Dep't of Social Services v. Anonymous

OATH Index No. 2055/19 (Jan. 7, 2020), *adopted*, Comm'r Dec. (Feb. 20, 2020), **appended**

Petitioner proved that respondent was excessively absent and remained on-site after her scheduled departure time without authorization on 76 occasions. Retaliation defense not established. Termination of employment recommended.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SOCIAL SERVICES (DEPARTMENT OF HOMELESS SERVICES/HUMAN RESOURCES ADMINISTRATION)
Petitioner
- against -
ANONYMOUS[1]
Respondent

REPORT AND RECOMMENDATION

NOEL R. GARCIA, *Administrative Law Judge*

This is a disciplinary proceeding brought by petitioner, the Department of Social Services ("DSS"), against respondent under section 75 of the Civil Service Law. Petitioner charges that respondent, an associate staff analyst, has been excessively absent without leave ("AWOL") and refused to meet with her supervisor regarding her absences. Respondent is also charged with remaining at her work location after her scheduled departure time without authorization on 76 occasions (ALJ Ex. 1).

PROCEDURAL HISTORY

Charges were served upon respondent and a preliminary conference was scheduled for April 9, 2019. Respondent failed to appear and trial was set for June 10, 2019. On that day, respondent appeared with Lauren Carroll, a union representative. Ms. Carroll submitted a notice of appearance and requested an adjournment because respondent had only recently contacted the

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[1] Over petitioner's objection, respondent's request to withhold her name from this decision is granted because it includes discussions of her mental health. *See Admin. for Children's Services v. Anonymous*, OATH Index No. 2619/11 at 1 (Dec. 30, 2011) (employee's name withheld where report discussed her mental health history).

union (Tr. 5-7, 97-98). The request was denied because despite being properly served with disciplinary charges, respondent: failed to appear at the preliminary conference and gave no reason why she delayed in contacting her union; gave no reason why the adjournment request was being made on the day of trial; and, petitioner had several witnesses present and ready to testify. Petitioner presented their case-in-chief on the first day of trial, and Ms. Carroll represented respondent.

I scheduled a second day of trial so respondent could present her case-in-chief, and stated that I would liberally grant any request to have petitioner's witnesses recalled if respondent wished to engage in further cross-examination. The second day of trial was scheduled for approximately four weeks later, on July 11, 2019 (ALJ Ex. 6; Tr. 5-7). A copy of the transcript from the first day of trial was provided to the parties by e-mail on June 17, 2019 (ALJ Ex. 8).

In a letter dated July 3, 2019, Nora Sullivan, assistant general counsel for the union, informed me and respondent that the union was moving to withdraw from representing respondent because she had refused to communicate with them, and was not assisting in her defense (ALJ Ex. 2). On July 5, 2019, I sent an e-mail instructing respondent to state her position on the union's request to withdraw (ALJ Ex. 6). In a letter dated July 10, 2019, Ms. Sullivan renewed the union's request to withdraw, stating that respondent had failed to answer my e-mail, and that she had not contacted the union except to request a copy of the transcript from the first day of trial (ALJ Ex. 3). I reserved decision until the next trial date and instructed the union to appear.

The next day, July 11, 2019, Leonard Shrier, Esq., and Ms. Carroll appeared on behalf of the union (Tr. 96). Although she was over an hour late, respondent appeared and conferred with the union (Tr. 105). Respondent agreed to cooperate with her union representatives, and the union agreed to continue the representation. Over petitioner's objection, I granted an adjournment and a third trial date was scheduled for August 13, 2019 (Tr. 107-11). On that day, Ms. Sullivan appeared and represented respondent. Respondent presented her defense, but declined to recall any of petitioner's witnesses (Tr. 119-20). The parties were granted permission to submit post-trial briefs.

During the trial, petitioner relied on documentary evidence and the testimony of seven witnesses. Respondent testified on her own behalf and offered documentary evidence. At trial and in her post-trial brief, respondent 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."

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 her employment.

ANALYSIS

Respondent testified that she began her employment with the city in 1987, and has held the title of associate staff analyst since 1990 (Tr. 139-40). She is assigned to the Department of Homeless Services ("DHS"), which is an administrative unit within DSS. Her duties include working with contracted shelter providers to ensure compliance with relevant laws and regulations, facilitating contract-related payments, and addressing issues regarding shelter operations and services (Tr. 49, 140).

Petitioner charges that respondent was absent without authorization during three different time periods: May 5, 2015 to May 7, 2015; July 7, 2016 to August 19, 2016; and, May 14, 2018 to January 3, 2019. Petitioner also alleges that respondent refused to meet with her supervisor regarding her absences, and that she remained at her work location after her scheduled departure time without authorization on 76 occasions between March 2015 and June 2016 (ALJ Ex. 1).[2]

Respondent claims that in February 2012, she submitted a complaint to DHS objecting to its policy regarding the transfer of clients from shelters, and that she later submitted the same complaint to the city's Department of Investigation ("DOI"). Respondent further alleges that in 2015, 2016, and 2018, she sent e-mails and reports to DHS and DOI noting cleaning and maintenance issues at certain shelters. Because respondent argues that the charges should be dismissed because they were brought in retaliation for the complaints she submitted, her "whistleblower" defense is addressed first.

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[2] By e-mail dated August 20, 2019, petitioner withdrew remaining charges regarding lateness, failure to provide current address and telephone number, and other dates related to absences without leave (ALJ Ex. 7).

<u>“Whistleblower” Defense</u>

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 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 2019).

Under section 75-b(3)(a), where an employee

> reasonably believes dismissal or other disciplinary 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).

Therefore, to establish a “whistleblower” defense, respondent must show that the *sole* motivation for petitioner’s charges was to retaliate against her for the several complaints that she filed.

On February 27, 2012, respondent sent an e-mail to various DHS supervisors stating that she objected to petitioner’s policy regarding the transfer of clients from shelters (Resp. Ex. B; Tr. 134-36). Specifically, she believed that DHS was violating state and city law by transferring clients from one facility to another when clients obtained an order of protection or filed a complaint, and by denying transfer requests from clients who had safety concerns. Respondent noted that Ms. Tinsley-Ballard and another supervisor often ordered the alleged improper transfers. During the majority of the time related to the charges, Ms. Tinsley-Ballard was respondent’s supervisor. Respondent claimed that she “periodically” submitted complaints

regarding this issue to DOI, but could not recall the dates and did not provide any documentary proof of her alleged submissions (Tr. 138-39).

Respondent also sent three e-mails, dated March 31, 2015, October 1, 2015, and December 7, 2016, to Ms. Tinsley-Ballard and another supervisor, highlighting cleaning and maintenance issues at a shelter (Resp. Ex. A; Tr. 132-33). In the first e-mail, dated March 31, 2015, respondent noted that the "83rd Street (Skyway) Annex does not have budgeted staff to do daily cleanup of program participant rooms" and that participants had been given cleaning supplies with instructions to clean their assigned room. Respondent stated that she told the program that DHS would not issue any violations to any participant who did not comply with those instructions because cleaning was not a requirement to stay at a shelter. The October 1, 2015, e-mail noted again that because the same shelter did not have staff to clean participant rooms on a regular basis, "it was out of compliance with DHS policies . . . and regulatory standards." The December 7, 2016, e-mail appears to be a list of recommended changes to enhance safety measures at a different shelter, followed by a list of recommended repairs.

Lastly, respondent submitted to her supervisors two shelter monitoring reports that she filled out, dated March 28, 2018, and April 13, 2018 (Resp. Ex. A). The reports appear to assess a shelter provider's performance by documenting shelter utilization, staff performance, case records, community relations, access to medical services, and other related criteria. Respondent argued that her e-mails and shelter monitoring reports were related to health and safety, and that DHS "for an extended period of time" failed to address her reports (Tr. 132). She claimed that she reported her findings to DOI in 2015 or 2016 mostly by e-mail, and sometimes by mail. However, respondent did not provide any copies of any of the alleged e-mail submissions. She also stated that DOI never responded to her (Tr. 132-33).

Respondent argued that the current charges against her are solely the result of the complaints she filed because Ms. Tinsley-Ballard allegedly told her "not to speak on those matters, not to raise them, and certainly not to put them in writing" (Tr. 139). Further, she testified that since 2013, she has had a contentious relationship with Ms. Tinsley-Ballard, whom she claimed constantly criticized her, made fun of her Islamic garb, and withheld her pay due to disputes with the accuracy of her timesheets (Tr. 145-47, 159-61). Respondent's testimony suggested that Ms. Tinsley-Ballard brought the charges against her in retaliation for her complaints.

Upon review of all the evidence, respondent did not establish that the charges are motivated solely by the complaints she filed.

First, the evidence establishes that the charges against respondent were not brought by Ms. Tinsley-Ballard, but as part of petitioner's normal practice concerning employees who are absent without authorization. For instance, on June 7, 2018, DSS's Office of Human Capital Management sent respondent a letter noting that she had been absent since May 14, 2018, without approved leave (Pet. Ex. 1). The letter warned respondent that if she did not file for leave or report to work, the matter would be referred to the Office of Disciplinary Affairs. Sherita Singleton, a DSS leave consultant, testified that on June 8, 2018, respondent sent her a leave request (Tr. 11). In response, respondent was sent another letter instructing her to submit medical documentation (Pet. Ex. 1). Ms. Singleton stated that when respondent did not submit any documents by the June 25, 2018 deadline, her request for leave was denied, and the matter was referred for disciplinary action (Pet. Ex. 2; Tr. 12-13).

Mark George, a supervising disciplinary coordinator, testified that on July 3, 2018, DSS's Office of Disciplinary Affairs sent respondent a letter warning her that disciplinary charges would be filed against her if she did not immediately report to work, submit medical documentation, or resign (Pet. Ex. 3; Tr. 24-25). Respondent did not respond to the letter (Tr. 27-28). Vladimir Vizner, a DSS Hearing Officer, testified that a Step 1 hearing was scheduled for September 11, 2018, but rescheduled because respondent appeared without a union representative. Thereafter, respondent failed to appear at the rescheduled Step 1 hearing, although her union representative did appear on her behalf (Tr. 35-36).

There was no evidence presented that Ms. Singleton, Mr. George or Mr. Vizner, or any other person involved in charging respondent with excessive absence from May 14, 2018 to January 3, 2019, was aware that she had allegedly filed complaints with DHS supervisors or DOI. Instead, the evidence establishes that the charge was filed because respondent failed to submit medical documentation and continued to be absent from work.

Similarly, the remaining charges are contained in a complaint with the names of Mark Neal, DHS General Counsel, and Collette V. Grant, Attorney for the Ethics and Employment Unit, on the signature line (Pet. Ex. 13). There was no evidence presented that these individuals knew about the alleged complaints filed by respondent, or that Ms. Tinsley-Ballard caused these charges to be brought for retaliatory purposes.

Second, much of respondent's testimony regarding the claim of retaliation was uncorroborated, self-serving, and generally not credible. For instance, the documentary evidence shows that respondent sent three e-mails to Ms. Tinsley-Ballard and another supervisor in 2015 and 2016 regarding cleaning and maintenance issues at two shelters, and submitted two shelter monitoring reports in 2018 (Resp. Ex. A). Yet these e-mails and reports appear to be part of respondent's job duties to monitor services provided by contractors to shelter clients. The e-mails and reports, at most, point out non-compliance to DHS rules and regulations by the contractors, not by Ms. Tinsley-Ballard or DHS. Respondent stated that her complaint was based on DHS's alleged failure to address her reports "for an extended period of time," but the e-mails and reports do not make any such allegation (Tr. 132). While respondent claimed that Ms. Tinsley-Ballard allegedly told her "not to speak on those matters, not to raise them, and certainly not to put them in writing," she failed to state when or where such a comment was made, and if any witnesses were present (Tr. 139). Therefore, no credit is given to this uncorroborated statement.

Respondent further alleged that she submitted various complaints to DOI, mostly by e-mail (Tr. 133, 138). Yet she failed to produce any e-mail or document to support her claim. Significantly, no evidence was presented, and respondent did not claim that she ever told anyone at DSS or DHS, including Ms. Tinsley-Ballard, that she submitted complaints to DOI. Indeed, Ms. Tinsley-Ballard was never questioned on any aspect of respondent's alleged claim of retaliation. Therefore, even if these submissions were made, respondent did not prove that any DOI submitted complaint caused petitioner to retaliate against her by bringing disciplinary action.

On February 27, 2012, respondent did send an e-mail to various DHS supervisors, including Ms. Tinsley-Ballard, stating that she objected to petitioner's policy regarding the transfer of clients from shelters and that Ms. Tinsley-Ballard and another supervisor often ordered the alleged improper transfers (Resp. Ex. B). I find this internal complaint, mostly based on an objection to policy, insufficient reason to conclude that Ms. Tinsley-Ballard or DDS attempted to retaliate against respondent several years later.

In sum, the evidence did not establish that petitioner brought charges against respondent in retaliation for the complaints that she filed. Accordingly, respondent failed to establish the "whistleblower" defense as provided by Civil Service Law section 75-b.

<u>Absence from May 14, 2018 to January 3, 2019</u>

The main charge against respondent is that she was absent without authorization from May 14, 2018 to January 3, 2019. Ms. Bogad, a DSS manager and one of respondent's supervisors, testified that on May 14, 2018, respondent informed her by e-mail that she would be absent from work, followed by the word "health" (Pet. Ex. 7; Tr. 41, 44). Thereafter, respondent failed to return to work, but sent periodic e-mails to Ms. Bogad stating that she would be absent due to health (Tr. 41-44). Respondent never answered any of Ms. Bogad's emails asking if she resolved outstanding timesheet issues or if she needed assistance (Tr. 43-44). Respondent sent her last e-mail to Ms. Bogad on July 13, 2018, in which she stated that she would be absent until September 28, 2018 (Tr. 44). As discussed above, DSS's Office of Human Capital Management and Office of Disciplinary Affairs sent respondent letters requesting medical documentation, but she failed to provide any such documentation (Pet. Exs. 1, 3). Respondent returned to work on January 4, 2019 (Pet. Ex. 5; Tr. 28, 31).

Respondent did not dispute that she was absent from her work location during the time period in question. Instead, she alleged that she stopped reporting to work in May 2018 due to stress caused by conflict with her supervisor, Ms. Tinsley-Ballard. Respondent stated that in April 2018, Ms. Tinsley-Ballard "raise[d] her voice" to her, and that her paycheck "went on hold" (Tr. 164-65). After these incidents, respondent testified that she could not "move forward," "felt disabled," and stopped coming to work (Tr. 165).

Respondent conceded that she did not seek medical attention until September 13, 2018, when she met with a psychiatrist, Dr. Okunlola (Tr. 172). According to Dr. Okunlola's progress notes, he performed an initial psychiatric evaluation of respondent (Resp. Ex. J). He diagnosed her with post-traumatic stress disorder and major depressive disorder, and recommended a treatment of weekly individual therapy. A week later, on September 19, 2018, respondent attended a follow-up appointment with a social worker (Tr. 172-73). The social worker also recommended individual psychotherapy. Notably, the progress notes by the psychiatrist and social worker do not address whether respondent's condition made her unable to report to work (Resp. Ex. J). Respondent also admitted that she did not seek any further treatment until June 2019, when she attended two sessions with counselors from the city's employee assistance program (Resp. Ex. K; Tr. 173-74). A letter documenting respondent's attendance at the two sessions, which occurred well after respondent returned to work, does not include any discussion

of her medical status or ability to report to work from May 14, 2018 to January 3, 2019 (Resp. Ex. K).

Respondent's contention that her protracted absence from work should be excused because of a medical condition is unsupported by the evidence. Respondent first visited a psychiatrist two days after her first Step 1 hearing date, and almost four months after she began her absence. The medical progress notes presented make no finding that respondent's mental health prevented her from reporting to work during the period in question. She also apparently did not participate in weekly therapy, as her providers recommended, and was not prescribed 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 stress and depression sufficient to prevent her from reporting to work or even contacting her employer. Therefore, respondent did not establish that her absence of almost eight months 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 at 11-12 (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 at 6 (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 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").

<u>*Absence from July 7 to August 19, 2016*</u>

Petitioner charged that respondent was excessively absent and absent without prior authorization by failing to report to work from July 7, 2016 to August 19, 2016, and that she refused to meet with her personnel liaison and her supervisor upon returning from her absence.

Ms. Tinsley-Ballard testified that respondent stopped reporting to work on July 7, 2016 (Tr. 61, 66). Instead, respondent sent Ms. Tinsley-Ballard several e-mails in the days that followed indicating she would not be reporting to work (Pet. Ex. 9). Respondent, however, did not reply to Ms. Tinsley-Ballard's e-mails asking if her leave was personal or medical, and requesting that she provide her expected return date as well as medical documentation to justify her leave (Pet. Ex. 9; Tr. 60-63). On August 22, 2016, Ms. Tinsley-Ballard found respondent back at her work station (Pet. Ex. 10; Tr. 64). Respondent was instructed to meet with Providencia Valentin, a personnel liaison (Tr. 64, 84).

Ms. Valentin testified that she met with respondent upon her return to work (Tr. 84). According to the return to work confirmation form drafted by Ms. Valentin on August 22, 2016, respondent showed her medical documentation "for a medical condition since 8/15/16," which also stated that respondent was allowed to "return to work on 8/20/16" (Pet. Ex. 15). Ms. Valentin noted that the medical documentation provided did not "cover" the remaining days of respondent's absence.

At trial, respondent presented medical documentation to excuse her absences on July 18, July, 25, July 26, and August 11, 2016 (Resp. Ex. D). However, respondent did not specify if she had previously submitted these documents to DSS. As petitioner correctly pointed out in its post-trial brief, even if credit is given to the medical documentation provided to Ms. Valentin and to the additional documents submitted at trial, respondent failed to provide documents excusing her absence on 21 work dates during the period in question.

Accordingly, the evidence establishes that respondent had at least 21 unexcused and unauthorized absences from July 7, 2016 to August 14, 2016, which constitutes misconduct. *See Human Resources Admin. v. McCaskill-Bourdeau*, OATH Index No. 164/11 at 16-17 (Oct. 22, 2010) (20 days of absences over a nine-month period were excessive); *Health & Hospitals Corp. (Kings County Hospital Center) v. Campbell-Trumpet*, OATH Index No. 1419/03 at 4-5 (July 16, 2003) (ten days of absences during a four-month period were deemed to be excessive); *Health &*

Hospitals Corp. (Bellevue Hospital Center) v. Cruz, OATH Index No. 1162/03 at 5-6 (May 30, 2003) (18 days of absences during a seven-month period were excessive).

Petitioner did not prove that respondent refused to meet with her personnel liaison and her supervisor, as neither Ms. Valentin nor Ms. Tinsley-Ballard testified on this point. That charge should be dismissed.

Absence from May 5 to May 7, 2015

Respondent was charged with being absent without official leave from May 5 to May 7, 2015. On May 5, 2015, respondent sent Ms. Tinsley-Ballard an e-mail stating that "[d]ue to personal business, I will not be in today." (Pet. Ex. 8). Ms. Tinsley-Ballard replied "noted." On the next day, which was a Wednesday, respondent sent another e-mail, this time stating that "[d]ue to personal matters, it is necessary for me to be off this week." Ms. Tinsley-Ballard replied that respondent should call her "sometime today to discuss." Ms. Tinsley-Ballard testified that she believed that respondent's absence on the days in question were unauthorized because she failed to call her back or provide documentation to excuse her absence (Tr. 56). However, Ms. Tinsley-Ballard's testimony did not specify if she told respondent that her leave was unauthorized, or directed her to submit documentation. Instead, she instructed respondent to submit her timesheets for those three days as "LWOP" (leave without pay) (Pet. Ex. 8).

In her post-trial brief, respondent argued that she properly notified her supervisor that she would be absent, and that she was never told that her absence was deemed AWOL until charges were filed.

Petitioner failed to prove the charge by a preponderance of the evidence. Petitioner did not argue that respondent's requests for leave were untimely. Instead, when respondent requested leave by e-mail on May 5 and May 6, 2015, Ms. Tinsley-Ballard acknowledged the first request and asked respondent to call regarding her second request. Indeed, her response of "noted" to the first request could reasonably be interpreted as implicitly granting respondent's request for leave. Certainly there was no evidence that Ms. Tinsley-Ballard explicitly denied the requests. In fact, Ms. Tinslay-Ballard testified that she asked respondent to call after the May 6 leave request because she wanted "to get an idea of when [respondent was] going to come back" and to organize scheduling, and not because she was evaluating whether to grant or deny the request (Tr. 56).

Under the facts presented here, petitioner did not prove respondent's absence was unauthorized, and the charge should be dismissed.

Remaining on-site

Petitioner charged respondent with remaining at her work location without authorization on 76 occasions between March 2015 and June 2016. DHS's Code of Conduct, Chapter V, section 5.7 provides that an employee "shall not remain on Department premises after their regular working hours unless overtime or change of schedule has been previously approved…"

Ms. Tinsley-Ballard testified that respondent was instructed not to remain on-site past her scheduled departure time of 5:00 p.m. without authorization (Tr. 49-51). Petitioner submitted three conference memorandums, dated April 3, April 20 and August 9 of 2015, that memorialized meetings where respondent was told not to remain on-site past her scheduled departure time, and listing several dates when respondent had failed to comply with these instructions (Pet. Ex. 12). Petitioner also submitted respondent's timesheet, which evidence that respondent often stayed one to three hours past her departure time (Pet. Ex. 11). In all, the memorandums and timesheets establish that respondent stayed one to three hours past her departure time on 76 occasions between March 2015 and June 2016, in violation of DHS rules.

In her post-trial brief, respondent stated that she routinely worked late from March 2015 to January 2016, that petitioner does not allege that she engaged in inappropriate activity when she stayed after-hours, and that the charge may be retaliatory. Respondent's defense is without merit, as the evidence established that she disregarded her supervisor's instructions not to stay after work, and the claim that the charge is retaliatory is speculative.

Accordingly, respondent violated DHS rules by remaining at her work location without authorization on 76 occasions between March 2015 and June 2016.

FINDINGS AND CONCLUSIONS

1. Petitioner proved by a preponderance of the evidence that respondent was continuously absent without authorization from May 14, 2018 to January 3, 2019.

2. Petitioner proved by a preponderance of the evidence that respondent was absent without authorization for 21 days from July 7, 2016 to August 14, 2016. Petitioner did not prove that

respondent failed to meet with her supervisor upon her return concerning her absence.

3. Petitioner did not prove that respondent was absent without authorization from May 5 to May 7 of 2015.

4. Petitioner proved by a preponderance of the evidence that respondent remained at her work location past her departure time on 76 occasions between March 2015 and June 2016, in violation of DHS rules.

RECOMMENDATION

In connection with the above findings and conclusions, I obtained and reviewed an abstract of respondent's personnel record provided to me by the Department. Respondent began her city employment in 1987. In 2014, respondent accepted a 45-day suspension to resolve charges stemming from excessive absenteeism. For the charges here, petitioner requested termination of respondent's employment.

Respondent has been found guilty of excessive unauthorized absences from work from May 14, 2018 to January 3, 2019, a period of almost eight months. On this basis alone, termination of respondent's employment is warranted. *See Health & Hospitals Corp. (Bellevue Hospital Ctr.) v. Brenes-Garcia*, OATH Index No. 639/18 (Nov. 20, 2017) (termination of employment recommended where employee was AWOL for over six months); *Health & Hospitals Corp. (Bellevue Hospital Ctr.) v. Feliciano*, OATH Index No. 2039/16 (July 13, 2016) (termination of employment recommended where employee was AWOL for over seven months); *Human Resources Admin v. Vaughn*, OATH Index No. 1754/08 (Mar. 20, 2008) (termination recommended for employee AWOL almost seven months).

Additionally, respondent was also absent without authorization for 21 days from July 7, 2016 to August 14, 2016, and stayed past her departure time on 76 occasions between March 2015 and June 2016.

Respondent argued in her post-trial brief that any penalty should be mitigated because of the length of her city employment, her concern for the homeless, and because her mental health issues caused her lengthy absence. However, these mitigating factors are outweighed by respondent's previous disciplinary history for the same misconduct, and her general disregard for the rules and regulations pertaining to time and leave. For instance, while respondent was often

able to send e-mails to inform her supervisors that she would be absent, she consistently ignored their instructions to explain her absence, or to furnish medical documentation in a timely manner. She also disregarded multiple directives not to stay at her work location after her departure time.

As such, the only appropriate penalty for such misconduct is termination of employment, and I so recommend.

Noel R. Garcia
Administrative Law Judge

January 7, 2020

SUBMITTED TO:

STEVEN BANKS
Commissioner

APPEARANCES:

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Attorney for Petitioner

NORA SULLIVAN, ESQ.
Attorney for Respondent

Department of Social Services
Human Resources Administration
Department of Homeless Services

Office of Human Capital Management

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W-2-581
04/18

February 20, 2020

CONFIDENTIAL

IN PERSON SERVICE

Re: ODA Case Tracking No. 0142070-03

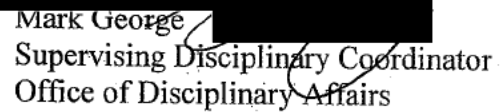
Dear

Administrator/Commissioner Steven Banks has carefully reviewed the Report and Recommendation of the Administrative Law Judge Noel R. Garcia and the record of the Section 75 Disciplinary Hearings held on August 13, 2019, on charges heretofore preferred against you for ODA Case Tracking No. 0142070-03 and OATH Index No. 2055/19. Administrator/Commissioner Steven Banks adopts all the findings of fact of the Administrative Law Judge and finds you guilty of misconduct. Therefore, he has decided that you shall be terminated from your position as an Associate Staff Analyst, effective at the close of business today.

Under the provisions of Section 76 of the Civil Service Law, you are entitled to appeal this determination by application either to the Civil Service Commission, 1 Centre Street, Room 2300, New York, New York 10007 or to the Supreme Court of the State of New York in accordance with the provisions of Article 78 of the Civil Practice Law and Rules. If you elect to appeal to the Commission, such appeal must be filed in writing within twenty (20) days of service of the Agency decision (with an additional three (3) days allowed for mailing).

If you have any questions concerning this matter, please contact your union representative.

Sincerely,



Mark George
Supervising Disciplinary Coordinator
Office of Disciplinary Affairs

Enclosure

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