. Ex. 10).

Investigator Camacho also obtained data from the Comptroller's bureau of information and systems technology to determine whether respondent used his ID card to open internal office doors (Pet. Ex. 11). While respondent's ID card was deactivated on the DCAS side for entry into the building, it was not deactivated for internal use within the Comptroller's office. The internal data did not contain any record of respondent using his ID to open internal doors on September 14, 2016 (Tr. 61; Pet. Ex. 11).

[3] Respondent ultimately corrected his timesheet sometime in October 2016.

Lastly, Ms. Maglio-Scotti testified that respondent had to use OASIS, a computer program, as part of his daily job duties, but that there was no record of respondent using the program on the date in question (Tr. 117-18; Pet. Ex. 21).

Respondent denies that he knowingly made and submitted a false entry on his time sheet. He speculated that since he was absent the next day due to a sinus infection, he probably was not feeling well on the date in question. He believes that he physically came to work, but probably put his head down and "didn't do much of any work" (Tr. 228). Respondent admitted that he did not provide this explanation to Ms. Maglio-Scotti when she spoke to him about this issue, but argues that he "wasn't asked" (Tr. 253).

Based on the credible evidence, including the building records, OASIS computer records, logbook and e-mails, petitioner proved that respondent was not present at work on September 14, 2016, but nevertheless submitted a timesheet the following week stating that he worked a full day. Even when given the opportunity to do so, respondent failed to promptly correct his timesheet. Therefore, because respondent violated Rule 3(K) of the Comptroller's rules by making a false statement, Charge 3 should be sustained.

Insubordination and Conduct Prejudicial to Good Order and Discipline (Charge 4 and Charge 6, Specification 1)

Respondent is charged with engaging in insubordinate behavior and engaging in conduct prejudicial to good order and discipline in violation of Rule 3(C) and (R) of the Comptroller's rules. Rule 3(C) states that "[r]efusing to obey a direct order, whether oral or written, or failing to carry out a direct order in an expeditious manner" is misconduct and grounds for disciplinary action (Pet. Ex. 24 at 63).

On October 13, 2016, Ms. Maglio-Scotti advised respondent that he was required to provide a doctor's note to justify every time he uses sick leave, including days when he leaves early due to illness. She memorialized the conversation in an e-mail to respondent on October 14, 2016 (Tr. 119-20; Pet. Ex. 22). The e-mail advised respondent that if he did not have a doctor's note he should record his absence as "Leave Without Pay" and mark "Absence Without Leave" as the reason. Respondent replied to the e-mail on October 25, 2016, stating, among other things,

> You may recall that during that conversation, you defined "Absence Without Leave" as my leaving work without permission to do so and I told you that I would not be making that entry if,

> and/or when an undocumented absence were to arise. I also stated that an early departure of one hour or three hours, for example, where I cleared my circumstances with a senior manager, with you and/or with your boss, constituted a leave with permission from the office and not a walk off the job, an abandonment of my duties without permission or an "Absence Without Leave".
>
> …I don't need to see my doctor to tell me to go home and get bed rest or sleep it off so just so [sic] I can get a letter for work to excuse me for an hour or a fraction of a day, I need to go straight home to rest. Since your issue seems to be credibility, I can show you disgusting photos like one that I showed [Mr. Carp] when I left an hour early or I can even let you know so you can inspect the toilet in the restroom after I am done so you can see for yourself. I think it's about time you end the harassment and the persecution of me. I am doing the best I can under the circumstances.

(Pet. Ex. 22)

Petitioner established that respondent's supervisor communicated a clear order regarding how to record undocumented absences. Yet respondent refused to follow the procedures when he stated "I would not be making that entry if, and/or when an undocumented absence were to arise." Therefore, the insubordination charge should be sustained.

Respondent's additional comment that I "can show you disgusting photos like the one that I showed Adam when I left an hour early or I can even let you know so you can inspect the toilet in the restroom after I am done so you can see for yourself" is prejudicial to good order and discipline. *See Dep't of Sanitation v.* Palmisano, OATH Index No. 2032/01 at 24-25 (Mar. 14, 2002) (although comments to supervisor were not a threat, they did constitute misconduct because they were unprofessional and discourteous); *Dep't of Sanitation v. Bonafede*, OATH Index No. 2124/11 at 21 (Nov. 1, 2011), *adopted*, Comm'r Dec. (Dec. 8, 2011), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 12-38-M (July 27, 2012) (respondent's behavior was discourteous, unprofessional, and prejudicial to good order and discipline).

Therefore Charge 6, Specification 1 should be sustained.

Conduct While Out on Approved FMLA Leave (Charge 5 and Charge 6, Specification 2)

It is undisputed that on June 26, 2016, respondent was issued a violation for operating a personal watercraft "on a well-posted slow speed/manatee zone" in Miami Dade County, Florida, while on leave pursuant to FMLA (Tr. 63; Pet. Exs. 12, 13). The personal watercraft is described in the citation as a Seadoo, with water jet propulsion. Respondent had been granted FMLA leave from May 9, 2016 through August 1, 2016, due to an injury (Tr. 67; Pet. Ex. 14). Based on

receiving this citation while on FMLA leave, respondent is charged with engaging in conduct tending to bring the City or the Comptroller into disrepute and with engaging in conduct prejudicial to good order and discipline in violation of Rules 3(R) and (S) of the Comptroller's rules.

Petitioner introduced respondent's FMLA leave application which included a document entitled "Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act)" (Pet. Ex. 14). On that document, respondent's health care provider stated that respondent would be unable to perform the essential functions of his job from May 9, 2016 to August 1, 2016 due to cervical and lumbosacral spinal pain with sporadic spasms. The provider also checked the "yes" box for question 5, which asks "Will the employee be incapacitated for a single continuous period of time due to his/her medical condition, including any time for treatment and recovery."

Petitioner alleges that by traveling to Florida and operating a personal watercraft at a time that he claimed FMLA leave due to inability to perform the essential functions of his job, respondent perpetrated a fraud against the Comptroller's office, which evidences his dishonest character. In support petitioner relies on two cases: *Dep't of Juvenile Justice v. Delice*, OATH Index No. 459/09 & 463/09 (Sep.10, 2008), *appeal dism*, NYC Civ. Serv. Comm'n Item No. CD 09-32-M (July 29, 2009) and *Dep't of Transportation v. Oliphant*, OATH Index No. 253/86 (Oct. 9, 1986).

In *Delice,* an employee was charged with engaging in misconduct that would bring negative criticism upon the Department by submitting fraudulent medical notes on three occasions. In sustaining the charge, Judge Addison held that the employee's fraud evinced his dishonest character, impeded petitioner's ability to fulfill its mission and brought substantial disrepute upon the agency because petitioner's "reputation is dependent on workers which it charges to uphold the highest standards of integrity and conduct." *Delice*, OATH 459/09 & 463/09 at 4.

In *Oliphant*, employee was charged with engaging in conduct tending to bring disrepute to the Department by failing to answer 190 motor vehicle summonses. In sustaining the charge, Judge Kramer held that given the nature of the employee's duties as a traffic enforcement agent, such conduct "tends to bring the Department into disrepute." *Oliphant*, OATH 253/86 at 8.

Similar to the reasoning in *Delice*, the charges that respondent engaged in conduct prejudicial to good order and discipline and conduct tending to bring the Office of the

Comptroller into disrepute should be sustained. As a claims examiner, respondent holds a position that requires a high standard of integrity and trust given that his work responsibilities included adjusting claims against the City of New York. It is essential that the public have faith that these duties are carried out by individuals in an honest and truthful manner.

Respondent's actions suggest dishonesty because while he was allegedly incapacitated and on FMLA leave, he was able to travel to Florida and operate a personal watercraft. This indicates that respondent's injuries were not so severe that he could not perform his work duties, and that he took advantage of FMLA leave for his personal leisure. Respondent does not dispute that he was issued the citation. Respondent offered no reason for his presence in Florida or for operating the watercraft. He offered no medical support for his argument that he could not perform the essential functions of his job, but was capable to operating a Seadoo watercraft. Respondent's argument that he did not reveal that he was a City employee when he received the citation is without merit.

Therefore Charge 5 and Charge 6, Specification 2 should be sustained.

False Statement on Employment Applications (Charge 7, Specifications 1-3; Charge 8, Specifications 1 and 4)[4]

Charge 7, Specifications 1 to 3 charges respondent with engaging in conduct proscribed by New York Penal Law Section 210.45, making a punishable false written statement, in violation of Rule 1(I) of the Comptroller's rules. Petitioner alleges that when respondent submitted a comprehensive personnel document ("CPD") to the Comptroller and a background investigation questionnaire to DOI as part of the employment process in 2002 and 2003, he falsely stated that he was employed by the Office of the Kings County District Attorney ("DA's office") as an Assistant District Attorney ("ADA") from October 1993 to March 1996. Instead, in December 1994 respondent was transferred to a paralegal title and remained in that position until he resigned from the DA's office in March 1996. Petitioner also alleges in Specification 2 that respondent made false statements regarding the tasks he performed during his tenure with the DA's office.

Charge 8, Specifications 1 and 4 charges respondent with making and submitting false statements to the Comptroller, in violation of Rule 3(K) of the Comptroller's rules. Petitioner relied on facts alleged under Charge 7, and adds that in November 2016, respondent submitted to

[4] Charge 8, Specifications 2 and 3 were withdrawn.

the Comptroller a resume in which he made false statements regarding the scope of his duties while employed with the DA's office.[5]

As a preliminary matter, the charges are not time-barred. Section 75(4) of the Civil Service Law provides that no disciplinary action shall be commenced more than eighteen months after the occurrence of the alleged incompetency or misconduct, except "where the incompetency or misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime." Civ. Serv. Law § 75(4) (Lexis 2018). N.Y. Penal Law section 210.45 states that "[m]aking a punishable false written statement is a class A misdemeanor" and defines the crime as follows: "A person is guilty of making a punishable false written statement when he knowingly makes a false statement, which he does not believe to be true, in a written instrument bearing a legally authorized form notice to the effect that false statements made therein are punishable."

The CPD, dated November 25, 2002, and DOI questionnaire, dated January 11, 2003, both contain form notices that warn that any false statements therein are punishable. Respondent signed each document and attested that all the information he provided on the forms was true and complete (Pet. Exs. 15, 17). Therefore, because the misconduct alleged would constitute a crime, the charges are exempt from the statute of limitations provided under section 75(4) of the Civil Service Law.

It is undisputed that respondent was initially hired by the DA's office as an ADA, but was subsequently transferred to the title of paralegal. Specifically, a DA's office memorandum states that respondent was appointed to the position of ADA on October 12, 1993, and was converted to the title of "Community Associate (Paralegal)" on December 20, 1994, after failing to pass the New York State Bar Examination for the third time. A letter from the director of DOI's background investigation unit to the Comptroller also notes that in December 1994, respondent was demoted from ADA to paralegal. A March 18, 1996, memorandum states that the DA's office "received written notice of resignation from Community Associate Emilio Gonzalez." Respondent's "Exit Interview Check List" from the DA's office lists his title as "Community Associate" (Pet. Exs. 17, 23).

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[5] As petitioner requested at trial, Charge 8, Specification 1 is amended to correct a scrivener's error. This charge states that "Specification one restates and realleges specifications one through three of Charge eight above" but should instead read that "Specification one restates and realleges specifications one through three of Charge *seven* above" (Tr. 248). Because Charges 7 and 8 both allege misconduct stemming from submitting false statements on the CPD, and the relevant alleged facts are contained in Charge 7, there is no prejudice to respondent in amending Charge 8 to correct the noted error.

Yet respondent stated on his CPD that from October 19, 1993 to March 19, 1996, his job and civil service title was "Assistant District Attorney" (Pet. Ex. 15). On the DOI questionnaire, respondent stated that the last position he held at the DA's office was "Assistant District Attorney" (Pet. Ex. 17).

Respondent argues that it was proper for him to claim the ADA title for his complete tenure with the DA's office because his job duties never changed, his DA's office ID card and business cards listed his title as an ADA, and his colleagues and supervisors referred to him as "ADA Gonzalez" (Tr. 238-42, 245; Pet. Ex. 23; Resp. Ex. B). He claimed that he was never issued a new ID after he was reclassified as a community associate, and that he used his ADA business cards with the DA's knowledge until his resignation (Tr. 242-44). Respondent also produced a letter that was given to him by District Attorney Charles Hynes accepting his resignation. The letter addresses respondent as "Assistant District Attorney" (Resp. Ex. A).

Respondent's argument is without merit. It appears that after respondent was reassigned as a paralegal, he received the professional courtesy of being referred to by the title of his former position, ADA. However, respondent admitted that his "title was changed" (Tr. 249). Yet he failed to include this information on the CPD and DOI questionnaire. Therefore, Charge 7, Specifications 1 and 3, and Charge 8, Specification 1, should be sustained.

Charge 7, Specification 2 alleges that on his CPD respondent falsely stated that as an ADA at the DA's office from October 1993 to March 1996, he "[p]rosecuted criminal charges [and] arraigned defendants before the criminal court," and "conducted [and] argued hearings on searches, seizures, probable cause, identification [and] character issues." Charge 8, Specification 4, alleges that on November 20, 2016, respondent submitted a resume that falsely states that in his position as an ADA he "[p]resented criminal charges and arraigned defendants before the Criminal Court" and "conducted and argued hearings on searches, seizures, probable cause, identification and character issues." Respondent testified that he performed all the tasks listed on the CPD and on his resume (Tr. 246-47).

Investigator Camacho obtained a letter from respondent's supervisor from the DA's office that states that "[w]ith the exception of conducting hearings and trials, the duties enumerated in [respondent's resume] may be performed by either an assistant district attorney or a paralegal . . . He could not be an assistant district attorney, and therefore represented the PSNY in court, at a hearing or trial, unless he was admitted to the bar, or was otherwise eligible under the student practice rules." However, the letter also states that "for details about his employment

with the [DA's Office], and for rules governing student practice . . . I suggest you contact the Human Resources department of the [DA's Office]" (Pet. Ex. 16).

On cross-examination, Investigator Camacho admitted that she was unable to confirm whether respondent did or did not perform the tasks that he listed on the CPD and on his resume (Tr. 90). Since petitioner did not prove by a preponderance of the evidence that respondent made false statements regarding the scope of his duties during his tenure with the DA's office, Charge 7, Specification 2, and Charge 8, Specification 4 should be dismissed.

FINDINGS AND CONCLUSIONS

1. Charge 1, Specification 1, should be sustained in that respondent was absent for 43 full and 2 partial workdays from February 1, 2016, to May 6, 2016.

2. Charge 1, Specification 2, should be sustained in that respondent has been absent from August 2, 2016, through the first date of trial, September 19, 2017.

3. Charge 2, Specifications 11-20, and 22-25, should be sustained in that respondent was AWOL in violation of Rule 8(A) of the Comptroller's rules on the following dates: August 16 to August 26, 2016; November 25, 2016; January 10, 2017; January 12, 2017; and January 19 to 20, 2017.

4. Charge 2, Specification 10, should be dismissed because on August 15, 2016, respondent was absent with approval, and not AWOL.

5. Charge 2, Specification 21, should be dismissed because on December 21, 2016, respondent properly advised his supervisor in a phone call that he would be absent due to illness, and was therefore not AWOL.

6. Charge 3, Specification 1, should be sustained in that respondent violated Rule 3(K) of the Comptroller's rules by submitting a timesheet falsely stating he worked a full day on September 14, 2016, when he did not in fact appear for work on that date.

7. Charge 4, Specification 1, should be sustained in that respondent engaged in insubordinate behavior in violation of Rule 3(C) of the Comptroller's rules when he stated in an e-mail to his supervisor that he would not follow the timekeeping procedures for entering his time for

undocumented absences nor provide medical documentation on days he departs early due to illness. Further, Charge 6, Specification 1, should be sustained in that respondent's discourteous comments in the same e-mail to his supervisor were prejudicial to good order and discipline in violation of Rule 3(R) of the Comptroller's rules.

8. Charge 5, Specification 1, and Charge 6, Specification 2, should be sustained in that respondent's actions in operating a personal watercraft in Florida while out on approved FMLA leave due to a purported injury suggests dishonesty and was conduct tending to bring the City or the Office of the Comptroller into disrepute and conduct prejudicial to good order and discipline in violation of Rules 3(S) and 3(R) of the Comptroller's rules.

9. Charge 7, Specifications 1 and 3, and Charge 8, Specification 1, should be sustained in that respondent submitted documents to the Comptroller's Office and the DOI containing the false statement that he was employed by the DA's Office from October 1993 to March 1996 as an ADA when in fact he was transferred to a paralegal title in December 1994, and remained in that position until his resignation from the DA's office in March 1996, in violation of Rules 1(I) and 3(K) of the Comptroller's rules.

10. Charge 7, Specification 2, and Charge 8, Specification 4, should be dismissed because petitioner failed to prove by a preponderance of the evidence that respondent made false statements in describing his duties while employed at the DA's office.

RECOMMENDATION

Upon making these findings, I requested and reviewed a summary of respondent's personnel history. Petitioner hired respondent in 2002. He has no prior disciplinary history.

Here, respondent has been found guilty of excessive unauthorized absences from work encompassing approximately 288 full work days since 2016, including a failure to appear at work at all in 2017 at least through the first date of trial, a period encompassing over eight consecutive months. The evidence suggests that respondent stopped attending work because he was upset at his demotion. Respondent stated in the grievance he submitted to the Comptroller that in order to "humiliate and punish" him, he was ordered to report to Ms. Maglio-Scotti, "someone with less management and less legal experience in financial risk management than

me" (Resp. Ex. N at 6). At trial, respondent testified that he requested a transfer away from the motor vehicle claims division and that it was "a waste of taxpayer monies to have me acting in [Ms. Maglio-Scotti's] unit as a data entry clerk" (Tr. 215-16). However, respondent's indignation at his demotion and of having to report to Ms. Maglio-Scotti does not absolve him of his basic responsibility of appearing for work.

Respondent's unauthorized absences are a fundamental form of misconduct which substantially impedes the Comptroller's ability to fulfill its mission. This charge alone is enough to warrant termination. *See Dep't of Homeless Services v. Anonymous*, OATH Index No. 1653/17 (Sept. 19, 2017); *Health & Hospitals Corp. (Coney Island Hospital) v. Murray*, OATH Index No. 506/18 (Jan. 26, 2018); *Human Resources Admin. v. Soto-Medina*, OATH Index No. 1121/16 (Feb. 26, 2016).

In addition, petitioner has proved various other charges including respondent's failure to comply with time and leave procedures, making false statements on his timesheet and on documents related to the employment hiring process, engaging in conduct tending to bring the Comptroller into disrepute, engaging in conduct prejudicial to good order and discipline, and insubordination. Taken together, the only appropriate remedy for respondent's misconduct is termination and I so recommend.

Noel R. Garcia
Administrative Law Judge

April 13, 2018

SUBMITTED TO:

SCOTT M. STRINGER
Comptroller

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