

Dep't of Correction v. Reid

OATH Index No. 76/23 (Apr. 13, 2023)

Petitioner failed to establish that correction officer submitted two forged or altered documents to its Health Management Division for doctor's office visits on June 22 and 23, 2021. Dismissal of the charge recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
-against-
RONALD REID
Respondent

REPORT AND RECOMMENDATION

ASTRID B. GLOADE, *Administrative Law Judge*

This employee disciplinary proceeding was referred by petitioner, the Department of Correction ("Department") pursuant to section 75 of the Civil Service Law. Petitioner alleges that Officer Ronald Reid violated the Department's Rules when he submitted two forged or altered notes from a doctor's office to document medical appointments (ALJ Ex. 1).

At a trial before me conducted by videoconference, the Department presented the testimony of Investigator Steve Atti and offered documentary evidence. Respondent testified in his own behalf and relied on documentary evidence. For the reasons below, I find that petitioner failed to prove the charge and recommend that it be dismissed.

ANALYSIS

Respondent, a correction officer since June 2017, was under medical care after he was injured during a use of force incident with an inmate in 2020. Because respondent had been on sick leave for an extended period of time, he was required to telephone the Department's Health Management Division ("HMD") to log out when he left his residence and log back in when he returned (Tr. 51-53). In addition, he was required to submit to HMD documentation of his activity

out of the residence within seven days of the activity (Atti: Tr. 16, 18; Resp.: Tr. 80-81; Pet. Ex. 4, Dep't of Correction Directive No. 2262R-A (eff. June 22, 2000) at III(E)). However, respondent was permitted four "recreation hours," from 1:00 to 5:00 p.m., during which he was allowed to be out of his residence without having to log in and out with HMD (Tr. 59, 80; Pet. Ex. 4 at III(E)(6)).

Respondent had an appointment with a doctor at HMD on June 26, 2021, and needed his treating physician to complete a "green sheet," also known as a treating physician summary report, for that appointment (Tr. 53). The purpose of the green sheet was to advise the Department whether respondent could return to work on full duty status or if there were medical restrictions on his activities. Respondent telephoned his doctor's office, explaining his situation and requested an appointment, but none was available prior to his HMD appointment (Tr. 53-54). Respondent decided to go to his doctor's office to see if he could be seen on June 22 and 23, 2021 (Tr. 54-55, 57). He logged out of his residence on both dates and submitted two notes to HMD to document his activities (Pet. Exs. 2, 3). Petitioner alleges respondent engaged in misconduct because the notes he submitted were forged or altered (ALJ Ex. 1).

Petitioner bears the burden of proving the charges by a preponderance of the credible evidence. *See Dep't of Correction v. Hall*, OATH Index No. 400/08 at 2 (Oct. 18, 2007), *adopted*, Comm'r Dec. (Nov. 2, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 08-33-SA (May 30, 2008). Preponderance has been defined as "the burden of persuading the trier[] of fact that the existence of the fact is more probable than its non-existence." *Prince, Richardson on Evidence* § 3-206 (Lexis 2008). "If the evidence is equally balanced, or if it leaves the [trier of fact] in such doubt as to be unable to decide the controversy either way, judgment must be given against the party upon whom the burden of proof rests." *Id.*; *see Rinaldi & Sons, Inc. v. Wells Fargo Alarm Service, Inc.*, 39 N.Y.2d 191, 196 (1976); *Dep't of Correction v. Travers*, OATH Index Nos. 2499/00, 2500/00, 2501/00, & 2502/00 at 37-38 (Feb. 28, 2001) (petitioner's evidence was inconclusive and respondents' evidence credible, resulting in a 50/50 case, which is insufficient for petitioner to sustain burden). Petitioner has not satisfied its burden.

Petitioner relied on documentary evidence and the testimony of Steve Atti, an HMD investigator whose responsibilities include collecting and substantiating medical information from the members of service and ensuring they comply with the Department's rules (Tr. 11-14, 27). Investigator Atti testified that he was assigned to investigate documents respondent submitted to HMD in late June 2021. He explained that his partner had given respondent a notice of failure to

submit documentation after respondent failed to submit required documentation when he logged out of his residence while on sick leave (Tr. 20-21; Pet. Ex. 1).

Respondent submitted two notes for his June 22 and 23, 2021 log outs, both of which were from the office of Dr. Barry Katzman (Tr. 21; Pet. Exs. 2, 3). The notes are on pre-printed forms with fillable lines for the date and the name of the patient, as well as pre-printed lines with space to indicate whether the patient was totally incapacitated, partially incapacitated, able to return to work, and had an appointment that day (Pet. Exs. 2, 3). Also included on the forms is a section for remarks. On the form respondent submitted dated June 22, 2021, the date is handwritten, and the line for "Patient had an appointment in our office today" is checked. A handwritten note in the "Remarks" section states "patient was seen in our office today. He has a follow up on 07/18/21." There is a signature for Dr. Katzman on the note (Pet. Ex. 2). Except for the date of June 23, 2021, the entries on the June 23, 2021 note are identical to those on the June 22, 2021 note (Pet. Exs. 2, 3).

Investigator Atti reviewed the two notes and determined that the documents looked fraudulent because it "looked like the date was changed" (Tr. 15, 22). He testified that it looked like somebody changed the June 22, 2021 date on the note, as well as the date of the follow-up appointment, July 18, 2021, and that the same changes were evident in the June 23, 2021 note (Tr. 22).

Investigator Atti visited Dr. Katzman's office on August 24, 2021, where he observed about five of Dr. Katzman's employees in the reception area (Tr. 22-23, 33-34). Investigator Atti met with Dr. Katzman, his office manager, and one other employee (Tr. 23, 36, 43-44). Investigator Atti testified that after reviewing the notes, Dr. Katzman and the two employees agreed that they "did look altered and nobody in their facility altered [the notes]" and that "nobody in that facility wrote that documentation" (Tr. 23, 44). In addition to examining the notes, Dr. Katzman's staff members reviewed their office database for evidence that respondent had been at the office on the June 2021 dates in issue, but found no record that he had been in their office (Tr. 23, 37). Investigator Atti testified that the employees told him the office used patient sign-in sheets, but he did not obtain them for June 22 and June 23, 2021 (Tr. 37-38).

During the August 24, 2021 meeting, Dr. Katzman and the two members of his staff told Investigator Atti that he would have to obtain a release signed by respondent for them to review respondent's treatment notes and provide information about respondent's attendance. Investigator

Atti obtained a HIPAA (Health Insurance Portability and Accountability Act) release signed by respondent and returned to Dr. Katzman's office on August 31, 2021 (Tr. 23-24; Pet. Ex. 5). Investigator Atti reviewed documents from respondent's file, including progress sheets, and determined that he had not attended appointments on June 22 and 23, 2021 (Tr. 24; Pet. Ex. 5).

Investigator Atti did not interview any of the other employees he saw working in the doctor's office during his initial visit (Tr. 38). According to his report (Pet. Ex. 5), on his second visit to Dr. Katzman's office, Investigator Atti obtained respondent's records from the office manager. There is no mention of him having interviewed the other members of the doctor's staff.

Respondent denied having forged or altered the medical documentation he submitted to HMD and insisted that an employee from Dr. Katzman's office prepared the notes dated June 22 and 23, 2021 (Tr. 64, 79).

Respondent testified that on June 22, 2021, because he needed his doctor to complete the green sheet for the HMD appointment scheduled for June 26, 2021, he traveled from his home in East Flatbush, Brooklyn to Dr. Katzman's office in Long Island "to try to secure an appointment" (Tr. 55). He used public transportation, which involved travel by subway and bus, and after over two hours of traveling he arrived at Dr. Katzman's office at about 3:00 p.m. (Tr. 55-56). When respondent arrived at the office, he checked in with a receptionist at the front desk and signed the sign-in sheet. He explained that he did not have an appointment but wanted to see the doctor because he had a document from his employer that needed to be signed. The receptionist instructed respondent to wait to see if another patient canceled or did not appear, and he could have that patient's appointment (Tr. 56-57).

After waiting about 30 minutes, respondent spoke to the receptionist, who said there were still no cancellations and told him to continue waiting (Tr. 58). Respondent waited another 30 minutes and then returned to the front desk, where he encountered a different receptionist (Tr. 58). The second receptionist told respondent that the doctor was fully booked for the rest of the day (Tr. 58). Frustrated, respondent decided to go home and return the next day (Tr. 58-59). He knew he had to contact HMD if he was going to be out of his residence after 5:00 p.m., the end of his recreation time, and called them while he was waiting for the bus to take him on the first leg of his journey home (Tr. 59). He contacted HMD again about ten minutes after he arrived home around 7:30 or 8:00 p.m. (Tr. 60).

On June 23, 2021, respondent returned to Dr. Katzman's office, traveling by subway and

bus as he had the day before. He left his home around 2:15 p.m. and arrived at the doctor's office close to 4:00 p.m. (Tr. 61). Respondent told the receptionist that he had been in the office yesterday and explained that he needed to see the doctor to have him complete paperwork. Respondent was again told to wait for a possible opening (Tr. 62). After waiting about 45 minutes he went to the receptionist and requested a note to verify his presence at the office. She gave him a note regarding his presence in the office on June 23, 2021, and he told her he also needed documentation for June 22, 2021 (Tr. 62-64; Pet. Ex. 3). The receptionist said, "no problem, I remember you," took the original note from respondent and went to the back, then returned two or three minutes later with two pieces of paper which she placed into an envelope (Tr. 63, 65). The additional document was the note for June 22, 2021 (Tr. 63, 65-66; Pet. Exs. 2, 3). Respondent recalled that the receptionist who provided him with the notes had been working in the doctor's office on both days (Tr. 63-64). On his way home, respondent called HMD to let them know he had been at the doctor's office and called HMD again shortly after his arrival home at around 8:00 p.m. (Tr. 67).

Respondent attended his scheduled appointment with an HMD doctor on June 26, 2021, and explained that he had been unable to see Dr. Katzman to have the green sheet completed, but showed the doctor his notes from Dr. Katzman's office. The HMD doctor told respondent to have the completed form the next time he had an appointment at HMD (Tr. 68).

After his HMD appointment on June 26, 2021, an HMD investigator informed respondent that he was missing medical documentation from the June 22 and 23, 2021 log outs (Tr. 68). Respondent replied that he had put the notes from Dr. Katzman's office in the HMD drop box on June 26, 2021, and followed up by emailing the notes to the investigator (Tr. 68-70). On August 18, 2021, a second HMD investigator requested the notes from Dr. Katzman's office (Tr. 70). Respondent complied with the request (Tr. 70). In October 2021, Investigator Atti contacted respondent to request that he complete a HIPAA release for medical documents relating to the notes, which respondent provided (Tr. 72).

Respondent testified after he was charged with altering the medical notes and submitting them to HMD, he went to Dr. Katzman's office on July 18, 2022, and asked that they look for evidence, including the sign-in sheets, that he had been in their office on June 22 and 23, 2021 (Tr. 75-76). Dr. Katzman told respondent that he had not been in the office on June 23, 2021, and therefore could not "vouch for" respondent (Tr. 76). The office staff could not find the sign-in sheets for the dates in question, but Dr. Katzman provided a letter stating, patient "states that he

was in my office” on those dates and that he “states he was not seen” (Pet. Ex. 6; Tr. 77). The note further indicates that Dr. Katzman’s office had no record of an appointment or sign-in, but respondent “states he spoke to the office staff at the front desk” (Pet. Ex. 6).

Upon learning that Dr. Katzman’s note of July 18, 2022 was insufficient to refute the allegation, respondent returned to Dr. Katzman’s office on August 29, 2022, and asked the staff to again search their files for the sign-in sheets for June 22 and 23, 2021 (Tr. 77). After waiting for 30 to 40 minutes, Dr. Katzman told respondent that someone in the office had “vouched” for his presence in the office, and he wrote a note stating that respondent “was in my Floral Park office on 6/22 and 6/23 of 2021. He was not treated because he did not have an appointment. Patient was given this note for both days due to the inconvenience” (Pet. Ex. 7; Tr. 77).

Petitioner’s evidence is insufficient to prove that respondent submitted forged or altered notes to HMD to document having logged out of his residence on June 22 and 23, 2021. It is true that there are irregularities in the appearance of dates on the notes that give the impression that the dates may have been altered. In addition, there are some aspects of respondent’s testimony that raise questions about his account. For example, responded stated that after he was unable to see Dr. Katzman on June 22, 2021, he returned the next day and waited for about 45 minutes to see him. However, Dr. Katzman was not in the office on June 23, 2021, and it is puzzling that respondent would have waited 45 minutes to see a doctor who was not even present. Similarly, respondent testified that he logged into HMD to report that he had returned from Dr. Katzman’s office shortly after he arrived home, at about 8:00 p.m. on June 22 and 23, but later acknowledged that HMD records indicate that he logged in at about 10:04 p.m. on June 22 and at 9:35 p.m. on June 23 (Tr. 60, 67, 81-82). Respondent offered no clear explanation for this discrepancy between his testimony and the HMD records. Despite these irregularities, however, petitioner bears the burden of proving that the notes respondent submitted to HMD were forged or altered, which it did not do.

Petitioner relied on the testimony of its investigator, who said that he reviewed the notes and it appeared that somebody changed the June 22, 2021 date on the note, as well as the date of the follow-up appointment, July 18, 2021, and that the same changes were evident in the June 23, 2021 note (Tr. 22). Petitioner also relies on hearsay statements made by Dr. Katzman, his office manager, and a third staff member made during investigative interviews, in which they said the documents looked altered and none of the staff members admitted to having provided the

documents to respondent, who they confirmed was not treated at the office on the dates in question. Although hearsay is admissible at this tribunal and may form the sole basis for an administrative adjudication, it must be sufficiently reliable and probative to be afforded substantial weight. *See generally* 48 RCNY § 1-46 (Lexis 2023); *Ayala v. Ward*, 170 A.D.2d 235 (1st Dep’t 1991), *leave to appeal denied*, 78 N.Y.2d 851 (1991) (“Hearsay is not only admissible in an administrative proceeding, but may also constitute substantial evidence if it is sufficiently reliable and probative on the issues to be determined.”) (citation omitted).

Here, although Investigator Atti testified that he observed five employees working in Dr. Katzman’s office, he only interviewed Dr. Katzman and two employees. Therefore, the denials of having provided the notes to respondent came from only about half of the employees in the office. It is plausible that the staff members who the investigator did not interview provided the notes to respondent or have relevant information about respondent’s presence in the office on the dates in question. In addition, in a note dated August 29, 2022, Dr. Katzman states that respondent was indeed in his office on the dates at issue, although he was not treated because he did not have an appointment (Pet. Ex. 7). The August 29, 2022, note raises questions as to the reliability of the statements Dr. Katzman and some of his staff made to Investigator Atti, but there is no evidence that petitioner sought to determine the accuracy of the note. In addition, petitioner, who bears the burden of proof, did not call Dr. Katzman or members of his staff to provide testimony, which may have clarified this point.

The facts here are unlike *Hall*, OATH 400/08, where Administrative Law Judge Salzman found that a correction officer submitted two falsified medical notes to HMD, which he claimed had been filled out by the staff at his doctor’s office. In *Hall*, it was undisputed that the doctor had only two staff members, both of whom, along with the doctor, submitted affidavits denying having signed or authorized anyone else to sign the notes in issue. *Hall*, OATH 400/08 at 3. In addition, the doctor testified at the trial, confirming the substance of his affidavit. *Id.* Therefore, the only three people who could have issued authentic notes denied, under oath, having done so. Here, in contrast, the evidence established that approximately half of Dr. Katzman’s staff were not interviewed as part of the investigation. Moreover, the statements of the staff members who were interviewed were not given under oath, and Dr. Katzman provided respondent with a note, the authenticity of which was not challenged at trial, confirming that respondent was at the office on the dates in question. That is not to say that every doctor and member of the doctor’s staff must

testify when the authenticity of a doctor's note is challenged. But on these facts, where the record is devoid of evidence of efforts to interview other members of the doctor's staff or to investigate the August 29, 2022, note, petitioner has failed to meet its burden.

Finally, respondent presented a plausible explanation that the dates on the notes might have been changed by a member of the doctor's staff. He credibly testified that he received a note from a receptionist in Dr. Katzman's office to document his visit on June 23, 2021. After he requested a second note for his visit on June 22, that staff member took back the June 23 note, then returned with two notes, giving rise to the inference that the staff member simply took a shortcut and altered the dates rather than write a new note. This is consistent with the appearance of the notes, which look identical in all respects except the dates. *See Dep't of Correction v. Cherry*, OATH Index No. 184/07 at 5 (Feb. 28, 2007), *aff'd*, 66 A.D.3d 556 (1st Dep't 2009) (petitioner failed to prove respondent submitted false or misleading medical notes where, although there were suspicious similarities between the documents, the doctor's office may have photocopied an earlier form for convenience and petitioner failed to present evidence from the doctor's office).

There is no dispute that respondent did not have appointments at Dr. Katzman's office on June 22 or 23, 2021, but his testimony that he went to the office hoping to be seen by his doctor and get his paperwork completed is credible. His submission of two notes stating that he had appointments on those dates, while inaccurate, does not render the notes forged or altered. Instead, it appears they reflect fill-in-the-blank form notes provided by the doctor's staff at respondent's request to reflect that he had been at the office on the dates in question. It is plausible that someone from the doctor's office thought it appropriate and convenient to give respondent the pre-printed note which acknowledged his presence in the office even though the terminology of respondent having appointments on the dates of the notes was incorrect.

In sum, petitioner failed to establish that respondent submitted forged or altered medical documentation to HMD as alleged.

FINDING AND CONCLUSION

1. Petitioner failed to establish by a preponderance of the credible evidence that respondent submitted forged or altered documentation to HMD pertaining to visits to his doctor's office on June 22 and 23, 2021.

RECOMMENDATION

I recommend that the charge be dismissed.

Astrid B. Gloade
Administrative Law Judge

April 13, 2023

SUBMITTED TO:

LOUIS A. MOLINA
Commissioner

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