

Dep't of Social Services
(Dep't of Homeless Services) v. McCain

OATH Index No. 1141/23 (Mar. 21, 2023)

Petitioner established that respondent engaged in discourteous conduct toward her supervisor. Petitioner failed to establish that respondent's conduct was threatening. A three-day suspension without pay is recommended.

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

In the Matter of
**DEP'T OF SOCIAL SERVICES
(DEP'T OF HOMELESS SERVICES)**

Petitioner
- against -
VICTORIA MCCAIN
Respondent

REPORT AND RECOMMENDATION

TIFFANY HAMILTON, *Administrative Law Judge*

Petitioner, the Department of Homeless Services within the Department of Social Services ("DHS"), brought this employee disciplinary proceeding against respondent, Victoria McCain, under section 75 of the Civil Service Law. Petitioner alleges that respondent, a caseworker, engaged in discourteous and threatening conduct toward her supervisor on March 24, 2021 (ALJ Ex. 1).

A trial was held before me on February 8, 2023, via videoconference. Petitioner relied on documentary evidence and the testimony of two witnesses. Respondent presented documentary evidence, testified on her own behalf, and offered the testimony of one other witness.

For the reasons set forth below, I find that respondent engaged in discourteous conduct toward her supervisor on March 24, 2021. I also find that petitioner failed to prove that respondent's conduct was threatening. For the proven charge, I recommend that respondent be suspended for three days without pay.

ANALYSIS

The charges against respondent stem from a March 24, 2021 incident at the Barbara Kleinman Shelter in Brooklyn. Petitioner alleges that respondent engaged in discourteous and threatening conduct toward her supervisor, Eric Hall, in violation of Sections 1.1, 1.2, 1.3, and 4.1 of the DHS Code of Conduct. Petitioner has the burden of proving the charges by a preponderance of the evidence. *See Dep't of Correction v. Hall*, OATH Index No. 400/08 at 2 (Oct. 18, 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).

In support of the charges, petitioner relied on the testimony of Mr. Hall and respondent's immediate supervisor, Lawanda Brown. Mr. Hall is the Director of Programs for the Barbara Kleinman Shelter in Brooklyn. He joined DHS in 2006 and has been in his current title since December 2017 (Tr. 13-14). He has worked with respondent since July 2018, and was her direct supervisor during her first two years with the agency (Tr. 14).

Mr. Hall testified that respondent's work performance in March 2021 was subpar. She consistently failed to perform her duties, which included working closely with clients to develop a plan to move out of the shelter and secure appropriate housing (Tr. 15). She routinely provided inaccurate information regarding her clients and their housing assignments, needed constant reminders, and was ill-prepared for meetings (Tr. 18). Respondent's lack of preparedness was evident at a case review meeting held on March 24, 2021, which took place in a small conference room on the second floor of the shelter (Tr. 19, 71). Mr. Hall asked respondent to stay behind to discuss her performance (Tr. 22). Ms. Brown was present at this second meeting with respondent (Tr. 24). Respondent requested that her union representative also be present, and he arrived shortly thereafter (Tr. 22).

There was conflicting testimony among the witnesses about what took place next. Mr. Hall testified that he began the meeting by providing feedback about respondent's poor work performance (Tr. 24). He addressed her failure to prepare for meetings and reminded her of the responsibilities associated with her caseload (Tr. 23). According to Mr. Hall, respondent became “very loud, aggressive, and confrontational” (Tr. 28). She called him a liar, got up and walked to

the exit, turned around and yelled, “you really don’t know me, but you will see” (Tr. 28-29). Mr. Hall then asked her if she was threatening him, and she repeated “you really don’t know me, Eric, but you will see” and walked out of the room (Tr. 29).

Mr. Hall felt “uneasy and very upset” about respondent’s behavior (Tr. 29). He e-mailed respondent later that afternoon and addressed her lack of preparedness for the case review meeting (Pet. Ex. 2). He also wrote a conference memorandum on March 25, 2021, describing respondent’s “loud, aggressive, and confrontational” behavior at the performance review meeting, and noting that she stated, “You don’t know me but you will see. You really don’t know me Eric. You will see” (Pet. Ex. 3). Finally, he referred the incident to DHS’s Office of Disciplinary Affairs in a memorandum also dated March 25, 2021 (Pet. Ex. 6; Tr. 30-31).

Ms. Brown, a social services supervisor, testified that respondent called Mr. Hall a liar several times, and screamed “you don’t know me” and “you’re not going to disrespect me” (Tr. 42). She described respondent’s overall manner as “aggressive and a little intimidating” (Tr. 43). Ms. Brown wrote an e-mail to Mr. Hall on the afternoon of March 24, 2021, summarizing what took place at both the case review meeting and the subsequent performance review meeting. In the e-mail, she stated that respondent called Mr. Hall a liar, said “you really don’t know me” several times, and in response to the question, “are you threatening me?” replied, “you really don’t know me, Eric” (Pet. Ex. 7).

Respondent testified that Mr. Hall was condescending toward her at the case review meeting, and yelled at her in front of others (Tr. 71-72). He then asked the other caseworkers to leave the meeting and told her to stay behind (Tr. 72). He spoke about her work performance but denied her the opportunity to respond (Tr. 73). Respondent then rose from her seat and stated, “please don’t speak to me that way, because you don’t know my personality.” She proceeded to leave the conference room “because [she] couldn’t take him yelling” (Tr. 73). She denied calling Mr. Hall a liar, claiming she had no reason to because “it was his opinion on how he felt about [her] work” (Tr. 73). She also denied making any verbal threats. Respondent noted that she has a “heavy” voice but that she did not yell during the meeting (Tr. 75).

Gary Hawkins, a community coordinator at the Barbara Klein Shelter and a union delegate, testified on respondent’s behalf. He did not observe respondent threaten Mr. Hall at any point during the performance review meeting (Tr. 62-63). He did not hear her state, “you don’t know me, but you will see,” but noted that people were talking and moving their chairs, preventing him from being able to hear clearly (Tr. 63). He acknowledged that respondent called Mr. Hall a liar,

though not in a “threatening” or “boisterous” way (Tr. 55, 64). Mr. Hawkins did not recall respondent yelling during the meeting. He knows respondent “as a colleague and almost...as a friend” and explained that “she speaks loud on a regular basis...that’s how she speaks” (Tr. 64). He did not consider her tone to be threatening (Tr. 64). After the meeting, Mr. Hawkins sent a note to the union delegate, describing what took place. In the note, he indicated that respondent was upset but that she did not “use any threatening connotation” toward Mr. Hall (Resp. Ex. B).

Petitioner’s Code of Conduct prohibits “threatening or intimidating a supervisor,” and requires employees to be “courteous and professional in their contact with department clients, fellow employees and the public at all times” (Pet. Ex. 5). “Not every disagreement with a supervisor or expression of dissatisfaction has been deemed misconduct by this tribunal, even when voices are raised and emotions are vented.” *Human Resources Admin., v. Wong*, OATH Index No. 316/15 at 11 (Dec. 1, 2014), *aff’d*, NYC Civ. Serv. Comm’n Case No. 2015-0836 (Nov. 4, 2015). Consideration is given to the context, substance, tone, and duration of the remarks or behavior at issue. *Compare Dep’t of Transportation v. Khan*, OATH Index No. 1093/06 at 4 (Apr. 27, 2006), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 07-15-SA (Feb. 12, 2007) (misconduct found where employee called supervisor a “liar”) and *Human Resources Admin. v. Levitant*, OATH Index No. 397/04 at 18 (Sept. 7, 2004), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 06-59 (May 2, 2006) (misconduct found where employee approached supervisor and said, “You don’t know who you are messing with. I will hurt you”), *with Human Resources Admin. v. Bichai*, OATH Index No. 211/90 (Nov. 21, 1989), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 90-54 (June 15, 1990) (employee’s loud arguing and refusal to accept a transfer did not rise to the level of misconduct).

Here, the resolution of the charges rests, in part, on the credibility of the witnesses. In assessing credibility, this tribunal has considered “witness demeanor, consistency of a witness’ testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness’ testimony comports with common sense and human experience.” *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).

I found petitioner’s witnesses to be credible. Both Mr. Hall and Ms. Brown testified in a clear and straightforward manner, without any apparent motive to lie. Their testimony was consistent with one another and was supported by contemporaneous reports that they each wrote

after the meeting, summarizing what took place (Pet. Exs. 2, 3, 6). Both witnesses recorded that respondent called Mr. Hall a liar and spoke in a loud, aggressive manner (Pet. Exs. 2, 3, 6).

I also found respondent's witness, Mr. Hawkins, to be credible. Aspects of respondent's testimony, on the other hand, lacked credibility. Although she denied calling Mr. Hall a liar, her own witness, Mr. Hawkins, testified that she did. Also, her claim that she stated, "you don't know my personality," as opposed to "you don't know me," is at odds with the overall context of the meeting, and an unlikely turn of phrase. Moreover, respondent's supposed reference to her "personality" was not corroborated by any witness or contemporaneous documents.

Despite my doubts about parts of respondent's testimony, petitioner failed to prove by a preponderance of credible evidence that respondent's comments, "you don't know me" and "you will see," amount to a threat. Respondent's remarks, even if spoken in a loud or aggressive tone, were ambiguous. *See Dep't of Sanitation v. Bonafede*, OATH Index No. 2124/11 (Nov. 1, 2011), *adopted*, Comm'r Dec. (Dec. 8, 2011), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 12-38-M (July 27, 2012) (the comment, "[y]ou live in Staten Island right ... I will catch up with you out there," even if accompanied by pointing a finger, was ambiguous and did not constitute a threat). Although Mr. Hall stated that he felt "uneasy and very upset" at respondent's behavior, he did not testify that he felt threatened or concerned for his physical safety (Tr. 29). No one called security or asked respondent to leave the building (Tr. 45). There is no evidence that Mr. Hall reported the incident to his supervisor. Mr. Hall did not e-mail respondent about her behavior on the day of the incident; instead, he focused his post-meeting e-mail on her lack of preparedness. The remarks, even in response to the direct question, "are you threatening me?" were sufficiently vague that they fail to constitute an expressed or implied threat under the circumstances. *See Dep't of Social Services (Human Resources Admin.) v. Miles*, OATH Index No. 1432/20 (Dec. 10, 2020), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2021-0126 (Aug. 19, 2021) (no misconduct where the comment, "what would happen if I wild out on someone?" was "nothing more than an ill-advised expression of frustration" and thus failed to constitute a threat). Accordingly, this charge is not sustained.

With respect to the charge of discourtesy, I find that petitioner has met its burden of proving the allegation by a preponderance of the evidence. Three witnesses, including respondent's own witness, testified that respondent called Mr. Hall a liar in a loud tone of voice in front of others, before walking out of the performance review meeting. Even crediting respondent's assertion that she has a "heavy voice," the content and context of the statement amount to discourtesy.

Respondent's remarks were demeaning and provocative, and there are surely more professional ways of expressing disagreement. Indeed, this tribunal has found misconduct under similar circumstances. See *Dep't of Social Services (Human Resources Admin.) v. Y. M.*, OATH Index No. 571/22 (Jan. 11, 2023) (discourteous conduct found where respondent demeaned her supervisor by calling her a liar and referring to her as juvenile); *Health & Hospitals Corp. (Columbia Goldwater Specialty Hospital & Nursing Facility) v. Mathias*, OATH Index No. 509/14 at 7 (Dec. 20, 2013), *adopted*, Exec. Dir. Dec. (Jan. 6, 2014) (finding that respondent was insolent and disrespectful when she demeaned her supervisor by calling her a liar); *Dep't of Transportation v. Khan*, OATH Index No. 1093/06 (Apr. 27, 2006), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD07-15-SA (Feb. 12, 2007) (same). Accordingly, the charge of discourteous conduct is sustained.

FINDINGS AND CONCLUSIONS

1. Petitioner proved that respondent engaged in discourteous conduct toward her supervisor on March 24, 2021.
2. Petitioner failed to establish that respondent used threatening language toward her supervisor on March 24, 2021.

RECOMMENDATION

Upon making these findings, I requested and received respondent's personnel abstract. Respondent has been employed by DHS since July 2018, and although her performance evaluation rating was "marginal," she has no prior disciplinary record. Petitioner sought a 15-day suspension without pay as a penalty for respondent's misconduct (Tr. 10). However, petitioner failed to prove one of the charges, and the proven misconduct was not so egregious as to warrant such a significant penalty.

This tribunal has generally recommended a penalty of three to ten days' suspension for instances of discourteous conduct toward a supervisor or co-worker by an employee with a minor or no disciplinary history. See *Dep't of Health and Mental Hygiene v. Pepple*, OATH Index No. 1505/20 at 11-12 (June 22, 2021) (three-day suspension for long-term employee with no disciplinary history who sent discourteous and unprofessional e-mails to a supervisor); *Dep't of Transportation v. Dhar*, OATH Index No. 2024/14 at 8 (July 3, 2014), *aff'd*, NYC Civ. Serv. Comm'n Item No. 2014-0757 (Nov. 25, 2014) (three-day suspension for long-term employee with minor disciplinary history who used discourteous and unprofessional language during an argument

with a co-worker); *Human Resources Admin. v. Germaine*, OATH Index No. 758/01 at 6-7 (Jan. 31, 2001) (four-day suspension for employee with no prior discipline who engaged in a loud and disruptive argument with a co-worker); *Dep't of Environmental Protection v. Berlyavsky*, OATH Index No. 1011/06 at 6-7 (Apr. 19, 2006) (five-day suspension for employee with no prior discipline who shouted angry, unprovoked accusations at his supervisor in front of others, disrupting operations); *Dep't of Social Services (Human Resources Admin.) v. Hamzat*, OATH Index No. 2248/19 at 6-7 (Sept. 11, 2019) (ten-day suspension for long-term employee with no prior discipline who behaved in a discourteous and disruptive manner).

Respondent is obligated by the agency's Code of Conduct to maintain courtesy and professionalism, even when she disagrees with a supervisor's feedback or directive. Respondent's discourteous behavior understandably caused her supervisor to feel uneasy and upset. However, the sole discourteous incident was brief in duration, confined to a conference room, and did not involve any use of profanity. Accordingly, I recommend a penalty of three days' suspension without pay.

Tiffany Hamilton
Administrative Law Judge

March 21, 2023

SUBMITTED TO:

MOLLY WASOW PARK
Acting Commissioner

APPEARANCES:

EMILY TONE-HILL, ESQ.
Attorney for Petitioner

JILL MENDELBERG, ESQ.
Attorney for Respondent