

Dep't of Correction v. Latty

OATH Index No. 737/04 (Mar. 19, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD05-24-SA
(Apr. 15, 2005).

Default proceeding. Termination is recommended where proof established that respondent has multiple and continuous absences from work without authorized leave since November 2002.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of

DEPARTMENT OF CORRECTION

Petitioner

- against -

VICTOR LATTY

Respondent

REPORT AND RECOMMENDATION

DONNA R. MERRIS, *Administrative Law Judge*

This is a disciplinary proceeding brought by the Department of Correction ("Department") pursuant to section 75 of the Civil Service Law. Respondent, Correction Officer Victor Latty is charged in multiple specifications with being absent without authorization (AWOL) (ALJ Ex. 1).

The hearing was conducted before me on March 19, 2004. Upon respondent's failure to appear, proper proof of service of the charges and notice of the hearing was submitted (ALJ Ex. 2) and testimony provided which established that respondent was personally served with notice of the instant proceeding (Tr. 7-9).¹ Such evidence established the jurisdictional prerequisites for finding respondent in default (Tr. 9). Upon finding respondent in default, the proceeding continued in the form of an inquest.²

¹The transcript of the proceeding is hereinafter referred to as, "Tr."

²Counsel for respondent's union appeared at the outset of the instant proceeding and represented to this tribunal that he had been unable to contact respondent and had not, therefore, been retained to represent respondent in this hearing. Accordingly, pursuant to this tribunal's Rules of Practice, section 1-11(D), counsel was relieved and did not participate in the hearing

EXCERPTED FROM TRANSCRIPT OF PROCEEDINGS HELD ON MARCH 19, 2004

MR. deARMAS: All right. I guess before I sum up, if I may, I'd like to renew my application which I made prior to this witness coming on the stand, conforming charges to the proof given the circumstances I mentioned earlier?

ALJ MERRIS: All right. DR#352/03, which states that the Respondent was AWOL from May 29, 2003 to August 5, 2003, the evidence shows -- the credible evidence shows that the Respondent was AWOL from May 29, 2003 to October 9, 2003, at which time he did report to the Health Management Division. This charge is hereby conformed. The date August 5, 2003 is changed to October 9, 2003...

ALJ MERRIS: Thank you. All right. I'm prepared to make my report and recommendation to the Commissioner on the record today, Mr. DeArmas.

MR. deARMAS: Okay.

ALJ MERRIS: I would just note at the outset that this, the following will constitute my report and recommendation. However, I do reserve the right that when the transcript of this proceeding is presented to me, I may do some minor editing.

MR. deARMAS: Yes, Your Honor.

ALJ MERRIS: Although I will not certainly change the substance of that document. As noted earlier, the credible evidence and the testimony of Officer -- Captain Vaca, V-a-c-a, was sufficient to satisfy the jurisdictional prerequisites for finding Officer Latty, the Respondent in this matter in default of today's proceeding and I did so. And we proceeded in absentia.

DR#285/03, charges that this Respondent was absent without leave and that he failed to report for his scheduled tours of duty on May 14, 15, 16 and 17, of 2003. The evidence as attested to by Captain Parker and shown in the documents provided to me and kept in the regular course of the Department's business, specifically Petitioner's 6 and 7, indicate that this Respondent was in fact not present for his scheduled tour. Respondent did not call, did not report and provided no evidence to the Department as to his failure to appear and was not granted leave for those days. Accordingly

that specification that Respondent was absent without leave from May 14 through May 17, 2003, is sustained.

DR#173/03, charges that the Respondent requested on March 15, 2003 and was denied, time off for personal emergency and thereafter failed to report for his duty, is also sustained as shown by the evidence of Captain Guillbeaux, that the Respondent called and asked for personal emergency leave. According to the Department procedure that emergency leave was denied, primarily because the Respondent called too late. The Respondent was instructed to report within one hour and he failed to do so and made no contact with the Department. Accordingly, DR#173/03 is sustained.

DR#836/2002, charges again that the Respondent was absent without leave from November 25, 2002 through November 28, 2002 and on December 1, 2002. Again, Petitioner's evidence and testimony establish that this in fact was the case as illustrated by the Tour Certification Sheets for those days. The Respondent did not report, did not call in, was not granted leave for those days. Accordingly, #836 of 2002, is sustained. DR#63 of 2003, that Respondent on December 20, 2002 failed to appear for a scheduled appointment at the Health Management Division is similarly sustained. The Department's evidence indicates that Respondent is an employee who has been placed on chronic sick status, because he called in sick more than 12 times in a calendar year, or within a year. This respondent was required to come to HMD on the day that he called in sick. On December 20, 2002, Respondent called in sick. He instructed to report to the Health Management Division pursuant to the procedure by 1600 hours, I believe that's 4:00 p.m., is that right?

MR. deARMAS: Correct, Your Honor.

ALJ MERRIS: And he had two and a half hours to get to the Health Management Division and failed to do so. Accordingly, 63/2003 is sustained.

DR#286/03 charges that Respondent was absent without leave on May 8, 9, 10 and 11 of 2003. And similarly, those charges have been sustained. I note, Mr. deArmas, that there's some overlap from May 9, 2003 when the Respondent called in sick and failed to appear, right?

MR. deARMAS: Right.

ALJ MERRIS: So from May 9, 10 and 11, well he had called in sick on May 9, he was not granted -- the Department takes a view that he was AWOL, because he did not appear at HMD on those days, is that correct?

MR. deARMAS: That's correct, Your Honor.

ALJ MERRIS: All right. And Ms. Leary testified that the Respondent did not appear at HMD as he was required to do on those dates.

MR. deARMAS: Correct.

ALJ MERRIS: Accordingly, DR#286/03 is sustained, that Respondent was absent without leave on May 8, 9, 10 and 11 of 2003. Now, during that period in May of 2003, it's charged in DR#352/03 that Respondent was required to report to the Health Management Division on May 29, 2003. And according to the testimony of Ms. Leary, May 29, 2003 was the date to which Respondent was to return to duty and in order to do that he had to report first to the Health Management Division. Respondent failed to do so, according to Petitioner's Exhibits 14 and 15 and the testimony of Ms. Leary, which I found to be credible. Because Respondent did not report to duty on May 29, 2003, he was placed in AWOL status and taken off sick leave and he continued to be AWOL to October 9, 2003, at which time the evidence establishes that he did report to HMD. Accordingly, DR #352/03 has been sustained.

MR. deARMAS: Your Honor, I'd like to if I may, I'd actually overlooked part of the overlap. I would like to if I may at this juncture, just withdraw the charges, just to avoid issues on Appeal pertaining to May 9, 10, and 11. I know the officer had an obligation to report to HMD on the 9th, which he did not comply with, did not appear for HMD and there were -- in fact, did not appear at HMD for several months from that date on. But just because of the fact that there may be some technical reason why he may have been carried at some point as sick for those days, despite his failure to appear. And in light of the fact that we think the Agency has, or it is our position that we have more than sufficient grounds upon which to request the penalty recommendation which we asked for. And in the interest of avoiding any appealable issues, I would like to withdraw the specifications 2, 3 and 4, of Petitioner #286/03.

ALJ MERRIS: All right.

MR. deARMAS: Okay.

ALJ MERRIS: I'll grant your motion. So for DR#286/03, the charges that the officer failed to report on May 8, 2003, only. Is that correct?

MR. deARMAS: Yes, Your Honor, thank you.

ALJ MERRIS: Now on #63/2003, did I address that one?

MR. deARMAS: You did, Your Honor.

ALJ MERRIS: I did, okay. So that's each of the charges.

MR. deARMAS: Correct.

ALJ MERRIS: Mr. deArmas has provided me with history, disciplinary history and Personnel history of the Respondent, Mr -- .Officer Latty. Officer Latty was appointed as a Correction Officer on August 3, 1989. And he has a prior disciplinary record starting in May of 2002, there were some time and leave violations, which resulted in the loss of a total of eight vacation days. In 1995, Officer Latty was suspended for 15 days for conduct unbecoming. And in 2002, again he was suspended for 40 days. I believe Mr. deArmas, directive 2262 and rule and reg 3.05.100 has to do with time and leave, is that correct?

MR. deARMAS: Yes, Your Honor.

ALJ MERRIS: So he is already been suspended for 40 days for time and leave violations, is that right?

MR. deARMAS: Yes, Your Honor.

ALJ MERRIS: In 2002 and 2003, the Respondent has extensive sick leave use. As indicated in the report, this Respondent has had difficulty at least since 2000, reporting to work. He has not come forward in any of these proceedings to tell us why or to defend any of these allegations. In view of the fact that the absence without leave was extensive from May through October of 2003, at least through October 9 of 2003, and Respondent has not come forward to explain his absence, it does not appear that continued suspensions would serve to remedy this behavior. Clearly the absences affect the Department, the Department's ability to fulfill their function. So I find that the charges under this oath index number have been sustained to the extent noted. And I find also, that this conduct, this fundamental form of misconduct cannot be tolerated by the Department, and recommend to the Commissioner that Officer Latty be terminated from his position. This is the essence of my report and recommendation. As I indicated to you earlier, Mr. deArmas, I may make some edits in the transcript.

MR. deARMAS: Understood, Your Honor.

ALJ MERRIS: When it is returned to me, I'll provide you and the Law Firm and Mr. Latty with a copy.

MR. deARMAS: Thank you so much, Your Honor.

ALJ MERRIS: Thank you. This matter is closed.

Donna R. Merris
Administrative Law Judge

SUBMITTED TO:

MARTIN F. HORN
Commissioner

APPEARANCES:

ORBEIN DEARMAS
Attorney for Petitioner

KOEHLER & ISAACS LLP
Attorneys for Correction Officers Union
By: RUDY BEHRMANN, ESQ.

No Appearance by Respondent