Dep't of Correction v. Anonymous

OATH Index No. 348/19 (Apr. 29, 2019), *adopted in part, rejected in part, modified on penalty*, Comm'r Dec. (June 21, 2019), **appended**, *modified*, NYC Civ. Serv. Comm'n Case No. 2019-0633 (Feb. 12, 2021), **appended**

Petitioner proved that respondent, a captain, was excessively absent due to illness from September 2017 to February 2019. However, all but two days of absence were due to a psychological disability caused by an inmate assault; despite her disability, respondent returned to work and assumed a captain's post from June 2018 to September 2018, when petitioner ordered her out on leave; and respondent returned to work in February 2019. Based on all of the circumstances, termination of respondent's employment would be unduly harsh. Suspension without pay for 30 days recommended.

Commissioner rejected ALJ's finding that petitioner failed to prove that respondent was unable to work or that she should be penalized for excessive absenteeism from September 28, 2018 to February 12, 2019. Commissioner increased penalty to termination. Penalty determination was rendered moot due to respondent's retirement. Penalty held in abeyance to be implemented if respondent returns to employment.

Civil Service Commission finds that DOC Commissioner erred in stating that the penalty of termination was "to be held in abeyance" should Appellant reapply for a position at DOC, or any other agency. Should respondent apply for reinstatement at DOC, the agency would be required to assess her fitness for duty at that time.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
ANONYMOUS[1]
Respondent

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[1] At respondent's request, without objection by petitioner, respondent's name has been omitted due to the detailed discussion of her mental health history (Tr. 193-94). 48 RCNY § 1-49(d) (Lexis 2019); *see Admin. for Children's Services v. Anonymous*, OATH Index No. 212/12 at 1 (Dec. 15, 2011) (omitting respondent's name from report that discussed sensitive medical issues).

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner, the Department of Correction (DOC), brought this proceeding under Civil Service Law section 75. The amended petition alleges that respondent, a captain, inefficiently performed her duties because "she has demonstrated a pattern of excessive absences and an inability to perform the full range of her duties" on four occasions for approximately 240 days from September 2017 to February 2019 (ALJ Ex. 1; Tr. 10). Petitioner now seeks termination of respondent's employment (Tr. 13). Respondent seeks dismissal of the charges or a penalty "substantially short of termination" (Tr. 20, 185).

At trial on February 12, 2019, petitioner presented documentary evidence and the testimony of three witnesses: Ms. Alston, a timekeeper at DOC's central timekeeping unit; Ms. Tyther-Lawson, a principal administrative associate in DOC's Health Management Division (HMD); and Deputy Warden Phipps, from the Eric M. Taylor Center (EMTC) on Riker's Island. Respondent testified on her own behalf and also offered documentary evidence.

For the reasons below, the charges are sustained in part. I recommend that respondent be suspended without pay for 30 days.

ANALYSIS

Introduction

The material facts are undisputed. Petitioner hired respondent in 2005. In 2012, while respondent was on a promotional list for captain, she was brutally assaulted and knocked unconscious by an inmate. After recovering from her physical injuries, respondent returned to full duty and was promoted to captain. Shortly afterwards, respondent began to experience palpitations and panic attacks following inmate disturbances. Respondent was diagnosed with post-traumatic stress disorder (PTSD).

From September 11, 2017 to May 31, 2018, respondent was on sick leave due to her psychological condition. She returned to work on June 1, 2018. Petitioner placed respondent on medically monitored restriction (MMR) status and respondent worked as a captain from June 1 to September 27, 2018, without inmate contact, missing only one day due to illness. On

September 28, 2018, HMD ordered respondent to go out on sick leave to obtain more intensive treatment for her PTSD. Respondent returned to work by February 4, 2019.

Meanwhile, respondent's applications for a disability pension have been repeatedly denied by the New York City Employees' Retirement System (NYCERS). The NYCERS Medical Board and independent consulting psychiatrists all agree that respondent suffers a psychological disability due to the inmate's assault. But they opined that, with the benefit of additional treatment, she might be able to resume her duties as a captain without restrictions.

Despite independent experts' opinions that respondent may be able to resume her full duties as a captain after further treatment, and despite respondent's efforts to resume working as a captain, petitioner seeks to terminate her employment due to her excessive absenteeism in the seventeen months from September 2017 to February 2019. Because respondent worked at a captain's post for four of those months and petitioner prevented her from working for four additional months, the charge should only be partly sustained and respondent's employment should not be terminated.

Petitioner's Evidence

Ms. Alston summarized respondent's recent timekeeping records (Tr. 22). Respondent worked from January to September 2017, but she was out on sick leave from September 11, 2017 to May 31, 2018, she took a sick day on June 25, 2018, and was out sick from September 28, 2018 to January 11, 2019 (Tr. 32, 36; Pet. Exs. 1, 2). After taking annual leave and another sick day on January 20, 2019, respondent again returned to work on February 4, 2019 (Tr. 39, 41; Pet. Exs. 1, 2).

Ms. Tyther-Lawson testified that members of service must call HMD to take time off due to illness and provide medical documentation (Tr. 53). HMD's medical personnel decide whether the employee can return to work full duty without restrictions or MMR with some restrictions, such as no inmate contact or no heavy lifting (Tr. 53-54, 79). Based on HMD records, including medical documentation submitted by respondent and notations by HMD medical staff, Ms. Tyther-Lawson summarized respondent's recent absences due to illness:

1. Documented sick leave due to adjustment disorder with anxiety and residual PTSD, with possible return to post within jail with full inmate contact. Patient prescribed cognitive behavioral therapy and medication. September 11, 2017 – May 31, 2018.

2. MMR status and documented adjustment disorder with anxiety. June 1, 2018 – June 24, 2018.

3. Undocumented sick day for gastrointestinal condition. June 25, 2018.

4. MMR status and documented adjustment disorder with anxiety. June 26, 2018 – September 27, 2018.

5. Documented sick leave due to PTSD, nightmares, flashbacks, adjustment disorder with anxiety associated with potential return to full duty with potential for full inmate contact and possibility of exacerbation of post-traumatic stress disorder. Patient continues cognitive behavioral therapy. September 28, 2018 – January 17, 2019.

6. MMR status and documented adjustment disorder with anxiety and possibility of exacerbation of post-traumatic stress disorder. January 18 – January 19, 2019.

7. Undocumented sick day for gastrointestinal condition. January 20, 2019.

8. MMR status and documented adjustment disorder with anxiety and possibility of exacerbation of PTSD. January 21, 2019 – present.

(Tr. 71; Pet. Exs. 3, 4).

Petitioner did not present testimony or documents from any medical or mental health professional. Nor did petitioner introduce documentary evidence regarding the tasks and standards for captains. Instead, Deputy Warden Phipps testified that captains directly supervise correction officers and "pretty much" teach them how to do their jobs (Tr. 86).

Deputy Warden Phipps asserted that a captain who calls in sick creates a problem for other captains, including mandatory overtime, higher costs, lower morale, and possible security risks (Tr. 93-94). Deputy Warden Phipps also stressed that captains must be physically and mentally fit to respond to alarms (Tr. 90).

However, Deputy Warden Phipps conceded that there are full-duty posts for captains that do not require inmate contact (Tr. 112-14). For example, a "movement" captain works in an office and is responsible for sending written instructions to transfer inmates (Tr. 115). Control room captains also work in offices and track the location of members of service (Tr. 112). During an alarm, the captain must remain in the control room to ensure that the correct personnel

are in place (Tr. 112). During 2017, respondent worked in HMD and from June to September 2018, she worked in the control room at EMTC (Tr. 124).

Respondent testified about the inmate assault that led to her absences, her course of treatment, and her work history. On March 9, 2012, respondent was searching a housing area at EMTC when she ordered an inmate to pick up his mattress (Tr. 131). The inmate punched respondent several times and knocked her unconscious (Tr. 131). When respondent awoke, she was in the arms of other officers who were taking her to the facility's medical clinic (Tr. 131). Respondent had an injured elbow and a loose tooth, and she was bleeding from a hole in her mouth, which required several sutures to close (Tr. 131). After recovering from her physical injuries respondent returned to full duty less than three months later (Tr. 140).

When respondent returned to work, she was assigned to the correction academy for additional training prior to her promotion to captain (Tr. 132). After completing the training, petitioner promoted respondent to captain and assigned her to the Otis Bantum Correctional Center (OBCC) (Tr. 133). During a search of a housing area on her first day at OBCC, respondent stared shaking and her heartbeat accelerated (Tr. 134). Respondent later went to a bathroom to compose herself (Tr. 134, 175).

Respondent has been treated by a therapist, Dr. Calipe, continuously since April 2012 (Tr. 137). However, from 2012 to 2015, respondent's panic attacks continued (Tr. 134, 149). Though respondent answered alarms and completed her assigned tasks, she found it hard to function (Tr. 149). At first, respondent did not tell her colleagues about her condition and she tried to work through it (Tr. 134). On approximately eight occasions, colleagues took respondent to a DOC clinic after she experienced similar symptoms – panic attacks, heart palpitations, and difficulty breathing (Tr. 136). According to respondent, during these episodes, she had no control over what her mind and body were doing (Tr. 144-45).

In March 2015, inmates attacked respondent and other staff (Tr. 138, 146). After respondent used a chemical agent to spray several inmates and additional personnel helped get the situation under control, respondent experienced a severe panic attack and was taken to a local hospital (Tr. 138, 146-48).

In November 2016, respondent applied for a disability retirement. In July 2017, the NYCERS Medical Board recommended denial of that application. After reviewing reports from several treating physicians, the Medical Board concluded that although respondent's injuries

occurred during the performance of her duties and resulted from inmate contact, there was a reasonable possibility of recovery "following continued treatment" (Resp. Ex. A).

The Medical Board referred to a detailed report, dated June 11, 2017, from Dr. Solomon Miskin, an independent, board-certified psychiatrist retained by NYCERS. Dr. Miskin noted that respondent was in therapy for more than a year, under the care of a psychologist with whom she met every week. Respondent also met with a psychotherapist every one or two weeks. According to Dr. Miskin, respondent was presently disabled from returning to her former title, correction officer. Yet Dr. Miskin opined that there was a reasonable expectation that, with adequate treatment, respondent could return to full duty within one year as a correction's captain (Resp. Ex. A).

From September 11, 2017 to May 31, 2018, respondent was on documented sick leave due to PTSD. On May 18, 2018, the NYCERS Medical Board again recommended denial of respondent's application for a disability retirement. The Medical Board noted that according to Dr. James Lynch, another independent, board-certified psychiatrist retained by NYCERS, respondent "might respond well under the care of a psychiatrist with proper medication management" (Resp. Ex. B).

In an accompanying report, dated February 27, 2018, Dr. Lynch noted that respondent developed psychological symptoms as a result of an inmate assault and had been diagnosed with PTSD. Though Dr. Lynch opined that a more appropriate diagnosis would be Adjustment Disorder or Reactive Anxiety/Depression, he found that respondent's psychological treatment had been unable to restore her to full function. Dr. Lynch suggested that respondent should be treated by a psychiatrist or prescribed medication that could potentially restore her mental state. However, Dr. Lynch recognized that, even with such treatment targeted at her symptoms of anger, anxiety, and depression, respondent "still may not be able to return to her occupation without restriction" (Resp. Ex. B).

Respondent testified that at about the same time that she returned to work on June 1, 2018, she began seeing a psychiatrist and taking medication, as recommended by the NYCERS Medical Board (Tr. 139-40; Resp. Ex. B). Respondent worked as a captain in the control room at EMTC from June 1, 2018, to September 27, 2018 (Tr. 141). She was out sick only one day during those four months (Tr. 141).

Though respondent wanted to continue with her treatment and work at EMTC, a relatively new doctor at HMD ordered her to go out sick on September 28, 2018 (Tr. 141). The new HMD doctor wanted respondent to undergo immersive therapy (Tr. 141). Respondent complied with that order and went out on sick leave (Tr. 141, 153).

From September 28, 2018 to January 17, 2019, respondent went to HMD on at least three occasions seeking to return to work (Tr. 141-42). According to respondent, her psychiatrist wanted her to return to work in a correctional facility to see how she responded to new medication (Tr. 142). HMD allowed respondent to return to work on January 17, 2019 (Tr. 142).

Meanwhile, respondent has reapplied for a disability retirement (Tr. 142). When asked to address the tension between her desire to return to work and her application for disability retirement, respondent conceded that her doctors have stated that she is disabled and have not approved her for full duty (Tr. 143, 154). Respondent, who is not a mental health professional, believed that there was "something wrong" with her, but she was unsure or did not know whether she considered herself disabled (Tr. 143-44).

Respondent acknowledged that inmate contact and the possible use of force are part of her job and she could not insist upon a specific post (Tr. 145, 148-49). However, respondent also stressed that she has been trying to recover and has fully complied with doctors' instructions to attend therapy, take medication, and received psychiatric treatment (Tr. 158, 165). Respondent also noted that there were "plenty of places" within the Department where she was currently able to work as a captain (Tr. 166).

The Charge

The amended petition alleges that respondent was excessively absent on four occasions, for more than 240 days, from September 11, 2017 to February 12, 2019, the date of trial (ALJ Ex. 1; Tr. 10).[2] Besides two brief occasions of sick leave of one and two days, respectively, the bulk of respondent's sick leave occurred on two occasions: September 11, 2017 – May 31, 2018 (181 days) and September 28, 2018 – January 17, 2019 (74 days) (ALJ Ex. 4). For the period from September 2017 to May 2018, the charge should be sustained. The portion of the charge covering from September 2018 to February 2019 should be dismissed because the unrebutted

[2] It is unclear how petitioner calculated the total number of days that respondent has been out sick since September 11, 2017. Assuming a five-day work week and excluding public holidays, the total appears to be 258 days (Pet. Exs. 1, 4).

evidence showed that respondent was ready, willing, and able to continue working at her assigned post and that petitioner ordered her to go out on sick leave.

Excessive absenteeism, even if due to documented illness, may be punished under section 75 of the Civil Service Law. *Garayua v. Bd. of Education*, 248 A.D.2d 714 (2d Dep't 1998) ("nonwillful absenteeism may be adjudicated" under section 75); *Dep't of Correction v. Smith*, OATH Index No. 1894/00 (June 19, 2000), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 03-76-SA (Sept. 23, 2003) (same). Petitioner's absence control and sick leave policy provides that members of the Department's uniformed force who are out sick more than 40 days in 12 months may be subject to termination of employment. Dep't of Correction Directive No. 2258R-A § (III)(E)(1). The evidence established that respondent was on continuous sick leave from September 11, 2017 to May 31, 2018, for 181 days. Respondent did not allege that she was fit to perform any work during this period or that petitioner prevented her from working. Because respondent was out sick for more than 40 days within 12 months, she was excessively absent during that period.

However, petitioner failed to show that respondent has been unable to work since June 1, 2018. Instead, the evidence showed that respondent worked steadily from June 1 to September 27, 2018. Though respondent was on MMR status and restricted from having inmate contact, she was assigned to a captain's post and performed her duties throughout this period. Respondent also presented unrebutted testimony that she was ready, willing, and able to continue working while her doctors continued to treat her disability. Indeed, respondent noted that she had been following the recommendation of a NYCERS-appointed, independent board-certified psychiatrist, who suggested that she try taking medication and seeing a psychiatrist.

Despite respondent's steady attendance, productive work, and response to treatment since June 1, 2018, petitioner ordered her out on sick leave on September 28, 2018. That decision was reportedly based on the opinion of a medical professional at HMD who believed that respondent would benefit from immersive therapy. Petitioner offered no medical evidence or qualified witness to explain the basis for that decision. Thus, there was no showing that it was necessary to place respondent out on sick leave from September 2018 to January 2019.

Under these circumstances, where respondent was capable of working and petitioner ordered her out on leave, she should not be penalized for the agency's actions. *See Dep't of Correction v. Ferrer*, OATH Index No. 1100/98 (June 10, 1998) (charges dismissed where

officer who was on sick leave due to a seizure disorder was prevented from returning to work because of Department policy that officer had to be seizure-free for one year); *Dep't of Correction v. Vives*, OATH Index No. 1162/14, 1163/14, & 1164/14 at 2 (Apr. 17, 2014) (excluding four days of sick leave from excessive absence charge where officer's treating physician cleared her to return to work, but HMD requested additional information); *see also Dep't of Environmental Protection v. D'Amore*, OATH Index No. 1307/17 at 7-9 (May 4, 2017) (recommending dismissal of long-term absenteeism charge where 16-month absence was due to delays in processing worker's compensation approval for surgery and agency failed to offer light duty assignment); *DOITT v. Anonymous*, OATH Index No. 051/15 (May 6, 2015), *adopted*, Comm'r Dec. (Aug. 26, 2015) (AWOL charge dismissed where employee attempted to resolve employment status but was prevented from returning to work due to agency's reservations about his fitness).

FINDINGS AND CONCLUSIONS

1. Petitioner proved that from September 11, 2017 to May 31, 2018, respondent was unable to work, out sick for more than 180 days, and excessively absent.

2. Petitioner failed to prove that respondent was unable to work or that she should be penalized for excessive absenteeism from September 28, 2018 to February 12, 2019.

RECOMMENDATION

Upon making these findings, I requested and reviewed respondent's personnel abstract. As noted, petitioner hired respondent in 2005 and promoted her to captain in 2012. Other than two recent command disciplines, respondent has no disciplinary record. Before 2012, respondent's attendance was good. Following the 2012 inmate assault, respondent has had extensive sick leave usage. Petitioner now seeks termination of respondent's employment. Respondent's seeks a lesser penalty. Based on all the evidence presented, termination of respondent's employment would be excessive.

As a preliminary matter, petitioner's penalty request was based on the premise that respondent was chargeable with more than 240 days of sick leave from September 2017 to date. Because approximately one-third of those absences were at petitioner's direction, after respondent had been working steadily for four months, a lesser penalty would be appropriate.

Moreover, petitioner's sick leave and absence control policy does not mandate termination of employment. *See* Directive 2258R-A § III(E)(1) (employee who reports sick more than 40 days within 12 months "may be subjected to termination"). Mitigating factors that must be considered before commencing a disciplinary or termination action shall include: the employee's use of sick leave since joining the Department; whether the sick leave resulted from a line of duty injury; whether sick leave usage preceded or followed pass days and holidays; and the nature of the illness. *Id*. at § (III)(F).

There is mitigation here. Respondent's injuries occurred while she was performing her duties and she was assaulted by an inmate. Prior to that assault, respondent had an excellent attendance record. Though respondent has taken many sick days in the past few years, she returned to work in June 2018, worked steadily until petitioner ordered her to go out sick in September 2018, and returned to work in January 2019. This is not a case involving an employee who is unwilling or unable to work. *Cf. Dep't of Correction v. Knupp*, OATH Index No. 1774/18 at 9 (Jan. 4, 2019) (termination of employment recommended for captain who had been out sick for nearly 300 days and had not returned to work by the time of trial); *Dep't of Correction v. Shepheard*, OATH Index No. 965/03 at 31 (Nov. 6, 2003) (termination of employment recommended where captain had been absent for 178 days and had not returned to work by the time of trial).

Termination of respondent's employment may also be inconsistent with the "uniquely broad and remedial purposes" of New York City's Human Rights Law. *Jacobsen v. NYC Health & Hospitals Corp.*, 22 N.Y.3d 824, 835-36 (2014). The City's Human Rights Law prohibits employers from firing employees based on their disabilities and it requires employers to "provide a reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job." Admin. Code § 8-107(15)(a); *see Jacobsen*, 22 N.Y.3d at 835 ("burden [is] on the employer to show the unavailability of any safe and reasonable accommodation and to show that any proposed accommodation would place an undue hardship on its business"). It is also unlawful for an employer "to refuse or otherwise fail to engage in a cooperative dialogue within a reasonable time with a person who has requested an accommodation or who the covered entity has notice may require such an accommodation." Admin. Code § 8-107 (28); *see Cruz v. Schriro*, 2016 N.Y. Misc. LEXIS 944 at 14 (Sup. Ct. N.Y. Co. 2016) ("first step" in providing a reasonable accommodation requires an employer to "engage in a good faith interactive process

that assesses the needs of the disabled individual and the reasonableness of the accommodation requested"). Furthermore, a determination that there is no reasonable accommodation that would enable an employee to satisfy the essential duties of a job "may only be made after the parties have engaged, or the covered entity has attempted to engage, in a cooperative dialogue." Admin. Code § 8-107 (28)(e).

There was no evidence that petitioner has attempted to engage respondent in a cooperative dialogue. Instead, after a protracted absence from work due to a disability, respondent returned to work on June 1, 2018, and continued to work until September 28, 2018, when petitioner ordered her out on sick leave for three more months. Respondent presented evidence that the NYCERS Medical Board has repeatedly found that, despite her current disability due to a workplace injury, respondent could possibly return to full duty after additional treatment (Resp. Exs. A, B). Yet petitioner insists that respondent's excessive absences amount to medical incompetence warranting termination of her employment (Tr. 192-93).

Petitioner also failed to show the unavailability of a reasonable accommodation or that such an accommodation would impose an undue hardship. Respondent is not seeking the creation of a permanent light duty position. Instead, she has shown that petitioner has regular posts for captains in the movement offices, control rooms, and HMD that do not involve extensive inmate contact. Temporarily assigning respondent to one of those posts will enable her to be a valuable member of the Department while she continues to be treated for her job-related disability.

There was testimony that excessive absences by a captain may result in higher overtime costs and lower morale. Such legitimate concerns are understandable. But termination of respondent's employment would also have adverse consequences to the Department. For example, the Department would lose an experienced and talented captain who is capable of making a valuable contribution to the agency's mission as she continues to follow the advice of mental health professionals and strives to return to full duty. Engaging in cooperative dialogue with respondent and agreeing upon a reasonable accommodation would make clear to other members of service that the Department is committed to providing them with the opportunity to have productive careers even after they suffer injuries in the line of duty.

On this record, where respondent is capable of working at several posts suitable for a captain and, after further treatment, may be able to assume any captain's post, termination of her

employment could potentially violate the City's Human Rights Law and also run afoul of related state and federal law. *See Jacobsen*, 22 N.Y.3d at 834 (prima facie showing of disability discrimination under New York State's Human Rights Law established where employee suffers from a disability that caused conduct resulting in termination of employment); *McEniry v. Landi*, 84 N.Y.2d 554, 560 (1994) (state's Human Rights Law violated where employment terminated based on pre-rehabilitation absences caused by disability; "The legislative purpose of preventing discrimination against employees with disabilities is best served by pinpointing the time of actual termination as the relevant time for assessing the employee's ability to perform."); *Vives v. NYC Dep't of Corrections*, 2019 U.S. Dist. LEXIS 51913 at 34 (E.D.N.Y. 2019) (denying summary judgment of discrimination and failure-to-accommodate claims under federal American with Disabilities Act, in part because former correction officer "demonstrated an inference of discrimination because she has shown a direct causal connection between her disability and her termination—she was terminated because of her absence and she was absent because of medical condition") (citations omitted).

For the proven charge of excessive absenteeism, the penalties available under section 75 the Civil Service Law include termination of employment, suspension without pay for up to 60 days, or a reprimand. A suspension is somewhat illogical for an employee who has been absent from work, but it is not as harsh as termination of employment and it would give appropriate weight to the mitigation presented. Though I do not have the authority to recommend alternatives – such as a leave of absence, probation, or holding a penalty in abeyance – the parties are free to do so. *See Dep't of Sanitation v. Delio*, OATH Index No. 900/04 at 4-5 (Apr. 20, 2004) (recommending 30-day suspension instead of termination of employment for long-term absence without leave stemming from employee's psychological problems, recognizing incongruity of a suspension as penalty for being absent for work; and acknowledging parties' ability to fashion a more appropriate remedy).

Accordingly, I recommend a penalty of 30 days' suspension without pay and urge the parties to consider an alternative, appropriate remedy.

Kevin F. Casey
Administrative Law Judge

April 29, 2019

SUBMITTED TO:

CYNTHIA BRANN
Commissioner

APPEARANCES:

PRECIOUS BONAPARTE, ESQ.
AMANDA OBERMAN, ESQ.
Attorneys for Petitioner

FRANKIE & GENTILE, P.C.
Attorneys for Respondent
BY: JAMES G. FRANKIE, ESQ.

In the Matter of Department of Correction,	:	
Petitioner	:	
-against-	:	OATH Index No. 348/2019 DR# 365/2018
[redacted]	:	
Respondent.		

ACTION OF THE COMMISSIONER

The instant matter was forwarded for my review after the Report and Recommendation issued by Administrative Law Judge Kevin Casey (hereinafter "ALJ Casey") of the Office of Administrative Trials and Hearings (hereinafter "OATH"). ALJ Casey presided over the fact finding hearing in the instant matter on February 12, 2019. ALJ Casey issued a Report and Recommendation finding:

1) Petitioner proved that from September 11, 2017 to May 31 2018, respondent was unable to work, out sick for more than 180 days, and excessively absent; and

2) Petitioner failed to prove that respondent was unable to work or that she should be penalized for excessive absenteeism from September 28, 2018 to February 12, 2019.

Based on the record in this matter and information provided by the Department's Trials and Litigation Division, I adopt ALJ Casey's factual findings and conclusions in part and modify the recommended penalty as to [redacted] from thirty (30) days suspension to termination.

Based on the record in this matter, ALJ Casey's first finding of fact, that the Department proved that from September 11, 2017 to May 31 2018, Respondent was unable to work, out sick for more than 180 days, and excessively absent is hereby accepted.

The Judge's second finding that Petitioner failed to prove that Respondent was unable to work or that she should be penalized for excessive absenteeism from September 28, 2018

to February 12, 2019; and his penalty recommendation of thirty (30) days suspension are hereby rejected.

At the outset of the trial, the Department sought, and the Court granted, an amendment of the charges. The charges, as amended, allege that Respondent

> "from on or about September 11, 2017, through April 18, 2018, and continuing to present, failed to efficiently perform her duties in that she has demonstrated a pattern of excessive absences and an inability to perform the full range of her duties as Captain by reporting sick, on four (4) occasions, both before and after her pass days, for approximately two hundred forty (240) days."

The testimony and evidence on record clearly established that [redacted] was absent from work, during the timeframes charged, due to her use of sick leave. However, ALJ Casey erroneously placed a burden on Petitioner "to show that the Respondent was unable to work." The Department was not required to show that the Respondent was unable to work. The issue was whether or not the employee was excessively absent and as a result of the absenteeism unable to perform her duties. The short answer to that was yes. Specifically, Departmental Directive #2258R-A provides that an employee may be subject to termination of employment due to excessive absenteeism if the employee is sick more than forty (40) days in a twelve (12) month period. OATH has repeatedly held that excessive and chronic absenteeism has been found to constitute incompetence under Section 75 of the Civil Service Law even where it is caused by a genuine illness, and is a basis for termination.

The appropriate penalty to address the seriousness of the Captain's incompetence is termination. However, the Department received notice that the New York City Employee Retirement System granted Respondent's application for a disability retirement. Thus, the Department's penalty determination, with respect to this matter, is rendered moot. Therefore, the Department defers prosecution in this matter and will hold the issuance of a penalty in abeyance. If Respondent returns to employment as a member of uniformed service with the Department of Correction, the Department will implement the penalty.

Date: 6.21.19 Signature: [redacted]

Cynthia Brann, Commissioner

THE CITY OF NEW YORK
CITY CIVIL SERVICE COMMISSION

In the Matter of the Appeal of

ANONYMOUS[1]

Appellant

-against-

DEPARTMENT OF CORRECTION

Respondent

Pursuant to Section 76 of the New York State Civil Service Law

CSC Index No: 2019-0633

DECISION

APPELLANT, a Correction Captain, appealed from a determination of the Department of Correction ("DOC") finding her guilty of incompetency for excessive absences following disciplinary proceedings conducted at the Office of Administrative Trials and Hearings ("OATH") pursuant to Civil Service Law ("CSL") Section 75.

Appellant began working as a Correction Officer in 2005 and was promoted to Captain in 2012. In March 2012, just prior to her promotion, Appellant was assaulted by an inmate but recovered from her physical injuries and returned to work three months later. However, subsequent to her return and promotion to Captain, Appellant began experiencing panic attacks and was diagnosed with post-traumatic stress disorder ("PTSD") stemming from the March 2012 attack. Appellant was absent from work after being placed on documented sick leave from September 11, 2017, to May 31, 2018, due to PTSD. Appellant returned to work on June 1, 2018 and was placed

[1] The case caption conforms to that adopted by OATH to protect Appellant's privacy

on medically monitored restricted status until September 27, 2018. On September 28, 2018, DOC ordered Appellant to go out on sick leave and she complied. Appellant made at least three attempts to return to work. DOC allowed her to return on January 17, 2019.

On April 20, 2018, DOC charged Appellant with a failure to "efficiently perform her duties in that she has demonstrated a pattern of excessive absences and an inability to perform the full range of her duties" after being absent for 240 days, from September 2017 to February 2019.[2] On April 29, 2019, the OATH Administrative Law Judge ("ALJ") issued a Report and Recommendation noting that the bulk of Appellant's sick leave occurred on two occasions: 181 days between September 2017 and May 2018, and 74 days between September 2018 and January 2019. The ALJ stated that after being absent for 181 days, Appellant returned to work without issue for 119 days until DOC ordered her to go out on sick leave. The ALJ reasoned that only the portion of the charge covering September 2017 to May 2018 should be sustained. He dismissed the remainder, stating that the period of absence between September 2018 and January 2019 was at DOC's direction. He noted that Appellant worked steadily for months prior to being placed on sick leave and had made repeated attempts to return to work before DOC permitted her to do so. The ALJ recommended a penalty of 30 days' suspension without pay.

On June 20, 2019, the DOC Commissioner issued the final decision which did not accept the ALJ's dismissal of the charge covering September 2018 and January 2019, and increased the penalty to termination but held imposition of that penalty in abeyance because Appellant was no longer a member of service having been granted a disability retirement on April 30, 2019.

[2] The initial charge covered absences from September 2017 to May 2018, but was amended at the OATH hearing to cover absences between September 2018 and February 2019.

Appellant filed an appeal with the Civil Service Commission ("Commission") on June 25, 2019. The Commission requested written arguments from the parties on November 19, 2020. [3] Appellant's attorney submitted his brief on November 23, 2020, and DOC submitted its brief on December 18, 2020. Appellant's attorney submitted a response to DOC's brief on December 23, 2020.

After a thorough review of the record below and submissions by the parties on this appeal, the Commission finds that there is sufficient evidence to support the findings of fact made by the DOC Commissioner. DOC has the right to separate an employee from service due to inability to perform. It is established in the record that Appellant was unable to perform her job duties, as confirmed by her retirement based on disability status resulting from PTSD.

However, the Commission finds that the DOC Commissioner erred in stating that the penalty of termination was "to be held in abeyance" should Appellant reapply for a position at DOC, or any other agency. Appellant was separated from employment by reason of having been granted a disability retirement. Should Appellant apply for reinstatement at DOC, the agency would be required to assess her fitness for duty at that time.

Therefore, based on the reasoning above, the findings of guilt are affirmed.

SO ORDERED

Date: February 12, 2021

[3] The Commission notes that its case processing timeframes for 2020 and 2021 have been impacted by Covid-19 related executive orders.