Dep't of Education v. Brust

OATH Index No. 2280/07, mem. dec. (Nov. 7, 2007)

On motion for reconsideration, ALJ adheres to prior memorandum decision and order setting pre-trial and trial schedule and resolving discovery disputes.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF EDUCATION
Petitioner
-against-
CRAIG BRUST
Respondent

MEMORANDUM DECISION

JOAN R. SALZMAN, *Administrative Law Judge*

Upon receiving my memorandum decision and order dated November 2, 2007 (the "Decision"), respondent moved via email on November 5, 2007, for reconsideration of two aspects of that decision and submitted a competing "proposed order," which I ruled via email was duplicative and unnecessary for the reasons set forth in detail in my email to counsel for the parties on November 5, 2007, which is incorporated herein by reference. I afforded counsel for petitioner time to respond in writing to the motion for reconsideration and he filed an email response today.

I have reconsidered the Decision in light of respondent's arguments, and find that he has presented nothing new that would impel me to modify the Decision. In essence, respondent's counsel is rearguing the same points already argued before me at the November 1, 2007 discovery conference, which is the subject of the Decision. Although he cites a case that was not previously cited in conference, it is not new law, and is in line with the authority I cited in the Decision. "This tribunal has stated that a motion to reargue, addressed to the discretion of the judge, is designed to afford a party an opportunity to establish that the judge overlooked or misapprehended relevant facts or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to the unsuccessful party to argue once again the very questions previously decided." *Police Dep't v. Edison*, OATH Index No. 1451/07, mem. dec., at 2 (Mar. 15, 2007). Respondent is attempting to reargue the very questions previously presented and decided. There is no suggestion that I

misapprehended any facts.

Most of respondent's timely requests for documents were granted, at least in part, as indicated in my Decision. His counsel takes issue with two aspects of the Decision: (1) the denial of evidence of all prior disciplinary action by the Department against employees other than respondent in the last five years, and (2) the stipulated mootness of his belated document requests that were served after the September 19, 2007 discovery cut-off, a date I had ordered to be the date for completion of all discovery, except as to discovery disputes that were to be brought to my attention at the November 1, 2007 discovery conference. In addition, respondent's counsel seeks to exclude agency audiotapes that he says are inaudible in parts, an issue that neither side raised during the lengthy discovery conference, although the issue had arisen previously via email in September.

As to evidence of other claims of harassment not involving respondent, respondent's counsel asserts that he argued at the conference that he was "seeking by the discovery requests to find out how the Department of Education has interpreted facts and what they have considered to be violations of the laws mentioned above. I further argued that we had a right to see what has been determined as significant misconduct, harassment etc. by prior cases and prior fact patterns." As I ruled at the conference, the allegations in the case before me must be evaluated in terms of the evidence of the charges and the defenses thereto, but, according to our case law, respondent does not have the "right" to put on evidence concerning misconduct or harassment other than that charged here. In denying respondent's request for irrelevant material, I ruled in the Decision that "[r]ecords of discipline of other custodial engineers are beyond the scope of this administrative proceeding," citing, *e.g.*, *Dep't of Education v. Halpin*, OATH Index No. 818/07, at 20 (Aug. 9, 2007). Respondent's reference to *Department of Environmental Protection v. Egonu,* OATH Index No. 1944/07 (July 24, 2007), does not signal any change in the controlling law. *Egonu* stands for the same proposition as does *Halpin:*

> [I]t is well established that a defense of selective prosecution is unavailable at an administrative trial. "No selective enforcement defense lies in any forum unless the selective enforcement alleged is based on constitutionally suspect criteria, and even then, the defense does not lie in the administrative forum, but only upon judicial review of any adverse administrative determination."

Egonu, OATH 1944/07, at 8 (citation omitted). To burden the record in this case with discovery of

material of every other misconduct and harassment charge brought by the Department in the last five years would not lead to the discovery of admissible evidence, would exceed the scope of this OATH proceeding, and would be contrary to the applicable principles of law that control the concept of relevance in this proceeding. In *Egonu,* which involved false entries on timesheets and electronic time devices recording employees' attendance at work, Judge Rodriguez ruled that respondent's counsel there "was advised throughout the trial that the swipe history reports relating to other employees were being admitted to the extent that they purport to show that the clock or the card access system was flawed, not to establish a defense of selective prosecution." *Id.* There is no similar factual issue as to a possible mechanical malfunction in this case, and no reason to modify the Decision on this point of law. Our decisions on this point are consistent with decisional law of the courts. *See, e.g., Bell v. New York State Liquor Auth.*, 48 A.D.2d 83, 84, 367 N.Y.S.2d 875, 876 (3rd Dep't 1975) ("In our view . . . the hearing officer and Special Term properly refused to permit appellants to develop the defense of discriminatory selective enforcement at the administrative hearing level. Such questions must be submitted to a judicial tribunal").

Although respondent's counsel argued in a conference call I conducted with both counsel today that he is not seeking evidence that goes to the defense of "selective prosecution," but rather wants to be able to say what facts have led to findings of sexual harassment or rejection of such charges in the past, the material sought is the same and the argument amounts to the same selective prosecution defense, which is not viable here. This is a matter for legal research, not discovery and proof. Even if respondent were to show that other employees were not found liable in other circumstances, those outcomes would not be relevant to liability here. The Department bears the burden of proof by a preponderance of the credible evidence; it must prove that respondent is liable for the particular charges alleged here, and he must defend himself as to the specific charges in this case.

Moreover, as I said in the November 1 conference, the Department's decisions in prior cases are in the public domain and available for legal research. On respondent's counsel's request, Mr. Muallem provided references to, and I printed and supplied to respondent's counsel, the website addresses where such prior case law is available to the public at no cost, for respondent's counsel's use in guiding his client and presenting arguments to the tribunal.

For all of the foregoing reasons, I adhere to the Decision and decline to modify it on the

question of the requests for evidence of prior misconduct and harassment charges brought and interpreted by the Department in other matters.

As for respondent's new assertion that his client will be prejudiced if his belated discovery demands are not permitted, I wrote to the attorneys for the parties on November 5, 2007, that the late requests were treated as moot at the November 1 conference, and, as respondent's counsel himself conceded, the new requests largely duplicated his timely requests. Nonetheless, on November 5th, I directed the attorneys in my email to confer with each other in good faith, as required by the Decision, to attempt to come to agreement as to whether the Department would voluntarily produce any documents that respondent is now contending he must have to prepare for the hearing lest his client be prejudiced. Following my instructions, it appears that counsel have come to agreement on the late requests and spent a productive hour and a half together on the telephone on November 6, 2007. Without waiving its position that the requests filed after September 19, 2007, were late, the Department has agreed to respond to those requests in advance of November 27, 2007, and has supplied respondent's counsel via email today with a written response including a paragraph-by-paragraph response to the most recent requests. The requests for additional documents by respondent have been addressed by counsel and agreed upon between them, following my decision to adhere to my ruling on selective prosecution evidence, as I indicated in the conference call today. Given that the Department has agreed to supply particular additional documents requested by respondent on September 21 and October 29, 2007, as set forth in the email today from Victor E. Muallem, Esq., counsel for the Department,[1] and as counsel for both sides indicated in today's conference call, the parties have resolved all outstanding issues with respect to the additional documents sought by respondent, and, therefore, I find this aspect of respondent's motion moot.

[1] For purposes of having a clear record, I note that as to respondent's October 29, 2007 Particularized Discovery Requests, the Department's responses are as set forth in Mr. Muallem's email of today, with the following clarifications made in today's conference call. Request Nos. 1 and 2 are withdrawn by respondent's counsel. Raphael F. Scotto, Esq., counsel for respondent, agreed with Mr. Muallem's response to Request No. 3 that such personnel files are maintained by custodians and not the Department. The parties agree that requests Nos. 4-20 are mooted by my ruling that selective enforcement is beyond the scope of this proceeding. As to Request Nos. 21 and 22, Mr. Muallem indicated that he knows of no documents other than those he has already produced. As to Request No. 23, Mr. Muallem added that the Department does not have access to or control of the complainant's personnel file, that it was respondent who hired her, and that she worked only in one school, such that respondent has knowledge of her personnel history; this request was rendered moot.

Finally, in the conference call held this afternoon, counsel for both sides stipulated that questions of audibility of the tape recordings can be reserved for trial.

In sum, I adhere to the terms of the Decision as noted above, and congratulate counsel for their response to the Decision and my November 5th email and the cooperation they have shown as to the various matters set forth in the email from Mr. Muallem today, as discussed in detail with Messrs. Muallem and Scotto in the conference call with me today.

So ordered.

Joan R. Salzman
Administrative Law Judge

Dated: November 7, 2007

APPEARANCES:

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