

Admin. for Children's Services v. M.S.

OATH Index No. 2054/16, mem. dec. (Jan. 11, 2017)

Employee discipline charges removed from the OATH calendar without prejudice because respondent is on leave of absence from Agency pending successful completion of probationary period of employment with New York City Transit Authority.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
ADMINISTRATION FOR CHILDREN'S SERVICES
Petitioner
-against-
M.S.
Respondent

MEMORANDUM DECISION

JOHN W. BURNS, *Administrative Law Judge*

The Administration for Children's Services ("ACS" or "Agency") brought this disciplinary proceeding, pursuant to section 75 of the Civil Service Law, against M.S.,¹ who was employed as a Juvenile Counselor at Crossroads Juvenile Center, a competitive civil service position. On January 13, 2016, respondent was served with misconduct charges stemming from an incident that occurred on December 11, 2015, which included insubordination, discourtesy, and absence from her post. Respondent attended a Step 1 hearing on January 20, 2016. In a decision dated and mailed April 14, 2016, the Step 1 Hearing Officer recommended a 15-day suspension without pay. Respondent did not accept the penalty, nor did she elect the grievance process dictated by her collective bargaining agreement, so the matter was calendared at OATH, with a pre-hearing conference scheduled for June 22, 2016, and a hearing scheduled for July 13, 2016.

In May of 2016, respondent submitted a Conditional Resignation and Request for Leave of Absence pursuant to Personnel Services Bulletin ("PSB") 200-10 because she had accepted a new position with the New York City Transit Authority ("Transit") in the civil service title of

¹ The respondent's full name has been redacted to protect her privacy rights. *See* 48 RCNY § 1-49(d) (Lexis 2017).

train operator. Respondent's last day of work at ACS was on May 6, 2016, and her first day of work at Transit was May 9, 2016. Respondent's new position at Transit requires a 12-month probation period.

On June 20, 2016, the respondent's attorney, Ms. Jean O'Hearn, contacted petitioner and requested an adjournment of the June 22 conference because she was going to be on vacation. Shortly thereafter respondent's attorney informed the Agency attorney that respondent was no longer an employee of ACS, having resigned effective May 8, 2016. Subsequently, Mr. Gary Maitland, on behalf of Ms. O'Hearn, requested an indefinite adjournment of the June 22 conference. The Agency attorney, on the other hand, requested to reschedule the conference for a definite date so that the disciplinary matter could go forward.

On June 24, 2016, ALJ Kara J. Miller requested that ACS submit a brief regarding the Agency's basis for exercising jurisdiction over respondent. Petitioner submitted a brief in support of the Agency's jurisdiction on July 13, 2016, and respondent submitted a brief in opposition. For the reasons below, this case should be removed from the OATH calendar without prejudice.

ANALYSIS

Under Personal Services Bulletin 200-10, an employee serving permanently in a competitive, non-competitive, or labor class title who is covered by the Citywide Agreement and who works in an agency covered by the Personnel Rules and Regulations of the City of New York who is appointed to another position in the competitive, non-competitive, or labor class that requires serving a new probationary period in an agency covered by the Personnel Rules and Regulations of the City of New York may request a leave of absence from her current agency in order to pursue the civil service position with another agency. That employee shall have the right to return to her former title and agency if she does not satisfactorily complete the new probationary period. *See* PSB 200-10 § II (Apr. 17, 2000). Upon receipt of the employee's conditional resignation and request for a leave, eligible employees must be granted a leave of absence for the probationary period in the subsequent position. *Id.* There is no discretion on the part of the agency for granting this type of leave. *Id.* When an employee who is granted leave pursuant to PSB 200-10 fails to satisfactorily complete the probationary period in the subsequent position, the employee must be allowed to return to her former title and agency, provided that the

employee continues to meet the qualifications and residence requirements applicable to her former title. *Id.* If the requirements are met, there is no discretion on the part of the former agency; it must allow the employee to return. *Id.* Formal resignation from the prior agency is required upon the successful completion of the probationary period at the new agency. *Id.*

When respondent accepted a position at Transit, an agency bound by the Personnel Rules and Regulations of the City of New York, ACS was required to place her on leave from her position and hold it open for her for the duration of her probationary period at Transit under Rule 5.2.3 of the Personnel Rules and Regulations of the City of New York. 55 RCNY ch. 12, app. A (Lexis 2017). While on leave, respondent has the right to return to ACS should she be terminated by Transit during her one-year probationary period or if she chooses to resign from her position at Transit during her probationary period. *See* PSB 200-10 § II (Apr. 17, 2000). Thus, while respondent is not currently an ACS employee, ACS would like to move forward and adjudicate this matter in order to create a record of respondent's misconduct for purposes of future progressive discipline in the event that she returns to the Agency.

ACS contends it has continued jurisdiction over respondent because respondent was served with charges while she was still employed at ACS. *See Dep't of Correction v. Smith*, OATH Index No. 355/85 at 3 (Dec. 17, 1985) ("Once such service was completed, personal jurisdiction over the respondent was obtained."). "When a public employee tenders her resignation after disciplinary charges are served, the agency is entitled to proceed with its attempt to prove the charges." *Dep't of Correction v. Griffith*, OATH Index No. 925/96 at 33 (Dec. 23, 1996), *modified on penalty*, Comm'r Dec. (Feb. 18, 1997); *see also Brooklyn Audit Co. v. Dep't of Taxation and Finance*, 275 N.Y.286 (1937) (resignation held not to terminate disciplinary proceeding); *Bd. of Education v. Telepan*, OATH Index No. 262/87 at 5 (Oct. 8, 1987) ("Because respondent's resignation letter was served on the Board eight days after the disciplinary hearing was completed the Board has the right to request a determination on the merits of the charges."); *Human Resources Admin. v. Tranes*, OATH Index No. 367/85 at 2 (Nov. 26, 1985) ("[R]espondent's resignation, subsequent to the service of disciplinary charges, does not act as a jurisdictional bar ... the Administration is entitled to proceed with its attempt to prove the charges, although it must accept the respondent's resignation, and cannot convert the resignation to a dismissal from employment.").

While ACS clearly continues to have jurisdiction over respondent, an OATH ALJ has discretion to remove a case from the trial calendar in the interest of justice or judicial economy when respondent has resigned. *See Dep't of Correction v. Anderson*, OATH Index No. 463/95 at 3-5 (Nov. 18, 1994). Additionally, under rule 1-02 of this tribunal's rules, OATH's jurisdiction "includes the authority to render any ruling or order necessary and appropriate under applicable law or agency rule for the just and efficient adjudication of cases." 48 RCNY § 1-02. Because any adjudication of this case will be rendered moot should respondent complete her probationary period at Transit, in the interest of judicial economy, this case should be removed from the calendar without prejudice.

ACS argues that the Agency would be prejudiced by waiting until May 2017, the end of respondent's probationary period at Transit, to pursue these disciplinary charges. I respectfully disagree. Since the statute of limitations is tolled on these charges because respondent has been served, there would be no bar to the Agency moving forward with the case if respondent were to fail her probationary period with Transit and return to the Agency. *See Dep't of General Services v. Atkins*, OATH Index No. 254/86 at 3 (Jan. 8, 1987) ("Disciplinary proceedings are commenced by the service of charges, and the limitations period is thereafter tolled.").

In its brief, ACS cites *Board of Education v. Telepan*, where this tribunal found that there was a legitimate public purpose in pursuing a disciplinary case to its conclusion after an employee resigned, to prevent the employee who would otherwise have been terminated from having an unfettered right to return to public employment. *Telepan*, OATH 262/87 at 5. The present case is easily distinguished from *Telepan*. As petitioner admits in its brief, ACS does not believe that the penalty in this case merits termination of employment. In *Telepan*, a specific finding of misconduct was needed in order to preclude respondent from future civil service employment under Civil Service Law section 50(4)(e). Under that provision, an employee is disqualified from future civil service employment if she has resigned or has been dismissed from another civil service position because of incompetency or misconduct. Civ. Serv. Law § 50(4)(e) (Lexis 2016). In the present case, respondent clearly resigned to take a new position, not because of misconduct for which the Step 1 Hearing Officer recommended a 15-day suspension, nor to prevent ACS from terminating her employment. Furthermore, ACS has admitted that they were not seeking termination in this case. If the misconduct alleged had been more egregious

and ACS was seeking a recommendation of termination of respondent's employment, that may be reason to hold the hearing now, but that is not the case here.

ACS also argues that it will be prejudiced by having to wait until respondent returns to the Agency, if she does at all, to proceed with this case because "witnesses may lose their clear recollection of events" and/or become unavailable by taking other jobs or retiring (Pet. Br. at 8). However, OATH routinely hears cases regarding misconduct involving charges of even older vintage. Additionally, ACS has the ability to preserve its testimonial evidence. If ACS is concerned that its witnesses will lose their recollection of events or that witnesses will not be available to testify should this case be brought again, ACS can take affirmative steps now, such as having witnesses complete affidavits or interrogatories regarding the misconduct incident at issue. ACS also has exclusive possession of documentary evidence such as log books, supervisory memoranda, e-mails, incident reports, and video recordings, which they should take affirmative steps to preserve, if they have not done so already.

On the other side of the equation is the burden to respondent. Respondent is a new employee at Transit, with little to no leave accruals. Any time missed from her new position to prepare for and attend conferences or hearings in this case would be without compensation and to her financial detriment. Respondent should not have to miss time from her new position to answer for charges brought by an agency for which she is no longer employed. Respondent also would be prejudiced if she decided not to participate in her defense of these charges. Respondent should not have to decide between participating in her defense on these relatively minor disciplinary charges or missing time in her new position, especially since any outcome will be moot once respondent completes her probationary period at Transit.

Respondent's probationary period with Transit will expire on May 9, 2017. Should respondent pass her probationary period, respondent would no longer have the right under PSB 200-10 to return to ACS. It would be an inefficient use of OATH's limited resources, as well as the resources of the parties, to hear a case where petitioner may never be in the position to actually discipline respondent.

In the interest of judicial economy I decline to hear a case where there is a high probability that the decision will be rendered moot within a matter of months. Therefore, I am removing this case from the trial calendar without prejudice. Should respondent return to ACS

on or before the end of her probationary period at Transit, ACS shall have the right to re-file the charges and move forward with this disciplinary proceeding at that time.

John W. Burns
Administrative Law Judge

January 11, 2017

APPEARANCES:

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