

Dep't of Health & Mental Hygiene v. Dickerson

OATH Index No. 1241/14 (Mar. 3, 2014)

Respondent was late for work on 116 occasions from September 4, 2012 to September 13, 2013, was absent without leave on 33 occasions from June 11, 2013 to September 12, 2013, and has been continuously absent without leave since October 8, 2013. Termination of employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF HEALTH & MENTAL HYGIENE
Petitioner
-against-
JOEY DICKERSON
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner brought this disciplinary proceeding under section 75 of New York's Civil Service Law against respondent, a stock worker, alleging that he has been excessively late and repeatedly absent without leave (AWOL) (Pet. Ex. 1).

Respondent failed to appear for the hearing on February 24, 2014. An attorney from respondent's union appeared and stated that he had written to respondent and had not received any response. The union attorney was excused because he had not received any communication from respondent, he was unable to file a notice of appearance, and he lacked standing or authority to appear on respondent's behalf. *See* 48 RCNY § 1-11(d) (LEXIS 2013). Petitioner presented affidavits of service indicating that it had mailed the notice of the hearing and charges to respondent at his address of record (Pet. Exs. 1, 2, 3, 4, 8). The evidence also showed that petitioner attempted personal service of the charges at respondent's address and a woman answered the doorbell but refused to open the door (Pet. Ex. 1). Based on this evidence, I found respondent in default and the hearing continued in his absence.

Petitioner relied on timekeeping records and testimony from respondent's supervisor (Pet. Ex. 6). The undisputed evidence showed that respondent was late for work, without authorization, on 116 occasions from September 4, 2012 to September 13, 2013; was AWOL on 33 occasions from June 11, 2013 to September 13, 2013; and has been continuously AWOL since October 8, 2013 (Pet. Ex. 6). Respondent's supervisor testified that she repeatedly counseled him about his poor attendance and warned him that it could result in disciplinary action. This testimony was corroborated by respondent's 2012 and 2013 performance evaluations and a memo that respondent's supervisor issued to him in April 2013 (Pet. Exs. 5, 7, 8). Despite those oral and written warnings, respondent's attendance became worse (Pet. Ex. 6).

Respondent's supervisor also testified that when she spoke to respondent about his poor attendance he usually offered no explanation. On occasion, he alluded to family or personal problems without offering any details or documents. His supervisor referred him to the Employee Assistance Program (EAP) and gave him forms regarding the Family Medical Leave Act (FMLA). It is unclear whether respondent went to EAP. He never filed for FMLA leave.

According to respondent's supervisor, respondent's poor attendance caused disruption in the workplace. Respondent is assigned to a warehouse that serves as the agency's central distribution center for medical supplies and other equipment. Because of respondent's chronic poor attendance, the warehouse is repeatedly short-staffed.

The charges should be sustained. Respondent's 116 occasions for lateness for the year ending September 13, 2013, about 66% of the days that he worked, were excessive. *See Human Resources Admin. v. Krisilas*, OATH Index No. 931/11 at 11 (Dec. 30, 2010), *aff'd* NYC Civ. Serv. Comm'n Item No. CD 11-69-A (Sept. 22, 2011) (19 latenesses in one year deemed excessive); *see also Office of Comptroller v. Nieves*, OATH Index No. 962/04 (Oct. 29, 2004) (35 latenesses within twelve months deemed excessive).

Respondent's 33 occasions of AWOL from June 11 to September 13, 2013, when he only worked one full week in three months, were also excessive. *See Health & Hospitals Corp. (Bellevue Hospital Ctr.) v. Cruz*, OATH Index No. 1162/03 at 5 (May 30, 2003) (18 absences in seven months, including five occasions of AWOL, deemed excessive given impact on workplace, failure to provide documentation, and pattern of absences occurring on or before a scheduled day off). And, as noted, he has been continuously AWOL since October 8, 2013.

FINDINGS AND CONCLUSIONS

1. Respondent was properly served with the charges and notice of hearing.
2. Respondent has been excessively absent and AWOL as alleged in the amended charges.

RECOMMENDATION

Respondent has been excessively late and AWOL. His failure to report for work is a fundamental form of misconduct that substantially impedes petitioner's ability to fulfill its mission. Accordingly, I recommend termination of respondent's employment. *See Fire Dep't v. Little*, OATH Index No. 1928/12 at 3 (July 11, 2012) (termination of employment recommended for excessive lateness and long-term continuous AWOL); *Dep't of Health & Mental Hygiene v. Saleh*, OATH Index No. 1038/03 at 3 (Feb. 24, 2003) (termination of employment recommended for long-term continuous AWOL).

Kevin F. Casey
Administrative Law Judge

March 3, 2014

SUBMITTED TO:

MARY TRAVIS BASSETT, M.D., M.Ph.
Commissioner

APPEARANCES:

KARRIE SHERIDAN, ESQ.
Petitioner's Attorney

No Appearance by or for Respondent