

Dep't of Probation v. Dixon

OATH Index No. 156/11 (Nov. 30, 2010)

Petitioner demonstrated that probation officer engaged in a confrontation with police officers, acted in a manner to discredit the agency, failed to notify the agency of her conviction, lost her identification, and has been absent without leave. Termination from employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of

DEPARTMENT OF PROBATION

Petitioner

-against-

SHERON DIXON

Respondent

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORGNIOTTI, *Administrative Law Judge*

This disciplinary proceeding was referred by the Department of Probation pursuant to Section 75 of the Civil Service Law. The Department alleges that Sheron Dixon, a probation officer, engaged in a physical confrontation with police officers during which she used profanity, spat on them, and was arrested; failed to notify the Department of her arrest; pled guilty to disorderly conduct and failed to notify the Department of her conviction; and lost her Department identification and failed to notify the Department of the loss. In a separate set of charges respondent is charged with being absent without leave since May 11, 2010 (ALJ Ex. 1).

A hearing was held on September 14, 2010. During opening statements, counsel for respondent alleged that respondent suffers from a disability and that she needs the help of a mental health professional (Tr. 8). Petitioner was allowed to present its witnesses and I granted respondent's request for a continuance until October 15, 2010, so that she could be evaluated and a determination made whether this matter should be considered under section 72 of the Civil Service Law (Tr. 70). Prior to the continued trial date, respondent's counsel advised that no medical evidence would be presented.

In support of the charges petitioner offered documentary evidence and the testimony of Ms. Melford, a supervisor with the Department's Intel Unit, Ms. Manns-Nelson, the Director of Bronx Juvenile Operations, Mr. Vogel, the Director of the Advocate's Office, and Police Officer Brannigan. Respondent testified on her own behalf and offered documentary evidence. The record was held open until October 28, 2010, for the filing of post-hearing submissions.

For the reasons below, I find that petitioner sustained all but two of the charges. I recommend that respondent be terminated from her employment.

ANALYSIS

Charges I, II, and III

Petitioner alleges that respondent: (I) was arrested in violation of Department rules; (II) used profanity towards police officers during an investigation, spat on an officer who was on her property, got into a physical struggle with the officers when they tried to arrest her, and spat on them after being arrested; and (III) failed to notify the Department of her arrest.

Petitioner's burden in this administrative proceeding is to prove misconduct by a preponderance of the credible evidence. *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 08-33-5A (May 30, 2008). I find that Charges I and III should be dismissed but that Charge II should be sustained.

The undisputed evidence demonstrated that respondent was arrested on August 7, 2009, and charged with violating New York Penal Law sections 120.05(3) (assault in the 2nd degree, with intent to prevent a police officer from performing his lawful duty, a felony), 195.05 (obstruction of governmental administration in the 2nd degree, a misdemeanor), and 205.30 (resisting arrest, a misdemeanor) (Pet. Ex. 1).

However, being arrested and charged with a crime is not misconduct independent from the acts that underlie the arrest. *Dep't of Environmental Protection v. Torres*, OATH Index No. 194/01 at 5 (Sept. 27, 2000). "It is well settled that an arrest, standing alone, is not punishable as misconduct, particularly where the actions which lead to the arrest are separately charged." *Health & Hospital Corp. (Lincoln Medical & Mental Health Ctr.) v. Jiminez*, OATH Index No. 1381/07 at 2 (June 21, 2007) (citations omitted). Thus, Charge I should be dismissed.

In the second charge, petitioner alleges that the underlying acts which led to the arrest constitute misconduct. I agree.

Although respondent resolved her criminal charges by pleading guilty to a reduced charge of disorderly conduct, she did not admit any of the acts in her plea allocution (Pet. Ex. 7). *See Dep't of Correction v. Breland*, OATH Index No. 128/85 at 5-6 (May 14, 1985) (collateral estoppel effect not given to a conviction based upon a guilty plea to a reduced charge). Thus, resolution of Charge II rests on the respective credibility of Officer Brannigan and respondent, who gave different versions of the incident.

Officer Brannigan has been a police officer for nine years (Tr. 79). According to his testimony and the sworn criminal court complaint, Officer Brannigan was driving in an unmarked police car on August 7, 2009, at 10:50 p.m., when he heard shots fired. He, along with a captain and a sergeant, got out to investigate (Pet. Ex. 6; Tr. 95, 112). The officers were in plain clothes and Officer Brannigan had his shield around his neck (Tr. 97, 112).

Officer Brannigan testified that he saw two people running and that it appeared one of them tossed something into the yard of a private residence (Tr. 80). While Officer Brannigan was in the yard conducting a search, he heard someone (respondent) inside the residence shout "Fuck 5-0" approximately three times. Officer Brannigan testified that he observed respondent standing in the first floor window and that she then stated, "Get the fuck out of my yard!" When Officer Brannigan advised that he was a police officer conducting an investigation, respondent spat out the window and into his face (Pet. Exs. 6, 2; Tr. 80, 81, 94-96).

Officer Brannigan testified that the sergeant asked if respondent had just spat on him and he and the sergeant went to open the front door. The captain climbed through the window where respondent had been standing and the sergeant and Officer Brannigan followed (Tr. 92-93, 100). The room was dark. When respondent swung her fist at the captain, the sergeant grabbed her and took her to the ground. At that point Officer Brannigan tried to handcuff respondent but she resisted by kicking, flailing, and spitting at the officers (Tr. 82, 101). Eventually, respondent was handcuffed and transported to the 46th Precinct (Pet. Exs. 2, 1; Tr. 82, 85, 93). Officer Brannigan testified that respondent seemed intoxicated and was seen by Emergency Medical Services after being arrested (Tr. 82, 105, 109-10). Officer Brannigan subsequently took respondent to the hospital to get hospital shoes because she was barefoot when arrested. While she was being transported, respondent called Officer Brannigan "red" and "baby" and made various statements including that she was a parole officer, the "handcuffs feel good," and she "spit on the window, but not on [him]" (Tr. 83-84). Officer Brannigan wrote these statements

down in his memo book (Tr. 83). Officer Brannigan testified that he was out of work for a week to take HIV medication because respondent had spit in his face (Tr. 83, 86, 97).

Respondent testified that she was home watching television around 10:00 p.m. She had drunk two or three beers and spat out the window without knowing that there were officers outside. The next thing she knew there was a noise at her door and then people, who did not identify themselves as officers, came into her home. She was tackled and pushed violently to the floor, handcuffed, and transported to central booking. Respondent denied stating “Fuck 5-0” or striking the officers and testified that she was bruised on her face, back, arm, and stomach in the altercation (Tr. 111-14, 120).

In determining credibility, this tribunal has looked to “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. 4, 1998), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 98-101-A (Sept. 9, 1998). Officer Brannigan was a credible witness who gave straightforward testimony that was consistent with his 2009 affidavit, the arrest report, his memo book, and his conversation with Ms. Melford (Tr. 16; Pet. Exs. 1, 2, 3, 6). On the other hand, respondent was not credible. Her testimony was often rambling, confusing, and at times nonsensical. Officer Brannigan’s more credible account supports a finding that respondent used profanity, spat on the officers, and resisted arrest.

Respondent’s claim that she did not know police officers were in her yard was not plausible. Rather, I credit Officer Brannigan’s testimony that he had his shield around his neck and that someone said “Fuck-5-0” three times while he was searching the yard. Officer Brannigan stated that “5-0” is a nickname for police and I credit his assertion that it was respondent who said, “Fuck 5-0” three times (Tr. 80, 81, 94). Thus, it is reasonable to conclude that respondent was cursing because she knew there was a police officer in her yard. Moreover, I credit Officer’s Brannigan’s testimony that he identified himself as a police officer when respondent told him to get the “fuck” out of her yard and that she intentionally spat on him in response. Respondent’s explanation that she just happened to spit out the window defied belief. During respondent’s opening statement, counsel stated that the reason respondent was spitting was that she had smoked two cigarettes in succession and that instead of using a tissue she spat out the window (Tr. 6). However, respondent made no mention of needing to spit because of

cigarettes and Officer Brannigan credibly testified on cross-examination that he did not smell cigarette smoke when he entered respondent's house (Tr. 97). I further credit the officer's testimony that respondent resisted arrest by flailing, kicking and spitting at the officers during the struggle. Respondent admitted that she had been drinking prior to the incident. Given her hostility towards the police when they were in her yard, it seems more likely than not that her anger escalated when they came into her house. Thus, Charge II is sustained.

In Charge III petitioner alleges that respondent failed to notify the Department of her arrest. The code of conduct requires that employees notify their supervisor and the Inspector General within 24-hours of an arrest (Pet. Ex. 8).

Ms. Manns-Nelson testified that on Monday, August 10, 2009, she received an e-mail from respondent's supervisor, Ms. Stridiron stating:

PO Sharon [sic] Dixon called-informed that she will not be in today. On Fri. (8/7/09) evening, a police officer came to her house and accused her of assaulting him. He body slammed her and now she is badly bruised. She may not be in until Wed.

(Tr. 40-41; Resp. Ex. A). Respondent testified that she called Ms. Stridiron on Monday morning and notified her that she had been arrested (Tr. 120). Ms. Stridiron did not testify.

There was undisputed evidence that respondent notified her supervisor that she had been in an altercation with a police officer and was accused of assaulting him. While respondent was not a credible witness, petitioner's hearsay evidence corroborated respondent's testimony that she told her supervisor that she had been charged with a crime. The fact that the supervisor did not use the word "arrest" in her e-mail (Tr. 27, 41-42) was inadequate to rebut respondent's sworn and largely corroborated statement. Thus, Charge III should be dismissed.

Charges IV and V

On May 10, 2010, the criminal charges against respondent were resolved by her plea to disorderly conduct, a violation, for which she was sentenced to a conditional discharge (Pet. Ex. 7). Petitioner alleges in Charge IV that by pleading guilty, respondent engaged in conduct that brought the Department into disrepute and was prejudicial to good discipline.

Generally, a guilty plea to disorderly conduct, standing alone, is insufficient to establish misconduct. *Human Resources Admin. v. Williams*, OATH Index No. 1114/05, at 14 (Sept. 21, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD06-60-SA (May 2, 2006). Whether a plea

brings discredit on an agency must be considered on a case by case basis. *Dep't of Correction v. Salmon*, OATH Index No. 311/93 at 10 (Mar. 4, 1993). Convictions which are fundamentally inconsistent to an agency's mission may be considered misconduct which brings the agency into disrepute. *Breland*, OATH 128/85 (conviction for disorderly conduct may bring discredit upon an agency when the agency is engaged in enforcing the law); *see also Admin. for Children's Services v. Solomon*, OATH Index No. 304/06 at 6 (May 15, 2006) (where an agency's function includes protecting children from violence, conviction for harassment constitutes misconduct). In determining whether a conviction constitutes misconduct, this tribunal has also looked to whether there is a sufficient nexus between the underlying act and respondent's civil service position. *Dep't of Correction v. Parrish*, OATH Index No. 1386/03 at 2 (Aug. 6, 2003), *adopted*, Comm'r Dec. (Sept. 23, 2003), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 04-37-SA (July 8, 2004).

Here, respondent is a probation officer who works in the Bronx Family Court. Probation officers are peace officers, Crim. Proc. Law § 2.10, vested with considerable authority and charged with preservation of the peace. *Parrish*, OATH 1386/03 at 2. As such, respondent has a duty to uphold the law and to set a good example for probationers in the Bronx Family Court. Her plea to disorderly conduct, even though it related to an off-duty incident, was inconsistent with the Department's law enforcement mission to supervise people on probation so that they can move out of the criminal justice system and was conduct unbecoming a peace officer. Therefore, the guilty plea was conduct of a nature tending to bring discredit upon the Department and this charge should be sustained.

In Charge V petitioner alleges that respondent failed to notify her supervisor and the Inspector General of the disposition of criminal charges, and failed to provide an official certificate of disposition as required by the Department's Code of Conduct (Pet. Ex. 8). The proof was undisputed. Ms. Manns-Nelson testified that she did not receive either a communication about the disposition or a certificate of disposition from respondent (Tr. 34-35). Mr. Vogel also testified that the Advocate's office did not receive any information regarding the disposition of respondent's charges; nor had it received a certificate of disposition (Tr. 53-54). Respondent admitted that she did not inform the Department of the disposition of her case (Tr. 117). Her excuse that she had no duty to report the disposition until she sought reinstatement (Tr. 133) was inaccurate and irrational. Thus, Charge V should be sustained.

Charge VI

In Charge VI petitioner alleges that respondent lost her badge and identification and failed to report them lost as required. The Department's Code of Conduct specifies that an employee who loses a badge or identification must "immediately" notify a supervisor of the loss, and file a police report (Pet. Ex. 8).

On August 17, 2009, respondent filed a written request for a leave of absence to attend to the criminal charges (Tr. 31, Pet. Ex. 4). That same day Ms. Manns-Nelson granted the request and instructed respondent to submit her shield, identification, keys and other personal items before going on leave (Tr. 33). Respondent turned over her body armor, pepper spray, and handcuffs (Pet. Ex. 5) but reported that she had lost her shield, identification, and keys on June 19, 2009, about 2 months earlier (Tr. 33-34, 130; Pet. Ex. 5). Ms. Manns-Nelson also testified that she never received a police report of the loss (Tr. 34-35). Respondent admitted that she lost her badge and identification and did not report it (Tr. 122, 131). Respondent's claim that her mother passed away two days before the property loss was not an excuse to the charge. Thus, Charge VI is should be sustained.

AWOL Charge

Respondent is charged with being absent without leave ("AWOL") since May 11, 2010. The proof is undisputed and this charge should be sustained.

A few days after her arrest, on August 17, 2009, respondent was granted a leave of absence to address her criminal charges. In her written request respondent stated, "I will return when the court matter is resolved" (Pet. Ex. 4). It is undisputed that the court matter was resolved on May 10, 2010, with her guilty plea and that respondent has not returned to work.

Respondent admitted that she has been absent since May 11, 2010. She claimed her absence should be excused because she thought she had to apply for reinstatement. As stated above, this excuse makes no sense. In fact, respondent did not apply for reinstatement or contact the Department about returning to work after May 11, 2010 (Tr. 65). Respondent's reinstatement defense was also inconsistent with her alternative excuse that she did not want to return prior to July 1, 2010, because that was near the anniversary of her mother's death (Tr. 121). It is notable that after July 1, 2010, respondent took no action to return to work. Even if respondent's excuses were credible, the Department's Code of Conduct requires that employees

be familiar with its rules and procedures (Pet. Ex. 8 at 4); *see also Dep't of Correction v. Gritten*, OATH Index No. 1116/04 at 7 (Aug. 2, 2004) (employees are charged with the knowledge of rules that have been properly published).

FINDINGS AND CONCLUSIONS

1. Petitioner failed to prove that being arrested was misconduct as alleged in Charge I.
2. Petitioner proved that respondent spit on police officers, used profane language, and resisted arrest as alleged in Charge II.
3. Petitioner failed to prove that respondent did not inform her supervisor of her arrest as alleged in Charge III.
4. Petitioner proved that pleading guilty to disorderly conduct was misconduct as alleged in Charge IV.
5. Petitioner proved that respondent failed to notify the Department of the disposition of the criminal charges as alleged in Charge V.
6. Petitioner proved that respondent lost her badge and identification and that she failed to report the loss to her supervisor or file a police report as alleged in Charge VI.
7. Petitioner proved that respondent has been absent without leave since May 11, 2010, as alleged in a separate set of charges.

RECOMMENDATION

Upon making these findings, I obtained and reviewed an abstract of respondent's work history for purposes of recommending an appropriate penalty. Respondent has been a probation officer since 1989. In 2008 she accepted a 14-day pay fine and a one-year probation for being absent without leave for an unspecified period of time. The Department Advocate seeks respondent's termination from employment.

Here, respondent has been AWOL for more than six months. In considering a penalty, this charge standing alone merits termination. Respondent's unauthorized absence is a fundamental form of misconduct which impedes the Department's ability to fulfill its mission and is deserving of termination as a penalty. *Dep't of Sanitation v. Moore*, OATH Index No.

1035/10 at 5 (Feb. 2, 2010) (termination for AWOL lasting over six months); *see also Dep't of Correction v. Toujague*, OATH Index No. 298/10 at 10 (Jan. 21, 2010) (termination for two month AWOL and three instances of being out of residence). Because respondent failed to present any mitigating circumstances surrounding her unauthorized leave and because this is her second AWOL in a two-year period, termination is warranted.

In addition, respondent's actions that led to her arrest and conviction for disorderly conduct provides an independent basis for termination.¹ Respondent's unprovoked attack on a police officer and her defiance of lawful authority directly reflects upon the Department's reputation as a law enforcement agency and respondent's position as peace officer. Respondent's failure to acknowledge any responsibility for her conduct and her claim that the arrest was "bogus" (Tr. 121), demonstrates a lack of insight and raises concerns about her fitness for a job where respect for the law enforcement is paramount. Because respondent's misconduct evinced a disrespect of law enforcement not compatible with her work as a probation officer, termination from her employment is appropriate. *Dep't of Correction v. Jenkins*, OATH Index No. 3070/09 at 18 (Dec. 16, 2009).

The additional charges of losing a badge and identification and failing to inform the Department of the disposition of the criminal charges provide further grounds to increase the penalty.

Despite respondent's long tenure, I find that the requested penalty is not so disproportionate to the sustained misconduct as to be shocking to one's sense of fairness. *Pell v. Bd. of Education*, 34 N.Y.2d 222 (1974). Accordingly, I recommend that respondent be terminated from her employment as a probation officer.

Alessandra F. Zorghiotti
Administrative Law Judge

November 30, 2010

¹ Because a civil service employee may not be punished twice for one instance of misconduct, to the extent Charges II and VI are duplicative, they will be treated as one charge for purposes of penalty. *Dep't of Finance v. Anderson*, OATH Index No. 1485/08 at 1 n.1 (May 6, 2008).

SUBMITTED TO:

VINCENT N. SCHIRALDI
Commissioner

APPEARANCES:

MICHAEL WRAY, ESQ.
Attorney for Petitioner

JOEL M. LUTWIN, ESQ.
Attorney for Respondent