Human Resources Admin. v. Grimes

OATH Index No. 1985/12 (Aug. 10, 2012)

Evidence established that respondent was intoxicated at work. Twenty-day suspension without pay recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
HUMAN RESOURCES ADMINISTRATION
Petitioner
-against-
LENNOX GRIMES
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner, the Human Resources Administration, brought this action against respondent, caseworker Lennox Grimes, under section 75 of the Civil Service Law. The charges allege that respondent reported for work under the influence of alcohol on February 6, 2012 (ALJ Ex. 1).

At the hearing on July 19, 2012, petitioner relied on documentary evidence and testimony from emergency medical technician Norman Scott; two co-workers, director Diana Lopez-Infante and supervisor Rachel Pelissier; and two private security guards, Diogenes Jimenez and Denise Young. Respondent testified in his own behalf and also offered documentary evidence.

For the reasons below, the charges should be sustained and respondent suspended without pay for twenty days.

ANALYSIS

The charges arise from allegations that respondent, a long-term agency employee, was intoxicated at work on the morning of February 6, 2012. To prevail, petitioner must show by a preponderance of the credible evidence that respondent committed misconduct. Civ. Serv. Law § 75(2) (Lexis 2012); *Dep't of Environmental Protection v. Ambrosino*, OATH Index No. 741/04 at 2 (Apr. 13, 2004). In assessing credibility, factors to be considered include: demeanor; consistency; supporting or corroborating evidence; and the degree to which testimony comports

with common sense. *See Dep't of Correction v. Hansley*, OATH Index No. 575/88 at 19 (Aug. 29, 1989), *aff'd sub nom. Hansley v. Koehler*, 169 A.D.2d 545 (1st Dep't 1991).

Petitioner prohibits employees from being intoxicated during working hours or on agency property. Executive Order 726, Code of Conduct for HRA Employees § III (25) (eff. Jan. 15, 2010). To prove intoxication requires more than vague innuendo or the detection of the odor of alcohol. *Human v, Resources Admin. v. Honey*, OATH Index No. 435/89 at 9-10 (Oct. 20, 1989). Instead, there must be "specific observations about respondent's physical condition, such as incoherence, slurred speech, stumbling or odd behavior." *Human Resources Admin. v. Adams*, OATH Index No. 342/02 at 4 (Jan. 16, 2002), *modified on penalty*, Comm'r Dec. (Feb. 25, 2002), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD03-41-SA (Apr. 11, 2003).

Here, petitioner met its burden by presenting clear and credible evidence. Petitioner's witnesses and compelling documentary evidence were more persuasive that respondent's vague, unsupported denials of wrongdoing.

Respondent's supervisor, Ms. Pelissier, recalled that a caseworker informed her, at about 10:30 a.m. on February 6, the morning after the Super Bowl, that respondent did not appear to be "acting right" (Tr. 25). Ms. Pelissier went to respondent's desk and saw him laughing, crying, and saying, to no one in particular, "She's beautiful" (Tr. 24-25). Concerned for respondent's well-being, Ms. Pelissier spoke to Ms. Lopez-Infante, who told her to contact Dr. Hudson, an on-site member of the medical review team (Tr. 25). Emergency medical technicians (EMTs) from the Fire Department arrived on the scene shortly afterwards (Tr. 28-30).

According to Ms. Pelissier, respondent was disheveled, his eyes were red, his pants were unzipped, and he was in no condition to work (Tr. 28, 30). Her recollection was that the EMTs asked respondent if he had been drinking and he replied that he had been "drinking during the weekend, during the football game" (Tr. 29). Respondent said that he wanted to go home but the EMTs convinced him to go to the hospital (Tr. 30).

A few weeks later, during a conversation about the side-effects of medicine, respondent handed Ms. Pelissier a newspaper article (Tr. 34, 36). At the hearing, Ms. Pelissier said that a March 2012 newspaper clipping that respondent offered in evidence looked like the article that he had showed her at work (Tr. 36). According to the article, the federal government had issued a warning that certain cholesterol-lowering drugs may raise blood sugar levels and cause

memory loss or diabetes (Tr. 36; Resp. Ex. A).

In a memo that she prepared on the day of the incident, Ms. Pelissier wrote that it appeared that respondent was intoxicated (Pet. Ex. 2). At the hearing, Ms. Pelissier again stated that it appeared respondent was drunk, but she conceded that she was uncertain and she acknowledged that she did not detect the odor of alcohol on his breath (Tr. 33, 38).

Ms. Lopez-Infante, who had minimal prior contact with respondent, recalled that he was disheveled, incoherent, and appeared drunk on February 6 (Tr. 11, 14-15). This was unusual, because respondent normally spoke very well and dressed neatly (Tr. 14). When the EMTs arrived, respondent initially refused to leave with them (Tr. 12-13). Ms. Lopez-Infante was particularly concerned that respondent had driven to work (Tr. 13-14, 19). In a memo she wrote that day, Ms. Lopez-Infante noted that respondent was "talking gibberish" and his eyes were "extremely blood shot" (Pet. Ex. 1).

One security guard, Mr. Jimenez, recalled that respondent's eyes were bloodshot, his speech was slurred, and he appeared intoxicated (Tr. 44-45, 49, 52-53). Mr. Jimenez recalled that, when the EMTs asked respondent whether he had been drinking, he replied, "Yeah, I drink. So what, is that illegal?" (Tr. 46). Asked if he had been drinking recently, he replied, "Yeah, I drank all weekend" (Tr. 46-47).

Mr. Jimenez testified that the EMTs told him that respondent was "definitely intoxicated" and they had to take him for "mandatory detox" (Tr. 47). When respondent said that he wanted to go home, the EMTs advised him that, because their initial diagnosis was that he was intoxicated they could not let him leave because he posed a risk to himself and others (Tr. 47). They told respondent that they had to take him to a hospital for observation (Tr. 47). When respondent refused to cooperate, the EMTs contacted the police department and officers arrived within minutes (Tr. 50). After the police arrived, respondent became more cooperative and the EMTs took him to a hospital (Tr. 51).

Ms. Young, another security guard, was more equivocal. She offered no opinion about respondent's condition, besides saying that he often talked in riddles and on this particular morning he was more erratic (Tr. 60, 62). He looked tired and was not himself (Tr. 63).

Mr. Scott, one of the two EMTs that responded, had little or no independent recollection of this incident (Tr. 70, 90). However, he introduced a pre-hospital care report that his partner

prepared on the day of the incident (Tr. 71-72; Pet. Ex. 4). The report, based on the EMTs observations and statements from respondent and others, was admissible as a business record and portions of the report based on respondent's comments were admissible as admissions by a party. Prince, *Richardson on Evidence* § 8-310, at 611 (Farrell 11th ed. 2008); *see also Smolinski v. Smolinski*¸ 78 A.D.3d 1642, 1645 (4th Dep't 2010) (party's admission to EMT, "I went off the road," admissible). Even if the document was not admissible on those grounds, it would be admissible at this tribunal where the strict rules of evidence do not apply. *See Human Resources Admin. v. Green*, OATH Index No. 3347/09 at 8 (Nov. 18, 2009). The report was highly reliable because it was prepared by a skilled, independent professional who had a duty to record observations.

According to the report, the EMTs arrived at the scene at 10:42 a.m. and took respondent to the hospital at 11:17 a.m. (Tr. 77; Pet. Ex. 4). Respondent's vital signs were within normal range and he denied taking any medications (Tr. 82, 84-85; Pet. Ex. 4). His co-workers reported that he appeared intoxicated and smelled of alcohol (Tr. 86; Pet. Ex. 4). The report also indicated that respondent had an unsteady gait due to intoxication, slurred speech, and alcohol on his breath (Pet. Ex. 4).

Based on their observations, the EMTs made a "presumptive diagnosis" that respondent was intoxicated (Tr. 87). Mr. Scott testified there was "no way" they would let respondent drive home because he posed a danger to himself and others (Tr. 89). Respondent's vital signs were normal and he did not appear to have any other injury (Tr. 90-91; Pet. Ex. 4). Thus, the EMTs did not suspect head trauma or any other medical condition (Tr. 90-91).

In his testimony, respondent denied that he was drinking at work or that he was intoxicated on the morning of February 6 (Tr. 104). He recalled reporting for work before 9:00 a.m. and sitting at his desk when Ms. Pelissier stopped by and asked if he was okay (Tr. 96). After he replied that he was fine, she said that he was mumbling or talking to his computer (Tr. 96). A security guard arrived and respondent again said that he felt all right but it seemed that there was a problem (Tr. 97). He recalled meeting with Dr. Hudson, who said that respondent was inebriated (Tr. 98-100). Respondent told the doctor that he had been out the night before and he took medication for his cholesterol that morning before coming to work (Tr. 101).

Conceding that he initially did not want to go with the EMTs to the hospital, respondent testified that he agreed to do so after the police arrive (Tr. 105). He said that he was at the hospital for six to seven hours (Tr. 107). And he claimed that a nurse or psychiatrist told him that she did not understand why he was at the hospital (Tr. 107). Respondent stated that a friend was with him at the hospital when this remark was made (Tr. 107). But respondent did not identify the friend or call the friend as a witness (Tr. 107).

Respondent denied that he was disheveled, that he was sluggish, or that he slurred his speech (Tr. 108-09). Due to a previous injury, respondent claimed that one eye appeared "little more red" than the other (Tr. 109). Asked if he consumed any alcohol before going to work on February 6, respondent testified, "Not that I remember" (Tr. 109). He said that he drank his last glass of wine "a little after" midnight but he did not have anything to drink from daylight until he got to work (Tr. 110). According to respondent, he drank three glasses of wine the night before this incident, finishing his last glass at the end of the football game (Tr. 102). He testified, "I would call it not partying, but enjoying the Super Bowl" (Tr. 102).

Respondent testified that he felt well enough to work. He believed that he may have had a physical or mental "breakdown" due to sciatica or all the people surrounding him. Or he may have had an adverse reaction from taking his cholesterol medication in the morning and drinking the previous night (Tr. 103-04, 106).

The eyewitness testimony from Ms. Pelissier, Ms. Lopez-Infante, and Mr. Jimenez, who all agreed that respondent appeared intoxicated, was sufficient to prove petitioner's case. Their testimony was also corroborated by the observations and actions of the EMTs. Through questioning and examining respondent, the EMTs ruled out other possible explanations, such as prescription medication or head trauma, and concluded that respondent was intoxicated. They were so concerned about his condition that they would not allow him to go home and they would not leave the scene without taking him to the hospital.

I also found Mr. Jimenez's detailed testimony to be particularly credible. He vividly recalled that respondent told the EMTs that he had been drinking "all weekend" (Tr. 46-47). That was consistent with the EMT report that respondent had the odor of alcohol on his breath and it undercut respondent's claim that he only had three glasses of wine.

Petitioner's witnesses did not appear to have any bias against respondent or any motive to lie. Indeed, most of petitioner's witnesses were sympathetic and did not want to say anything bad about respondent. For example, not all of the co-workers or security guards recalled smelling the odor of alcohol. But viewing the record in its entirety, the preponderance of evidence proved that respondent was intoxicated at work.

As Mr. Scott testified, a reaction to a prescription drug or a medical condition, such as diabetes, could conceivably cause some symptoms that resemble some signs of intoxication, including slurred speech or an unsteady gait (Tr. 92). But respondent offered no reliable evidence to support that defense. There was, for example, no hospital record or doctor's note attributing respondent's behavior to a medical condition or medicine. Moreover, the EMTs' observations and physical examination of respondent ruled out alternative theories. The most likely explanation for respondent's behavior is the one that he gave to the EMTs on February 6, 2012 -- he had been drinking all weekend.

The charge should be sustained.

FINDING AND CONCLUSION

Petitioner proved that respondent was under the influence of alcohol at work, as alleged in specification 1.

RECOMMENDATION

After making the above findings and conclusions, I requested and received a summary of respondent's personnel record. Petitioner hired respondent in 1988. He has no prior disciplinary record. Petitioner seeks a penalty of twenty days suspension without pay. That is appropriate.

Being under the influence of alcohol at work is a serious form of misconduct that generally results in a substantial penalty, especially if the employee has a disciplinary record. *See Dep't of Environmental Protection v. McGrath*, OATH Index No. 1111/95 at 10 (Mar. 24, 1995) (termination of employment recommended for on-duty intoxication and refusal to submit to testing, where employee had significant disciplinary history); *cf. Health & Hospitals Corp. (Kings County Hospital Ctr.) v. Ricketts*, OATH Index No. 535/03 at 9 (Mar. 27, 2003) (60-day

penalty for 20-year employee who was intoxicated while on duty, where employee had previously been suspended 30 days for other misconduct).

Petitioner's penalty request gave appropriate mitigating consideration to respondent's lengthy tenured and unblemished record. All available evidence suggests that respondent's misconduct was an aberrational act and entirely inconsistent with his normally professional behavior. Without condoning or excusing respondent's serious misconduct, the requested penalty is consistent with principles of progressive discipline and does not shock one's sense of fairness. *See Pell v. Board of Education*, 34 N.Y.2d 222, 234-35 (1974). Accordingly, I recommend that respondent be suspended without pay for twenty days.

Kevin F. Casey
Administrative Law Judge

August 10, 2012

SUBMITTED TO:

ROBERT DOAR
Commissioner

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