

Business Integrity Comm'n v. Cekic

OATH Index No. 1186/14 (Mar. 6, 2014), *adopted*, Acting Dep. Comm'r Dec. (Mar. 13, 2014)

Enforcement agent charged with loss of chemical spray canister and baton and with making multiple false statements as to how the equipment went missing. Administrative law judge found proof sufficient to sustain the charges. Due to extreme dishonesty shown by multiple lies about the equipment, penalty of termination recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
BUSINESS INTEGRITY COMMISSION
Petitioner
- against -
IZET CEKIC
Respondent

REPORT AND RECOMMENDATION

JOHN B. SPOONER, *Administrative Law Judge*

This disciplinary proceeding was referred to me in accordance with section 75 of the Civil Service Law. Petitioner, the Business Integrity Commission, charged that respondent Izet Cekic, a market agent, lost his agency-issued chemical spray and his baton and made multiple false statements about their loss.

A hearing on the charges was conducted on February 10, 2014. Petitioner presented the testimony of two supervisors. Respondent testified on his own behalf, contending that his equipment was stolen from his locker and admitting that he made false statements.

For the reasons provided below, I find that the charges should be sustained. I recommend that respondent be terminated.

ANALYSIS

Respondent has been employed at the Commission as a market agent since 2004. Market agents are uniformed law enforcement officers who patrol the City and enforce the laws regarding waste and carting of waste. Agents are "peace officers" under Criminal Procedure

Law section 2.10 and are authorized to carry chemical spray and batons (Tr. 17). The charges allege that respondent lost both his agency-issued chemical spray and his baton and that, when asked to explain, provided untruthful answers.

Mr. Santiago, the Commission director of enforcement, testified that, on April 29, 2013, respondent and his fellow agents were directed to turn in their chemical spray canisters for replacement. Respondent turned in a canister different from the one he was issued in that it was a different color and did not have the Commission inventory control number affixed to it (Tr. 20-21; Pet. Ex. 2). The canister respondent handed in was the same brand as the agency canisters but was red instead of blue and, instead of .33 per cent of the chemical irritant, it had 1.33 per cent (Tr. 22, 24-25). When asked for an explanation, respondent said he had “no idea” why the canister was different (Tr. 43; Pet. Ex. 6). Later it was discovered that respondent’s baton was also different from the baton that he had been issued (Tr. 46-47; Pet. Ex. 8).

In a June 14, 2013 memorandum to Mr. Santiago (Pet. Ex. 10), respondent stated that he was unaware his chemical spray and baton were substitutes and “believed to the best of my knowledge” that both his chemical spray and his baton were the same as the ones which he was issued. He noted that his locker had been tampered with in the past and attached a May 2012 memo complaining about “dents and scratches” on his locker, which he ascribed to tampering.

In September 2013, respondent was notified of a conference concerning disciplinary charges (Pet. Ex. 7). In an e-mail dated September 13 (Pet. Ex. 8), petitioner’s counsel, Mr. Curry, advised respondent to complete the required paperwork to notify his supervisors of the lost equipment.

A step 1 hearing was scheduled for October 4, but adjourned at respondent’s request to November 18, 2013. According to Ms. Farrell, the Commission policy advisor, respondent appeared at the hearing and produced a spray canister and baton different from those he had been issued (Tr. 94). Mr. Santiago indicated that, when questioned about the missing equipment at the hearing, respondent refused to answer the questions and generally provided no explanation (Tr. 61).

Respondent testified that he works the night tour from 10:00 p.m. to 6:00 a.m. as an enforcement agent, assigned to the Hunts Point market area (Tr. 101). He keeps his uniform and his equipment, including his chemical spray and baton, in his locker at the Commission facility

on Washington Avenue in the Bronx (Tr. 103). At some point two and one-half to three years ago, he found his locker open at the end of his tour. The following day he noticed that his chemical spray and his baton were missing. He testified that, when he realized his equipment was missing, he “panicked,” fearing that he would lose his job if he reported it (Tr. 104). He purchased the replacement chemical spray online and the baton at a Chinese gift shop (Tr. 104-05).

Respondent admitted that he initially told Mr. Santiago that he did not know what happened to his equipment (Tr. 106). Later he told his union representative that the equipment was “lost” (Tr. 122), a statement that was conveyed to those investigating respondent’s actions. He testified that, following the November 18 hearing, he discarded the replacement baton in the trash with other recyclables (Tr. 116). When asked whether he recalled being advised by Mr. Curry at the hearing to retain the baton as evidence for the OATH disciplinary hearing, respondent indicated he was not sure (Tr. 117).

He repeatedly apologized and stated that he “deeply regretted” his mistake in not immediately reporting the theft (Tr. 107, 115, 117, 123).

The hearing evidence raised no factual disputes as to the allegations in the charges. Respondent admitted that his spray canister and his baton went missing some three years ago and that he did not report this to the agency. Instead, he replaced both pieces of equipment with non-regulation items. When the different equipment was noticed by his supervisor, he initially denied knowing about it and later stated it was lost. At the hearing held on November 18, 2013, he refused to answer questions or provide any explanation concerning why he was no longer in possession of the issued equipment. BIC Code of Conduct section 5.1 provides that employees are responsible for their equipment and section 5.8 requires that they “promptly report” loss of any agency property to their supervisor. Specifications 1 and 2 of charge I and charge II must be sustained.

BIC Code of Conduct section 4.1 prohibits employees from making any false statements. *See* BIC Code of Conduct §§ 2.29 (employees shall not make false reports or false entries in records), 4.3 (employees must cooperate with any official inquiry). Charge III must also be sustained.

FINDINGS AND CONCLUSIONS

1. Specification 1 of charge I and charge II should be sustained in that, at some time prior to April 29, 2013, respondent's spray canister went missing and he failed to report it, in violation of BIC Code of Conduct §§ 5.1 and 5.8.
2. Specification 2 of charge I and charge II should be sustained in that, at some time prior to October 3, 2013, respondent's baton went missing and he failed to report it, in violation of BIC Code of Conduct §§ 5.1 and 5.8.
3. Charge III should be sustained in that, on November 18, 2013, during a disciplinary hearing, respondent refused to answer questions regarding his missing equipment, in violation of Specification 1 of BIC Code of Conduct §§ 2.29, 4.1, and 4.3.

RECOMMENDATION

Upon making the above findings, I requested and received a summary of respondent's personnel history in order to make an appropriate penalty recommendation. He has been employed with the City since 1998. He has been disciplined once in 2012, when he was suspended for one day for leaving work without permission. He was also placed on a 30-day suspension in November 2013, for the instant charges, and remains on suspension with pay pending the outcome of these charges. Respondent's lengthy employment provides grounds for mitigation.

His overall evaluations for 2009-2010 and for 2010-2011 were "very good," with his supervisor noting that he was "dependable," "calm," and "confident." His overall evaluation for 2011-2012 was "good," although his attendance and punctuality was found to be "conditional." These generally good evaluations provide further grounds to mitigate the penalty.

Petitioner's attorney contended that, despite respondent's tenure, the appropriate penalty for respondent must be termination because his admitted dishonesty is incompatible with his law enforcement position. Counsel noted in particular that, given the multiple lies respondent admitted making in this case, he could no longer rely upon respondent's truthfulness or integrity in issuing violations or in testifying about the circumstances of violations at a hearing (Tr. 136). It is true that this tribunal has found that acts involving falsification for a benefit, such as

obtaining approved leave or money, frequently warrant termination. *Dep't of Environmental Protection v. Martinez*, OATH Index Nos. 734/06 & 1486/06 (May 24, 2006) (recommending termination of sewage treatment worker who falsified documents concerning federally mandated water samples and lied to his superiors about his actions); *Dep't of Correction v. Roman*, OATH Index No. 1026/05 (Feb. 10, 2006) (recommending termination of correction officer who availed himself of an unauthorized public benefit, altered documents which he produced to investigators, and made false and misleading statements during an MEO 16 interview); *Transit Auth. v. Robertson*, OATH Index No. 1019/02 (Apr. 9, 2002) (recommending termination for a supervisor who created false documents and submitted them in support of three emergency-leave requests); *Human Resources Admin. v. Rivera*, OATH Index No. 219/94 (Nov. 24, 1993) (recommending termination of employee who submitted a fraudulent medical note to document a three-week leave of absence). Unlike the employees in these cases, however, respondent was not shown to have benefited from the false statements he made concerning his missing equipment.

The most disturbing aspect of respondent's misconduct in this case is not the loss of equipment but respondent's persistent refusal to offer a truthful explanation for this loss. He initially denied any knowledge that it was missing, then contended it was lost, and finally, at the hearing, admitted that his earlier statements were false and stated that his equipment was stolen. His testimony as to the circumstances of the supposed theft were not credible. His explanation that he did not report the theft when it occurred because he feared he would lose his job was not credible in that there was no evidence that any other agents had ever been disciplined, let alone terminated, for losing equipment. Respondent also offered no explanation as to why, after his supervisors discovered he had replaced the equipment in 2013, he persisted in offering two admittedly untruthful accounts, that he had no knowledge of what happened and that he lost the equipment. Given the lack of corroboration of the supposed theft and the admitted instances of deception, it seemed most likely that respondent clung to the theft story as a means of making himself less culpable for the loss, perhaps not realizing that this last lie only exacerbated the magnitude of his dishonesty.

I believe that, because of respondent's persistent and sustained untruthfulness about the circumstances of the equipment loss, including his unconvincing statements at the hearing, termination is the most appropriate penalty here. As noted by petitioner's attorney, an agent's

integrity is vital to performing his job duties, particularly where he is called upon to provide truthful and accurate testimony at hearings as part of his enforcement duties. *See Dep't of Correction v. Jenkins*, OATH Index No. 3070/09 at 18 (Dec. 16, 2009) (law enforcement officers, like respondent, are held to higher standards of integrity and honesty than other civilian employees); *Dep't of Correction v. Harris*, OATH Index No. 1444/97 at 26 (Sept. 29, 1997), *aff'd*, NYC Civ. Serv. Comm'n Item No. 98-109-SA (Oct. 26, 1998) (same). Officers who persist for months in making repeated false statements in order to subvert an investigation of alleged wrongdoing have been terminated. *Dep't of Correction v. Debblay*, OATH Index Nos. 2008/04, 2009/04, 2011/04 & 2012/04 (Dec. 3, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item Nos. CD 06-02-SA (Jan. 9, 2006) and CD 05-78-O (Sept. 30, 2005) (correction officers who were found to have used improper force against an inmate and then to have made repeated false statements in concealing the force incident terminated). Despite respondent's lengthy tenure, his ten months of providing admittedly false explanations, combined with his untruthful testimony at the hearing, make termination the most appropriate penalty.

Accordingly, I recommend that, for the misconduct found here, respondent be terminated.

John B. Spooner
Administrative Law Judge

March 6, 2014

SUBMITTED TO:

SHARI C. HYMAN
Commissioner & Chair

APPEARANCES:

JOHN CURRY, ESQ.
Attorney for Petitioner

RICHARD WASHINGTON, ESQ.
Attorney for Respondent