

Health and Hospitals Corp. (Queens Hospital Center)
v. Khan

OATH Index No. 0001/20 (Mar. 23, 2020), *adopted*, CEO Dec. (Apr. 16, 2020), **appended**

Petitioner proved that respondent committed dereliction of duty by failing to complete assignment to clean two pharmacies. Petitioner failed to prove that respondent engaged in insubordination or disruptive behavior. 30-day suspension recommended.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**

In the Matter of
**HEALTH AND HOSPITALS CORPORATION
(QUEENS HOSPITAL CENTER)**

Petitioner
- against -
SHAUKAT KHAN
Respondent

REPORT AND RECOMMENDATION

NOEL R. GARCIA, *Administrative Law Judge*

The Health and Hospitals Corporation (“HHC”) brought this disciplinary proceeding pursuant to section 7:5 of its Personnel Rules and Regulations. Petitioner alleges that on May 19, 2018, respondent Shaukat Khan, a housekeeping aide, failed to clean one or more pharmacies as directed by his supervisor and engaged in disruptive behavior while protesting the assignment. Respondent is charged with dereliction of duty, insubordination, and engaging in disruptive behavior (ALJ. Ex. 1). Respondent denied the charges.

At trial, petitioner relied upon the testimony of five witnesses and documentary evidence. Respondent testified in his own behalf.

For the reasons below, I find that petitioner proved only the dereliction of duty charge and recommend that respondent be suspended without pay for 30 days.

ANALYSIS

Charge 1, Specification 1 – Dereliction of Duty

The first charge alleges that on May 19, 2018, respondent failed to clean one or more pharmacies as directed by his supervisor on one or more occasions. Maxine Simpson, the Director of Labor Relations at Queens Hospital Center, conducted an investigation into the incident, which included interviewing and collecting statements from John Bennett, respondent's supervisor, and Diane Oakes, the Assistant Director of Geriatrics (Tr. 9-11, 52).

Pursuant to Mr. Bennett's statement,¹ dated May 21, 2018, on the day in question respondent was assigned to perform work in several areas of the hospital, including cleaning two pharmacies on the first floor because the hospital was short-staffed (Pet. Ex. 1). Before respondent began his assignment, Mr. Bennett told him "do not forget to do the two pharmacies," to which respondent replied, "[y]ou don't have to tell me. I know my assignment."

During the shift, however, Mr. Bennett received a call from one of the pharmacies notifying him that housekeeping had not cleaned the area. After the call, Mr. Bennett spoke to respondent and told him that he needed to go to the pharmacy because they had already called twice. Mr. Khan allegedly stated, "Why do I have to go to the pharmacy when you have this guy on the stairs doing nothing." Respondent was referring to his co-worker Lloyd Jackson, who was nearby and assigned to clean the staircases. Mr. Bennett told respondent, "that is your assignment. They just called me and I need you to go over there," to which respondent replied, "I am calling the [Administrator on Duty ("AOD")] because you are harassing me," before proceeding to walk away.

In his statement, Mr. Bennett alleged that when he and respondent came upon the AOD, respondent told her, "This guy is harassing me. I already have an assignment and he is giving me another assignment while he has this other guy just doing the staircase." The AOD explained to respondent that they were short-staffed and that everyone was being asked to help, to which respondent answered, "so why is he harassing me?" Mr. Bennett then asked Mr. Jackson to clean the pharmacies, which he did. Mr. Jackson's witness statement, dated May 21, 2018, confirmed that he was asked to clean the two pharmacies that respondent was assigned to cover

¹ Mr. Bennett did not testify in this case as he was unable to attend the trial (Tr. 94).

(Pet. Ex. 2). At trial, Mr. Jackson testified that he had no recollection of the day in question (Tr. 43).

Cheril Cane, a Coordinating Manager at Queens Hospital, testified that she created the daily schedule for the Environmental Services Department for May 19, 2018 (Tr. 28, 30). Pursuant to the schedule, respondent was assigned to clean the basement, lab, dietary, and medical record rooms (Pet. Ex. 5). The schedule also contains a handwritten notation that states “[respondent] has to do both pharmacies.” Ms. Cane believed that Mr. Bennett wrote this notation because he was the supervisor on duty that day, but she did not speak to him about the notation (Tr. 35-37).

Ms. Simone Barrows, the Assistant Director for Ambulatory Care Subspecialty Services, was the AOD at Queens Hospital on May 19, 2018, which was a Saturday. As AOD, she was responsible for managing hospital operations on that day, which included responding to inquiries from staff (Tr. 46). Ms. Barrows testified that she was in the stairwell leading to the Emergency Department when she was stopped by respondent, who asked her if she was the AOD. Respondent complained to her that his supervisor gave him an additional assignment beyond the tasks he was originally assigned to perform. Ms. Barrows directed respondent to address the issue with his supervisor (Tr. 47, 50).

On that day Ms. Barrows was being “shadowed” by Ms. Oakes, who was being trained as an AOD (Tr. 53). Ms. Oakes testified that respondent called the AOD office and complained to her that he was given an assignment but that his supervisor was asking him to perform an additional task (Tr. 53-54). After the call, she walked with Ms. Barrows to the Emergency Department and encountered respondent and his supervisor, Mr. Bennett, arguing at the bottom of a staircase. Ms. Oakes heard respondent tell Mr. Bennett that he had his own assignment and questioning him as to why the additional task could not be given to someone else. Ms. Oakes interjected and told respondent to complete the additional task and to file a grievance on Monday (Tr. 54-55).

Respondent, however, presented a different version of what transpired. He testified that he is a “floater” without a regular assignment, and that his shift begins at 7:00 a.m. and ends at 3:30 p.m. (Tr. 65-66, 71). On the day at issue he was assigned to clean the lab, basement, respiratory, and medical record areas. Cleaning includes sweeping, moping and taking out the

garbage (Tr. 67-69). Respondent stated that he is never given an assignment in “the middle of the day” (Tr. 70-71).

At first respondent claimed that between 10:00 a.m. and 11:00 a.m., Mr. Bennett told him “to do [the] pharmacy,” but that he had been “working that day [for] a long time,” the pharmacy was “not [his] area,” and the basement was “hard work” (Tr. 71-73). He explained that the hospital has two pharmacies: the main pharmacy, which is closed on the weekends, and a satellite pharmacy (Tr. 73, 77).

Later in his testimony respondent asserted that between 7:15 a.m. and 8:00 a.m. Mr. Bennet told him three times to bring toilet paper to the main pharmacy, which made him feel like he was being harassed (Tr. 73-74). He stated that he complied with the request, and that he had not understood that Mr. Bennet had asked him to clean the pharmacies (Tr. 76-78). He denied that he had refused to carry out Mr. Bennet’s instructions (Tr. 78). He claimed that he never told Ms. Barrows or Ms. Oakes that Mr. Bennett had given him an additional assignment. Rather, his sole complaint to them was that Mr. Bennett had asked him multiple times to bring toilet paper to the main pharmacy (Tr. 79-80).

Given the conflicting accounts of the incident, a credibility determination must be made. In assessing credibility, relevant considerations include demeanor, consistency of testimony, supporting evidence, witness motivation, bias or prejudice, and whether the testimony comports with common sense and human experience. *See Dep’t of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 98-101-A (Sept. 9, 1998).

The evidence established that Mr. Bennett told respondent to clean the two pharmacies, but that respondent failed to do so. Indeed, respondent admitted that between 10:00 a.m. and 11:00 a.m., Mr. Bennett told him “to do [the] pharmacy,” which is consistent with Mr. Bennett’s contemporaneous written statement and the written daily schedule for that day. In his written statement, Mr. Bennett wrote that he assigned respondent to “clean the two pharmacies,” while on the daily schedule it states “[respondent] has to do both pharmacies.” Mr. Jackson’s written statement is also consistent with Mr. Bennett’s statement. Mr. Jackson noted that the pharmacies had been assigned to respondent, but that his supervisor then asked him to clean the pharmacies, which he did. Further, Ms. Barrows and Ms. Oakes credibly testified that respondent’s

complaint was based on an additional task he was asked to do, and not on how many times he was approached by Mr. Bennet, as he later claimed.

Respondent's testimony was inconsistent, self-serving, and generally not credible. His claim that he was insistently told only to place toilet paper in a pharmacy that was closed, and not to clean the two pharmacies, defies common sense and is against the weight of the evidence. It is undisputed that respondent did not clean the pharmacies.

Therefore, respondent was derelict in his duty because he failed to carry out an assignment given to him by his supervisor. *See Health and Hospitals Corp. (Elmhurst Hospital Center) v. McKenzie*, OATH Index No. 2043/06 (Nov. 3, 2006) (charges of dereliction of duty and abandonment of post sustained where custodial assistant was assigned to clean operating room but was found by supervisor in employee lounge); *Health and Hospitals Corp. (Metropolitan Hospital Center) v. Santana*, OATH Index No. 1962/04 (Apr. 19, 2005) (hospital police officer who failed to respond to requests for assistance in restraining a combative patient found guilty of dereliction of duty).

Charge 1, Specification 1, should be sustained.

Charge 2, Specifications 1 and 2 – Insubordination

Charge 2 alleges that respondent was insubordinate on May 19, 2018, when he stated in sum and substance to his supervisor Mr. Bennett, "Why do I have to go to the pharmacy when you have this guy on the stairs doing nothing?" and when he stated in sum and substance to Ms. Oakes, "This guy is harassing me. I already have an assignment and he's giving me another assignment. I am not doing it."

To establish a charge of insubordination, an employer must prove three elements: (1) that an order was communicated to the employee and the employee heard and understood the order; (2) the contents of the order were clear and unambiguous; and (3) the employee willfully refused to obey the order. *Dep't of Homeless Services v. Chappelle*, OATH Index No. 1918/07 at 3 (Aug. 30, 2007). The charge here, however, focuses on the statements made by respondent, and not whether respondent failed to obey an order. Petitioner argued that insubordination also encompasses rudeness towards an employee's supervisor (Tr. 87).

This charge should be dismissed because it does not allege that respondent was given an order that he failed to perform. While respondent's statements border on discourteous conduct,

that is not the charge here. To the extent the charge was meant to encompass respondent's refusal to clean the pharmacies, the charge is duplicative of Charge 1. *See Dep't of Buildings v. Shepherd*, OATH Index No. 1971/19 at 3 (Nov. 18, 2019) (where additional specifications were based on the same facts as proven charges, those specifications found to be duplicative and not considered separately for purposes of penalty).

Charge 3, Specification 1 – Disruptive Behavior

Charge 3 alleges that respondent engaged in some or all of the acts described in Charges 1 and 2 in the presence of one or more patients, visitors, supervisors, and/or facility co-workers, which constitutes disruptive behavior.

The only interaction that could possibly be deemed disruptive because it occurred in the presence of other persons is the encounter that took place by the staircase leading to the Emergency Department, when respondent approached Ms. Barrows and told her that Mr. Bennett had given him an additional task. However, Ms. Barrows testified that she told respondent to speak to his supervisor and continued towards the Emergency Department. She further stated that aside from herself, only respondent, Mr. Bennett and Ms. Oakes were present (Tr. 47, 50).

Ms. Oakes confirmed that the exchange took place by the bottom of the staircase leading to the Emergency Department, which is where she saw respondent and Mr. Bennett engaged in an argument (Tr. 54). Ms. Oakes stated that aside from herself, Ms. Barrows, Mr. Bennett, Mr. Jackson and respondent, she saw a few people "by the loading dock" and "some patients" who "were just walking back and forth" (Tr. 56). She testified that the argument between respondent and Mr. Bennet was "loud" and attracted the attention of people who were on the loading dock. However, she noted that when she told respondent to follow his supervisor's instructions and to file a grievance on Monday, respondent turned and walked away (Tr. 61). She also conceded that she did not hear respondent make any threats or use foul language (Tr. 59).

Not every workplace disagreement or expression of discontent, even when voices are raised, is subject to discipline. *See Health and Hospitals Corp. (Woodhull Medical and Mental Health Center) v. Freeman*, OATH Index No. 1399/06 at 9 (July 20, 2006). When assessing disruptive behavior based on statements made, the "manner, tone, and content of the language used is to be assessed, including whether there is any disruption to the workplace, and whether the comment was made in front of co-workers and/or the public." *Id.* Further, "[a] subordinate

may disagree with his superior, even vehemently—provided that he does so decorously and discreetly—but he may not curse at or otherwise abuse his supervisors, and he may not generally disobey their directions.” *Human Resources Admin v. Bichai*, OATH Index No. 211/90 at 13 (Nov. 21, 1989), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 90-54 (June 15, 1990).

Petitioner did not prove by a preponderance of the evidence that respondent engaged in disruptive behavior. The exchange by the staircase leading to the Emergency Department appears to have been brief, and respondent did not make any threats, use inappropriate language or make disparaging remarks. While some people may have been in the area during the encounter, petitioner did not establish that the exchange disrupted hospital operations in any significant manner. Accordingly, Charge 3 should be dismissed. *See Health & Hospitals Corp. (Lincoln Medical and Mental Health Ctr.) v. Acosta*, OATH Index No. 1787/14 at 9-10 (July 23, 2014) (dismissing charge of disruptive behavior where respondent did not make any threats or use profanity and there was no evidence that his conduct was disruptive).

FINDINGS AND CONCLUSIONS

1. Petitioner proved that respondent was derelict in his duty on May 19, 2018, when he failed to clean two pharmacies as directed by his supervisor. Charge 1, Specification 1 is sustained.
2. Petitioner failed to prove that respondent was insubordinate on May 19, 2018, when he stated in sum and substance to his supervisor, “Why do I have to go to the pharmacy when you have this guy on the stairs doing nothing?” as alleged in Charge 2, Specification 1.
3. Petitioner failed to prove that respondent was insubordinate on May 19, 2018, when he stated in sum and substance to the Administrator on Duty, “This guy is harassing me. I already have an assignment and he’s giving me another assignment. I am not doing it” as alleged in Charge 2, Specification 2.
4. Petitioner failed to prove that respondent engaged in disruptive behavior in the presence of one or more patients, visitors, supervisors and/or facility co-workers, as alleged in Charge 3, Specification 1.

RECOMMENDATION

After making the above findings, I requested and received a summary of respondent's personnel record (ALJ. Ex. 2). Respondent has been employed by HHC since 1994. In 2018, respondent accepted a 25-day suspension to resolve similar charges related to disruptive behavior and dereliction of duty. The five most recent performance evaluations, from 2013 through 2018, each rated respondent's work as "satisfactory."

Petitioner did not provide a penalty recommendation. However, in determining an appropriate penalty here, respondent's prior similar misconduct must be taken into account. This tribunal has applied the principles of progressive discipline, which aims to modify employee behavior through increasing penalties for repeated or similar misconduct. *See Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Ford*, OATH Index No. 2383/09 at 11 (July 10, 2009) ("The theory of progressive discipline is to modify employee behavior through increasing penalties for the same or similar misconduct, and to give employees full notice that if they do not modify their conduct, they risk termination."); *Dep't of Transportation v. Jackson*, OATH Index No. 299/90 at 12 (Feb. 6, 1990) ("It is a well-established principle in employment law that employees should have the benefit of progressive discipline wherever appropriate, to ensure that they have the opportunity to be apprised of the seriousness with which their employer views their misconduct and to give them a chance to correct it.")

Here, respondent has been found guilty of dereliction of duty for failing to perform an assignment on May 19, 2018, as directed by his supervisor. It is troubling that respondent executed a settlement agreement in resolution of similar charges just five days beforehand on May 14, 2018. While those charges alleged that respondent directed threatening, intimidating, and abusive language towards colleagues, which is not the case here, those charges also alleged that respondent abandoned his post and was derelict in his duties. Thus a substantial penalty is warranted in order to communicate to respondent the importance of correcting his actions.

Accordingly, I recommend a 30-day suspension without pay.

Noel R. Garcia
Administrative Law Judge

March 23, 2020

SUBMITTED TO:

CHRISTOPHER ROKER
Chief Executive Officer

APPEARANCES:

ALEXANDER YELLEN, ESQ.
Attorney for Petitioner

ONYA BRINSON, ESQ.
Attorney for Respondent

HUMAN RESOURCES DEPARTMENT

April 16, 2020

Shaukat Khan


Dear Mr. Khan:

As the designee of Israel Rocha, Chief Executive Officer of NYC Health + Hospitals / Queens, I have reviewed the Report and Recommendation of Administrative Law Judge Noel R. Garcia, dated March 23, 2020 (the "Recommendation").

After reviewing the Recommendation, the trial record including the transcript and the admitted trial exhibits, your personnel history, and your attorney's response submitted pursuant to *Fogel v. Board of Education*, I agree with Judge Garcia's Recommendation sustaining the charge of Dereliction of Duty.

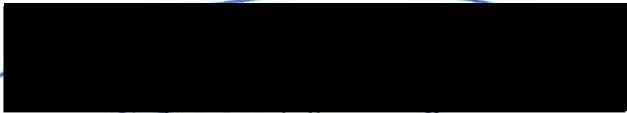
Your attorney's letter requests a lesser penalty than the 30-day suspension without pay recommended by Judge Garcia, claiming that there has not been progressive discipline. As Judge Garcia's Report and Recommendation said, progressive discipline "aims to modify employee behavior through increasing penalties for repeated or similar misconduct. *Recommendation* at 8.

After reviewing your personnel file, I agree with Judge Garcia that a 30-day suspension without pay is appropriate. You executed a settlement agreement on May 19, 2018 in resolution of charges including threatening behavior and dereliction of duty five days before the misconduct in the instant case. You accepted a 25-day suspension as part of the May 2018 settlement. Accordingly, a 30-day suspension for the instant misconduct is appropriate and consistent with the principals of progressive discipline.

For all of the foregoing reasons, I am adopting the Report and Recommendation in its entirety, including Judge Garcia's recommendation of a penalty of a 30-day suspension without pay.

You will be notified by your department with the dates that you will be required to serve this suspension without pay.

You may appeal this decision by application to the Personnel Review Board, within thirty (30) days from the date of this letter in accordance with Article 78 of the Civil Practice Laws and Rules.


Andrew Campbell
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NYC Health + Hospitals / Queens

cc: Alexander S. Yellen, Esq.
NYC Health + Hospitals Labor Relations
Via electronic mail

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