Dep't of Environmental Protection v. Johnson

OATH Index No. 1330/10 (May 13, 2010), *discipline rescinded by stipulation*, NYC Civ. Serv. Comm'n Item No. CD 11-14-O (Apr. 19, 2011), **appended**

Petitioner proved that respondent used a department vehicle without approval, allowed an unauthorized passenger to ride in the vehicle, and made a false entry in a document. Suspension without pay for twelve days recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Petitioner
- against -
NICHOLAS JOHNSON
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

The Department of Environmental Protection brought this proceeding, under section 75 of the Civil Service Law, charging respondent, water use inspector Nicholas Johnson, with using a department vehicle without authorization, improperly allowing a passenger to ride in the vehicle, and making a false entry on an agency document on August 10, 2009.

At a hearing on April 1, 2010, petitioner relied upon documentary evidence and testimony from one witness. Respondent testified in his own behalf.

For the reasons below, I find that petitioner proved the charges and recommend that respondent be suspended without pay for twelve days.

ANALYSIS

On August 10, 2009, Mike Cristino called 311 and reported that, while crossing a street in Brooklyn at 5:15 p.m. that day, he was almost struck by a truck driven by a "DEP worker" (Pet. Ex. 3). Cristino provided a license plate number and noted that "the passenger gave him the finger" (Pet. Ex. 3). A department truck with the specified license plate had been assigned to

respondent that day. He worked in the Bronx from 6:50 a.m. to 4:30 p.m. and had no business to conduct in Brooklyn (Pet. Exs. 1, 2; Tr. 27). According to chief inspector Winston Shirley, respondent's mileage log indicated that he drove 56 miles on August 10, more than three times the expected mileage for his assigned route (Tr. 33). Respondent denied that he used a department truck for any unauthorized activity (Tr. 59). He insisted that he returned the department truck at the end of his shift and did not drive to Brooklyn (Tr. 61).

As a preliminary matter, respondent noted that he was originally charged with improperly using the vehicle on August 20. After the step 1 conference, where respondent produced theater tickets to support an alibi defense, petitioner amended the charges and alleged that the unauthorized use of the vehicle occurred on August 10. Respondent failed to demonstrate any undue prejudice from the amendment, which occurred on January 13, 2010, well before the hearing on April 1, 2010 (Tr. 21). *See* 48 RCNY § 1-25 (more than 25 days prior to hearing, a party may amend a pleading, without seeking consent of adversary or permission of tribunal).

Respondent also challenged the admissibility and reliability of an e-mail from the 311 call center summarizing the complaint. Among other things, respondent faulted petitioner for not calling Cristino as a witness and not producing an audio recording of the 311 call. Ideally, petitioner would have presented such evidence, but it was not required to do so. *See S & S Pub, Inc. v. NYS Liquor Auth.*, 49 A.D.3d 654 (2d Dep't 2008) (hearsay is admissible at administrative proceeding and may even form the sole basis for adjudication); *see also Taxi & Limousine Comm'n v. Arisme*, OATH Index No. 1216/95 (June 13, 1995).

Cristino was not within petitioner's control. Petitioner's counsel spoke with him several times and sent him an affidavit, but he was unable or unwilling to take off from work to testify and he did not return the affidavit (Tr. 21). The e-mail that petitioner offered in evidence included the witness's name, home address, telephone number, and e-mail address (Pet. 3). That is significant for two reasons. First, the witness's willingness to provide such information made the complaint somewhat more reliable than an anonymous call. Second, the contact information was available to respondent. Nothing prevented respondent from either verifying the complaint with Cristino or calling him as a witness.

As for the failure to produce a recording of the 311 call, petitioner's counsel inquired about obtaining such evidence but was told that it was no longer available. The recordings are

maintained by another agency and were routinely erased before this matter was ever referred to the Department's disciplinary unit (Tr. 20-21).

Although the e-mail offered by petitioner contained hearsay, it was sufficiently reliable to be considered as evidence. Chief inspector Shirley testified that, following receipt of the e-mail, he spoke with Cristino and confirmed the substance of the complaint. Moreover, the e-mail referred to a truck with a specific license plate number and a "DEP worker" (Pet. Ex. 3). Petitioner later verified that the specified license plate number belonged to a Department truck. Those key details corroborated the 311 complaint. Thus, the evidence was sufficient to prove that the truck was in Brooklyn after 5:00 p.m. on August 10, 2009.

The closer question is whether respondent was the person driving the truck after 5:00 p.m. that day. Respondent correctly noted that the e-mail summary of the 311 call omits any reference to gender, race, age, or appearance of the driver or the passenger. In addition, respondent testified that he lives and works in the Bronx and he never went to Brooklyn that day. Respondent insisted that he returned the truck to its proper spot in a Jerome Avenue parking lot before 4:30 p.m. that day. He mentioned that an extra set of keys for the truck are kept in a supervisor's unlocked desk (Tr. 63). Respondent's testimony and the gaps in the summary of the 311 call create the possibility that someone else, perhaps a supervisor or security guard, drove the truck to Brooklyn that night. But that scenario is not likely.

The more likely scenario is that respondent drove the truck after working hours. That inference is supported by contemporaneous documentary evidence prepared by respondent. At the beginning and end of every shift, he made entries in a daily log listing the truck's starting and ending mileage (Pet. Ex. 2; Tr. 78). On the morning of August 10, 2009, respondent reported an odometer reading of 69,263 miles and at the end of the day he reported a reading of 69,319 miles, indicating that he drove 56 miles during his shift (Pet. Ex. 2). The next morning, he wrote that the starting mileage was 69,319, indicating that no one drove the car overnight (Pet. Ex. 2).

On August 10, 2009, respondent performed quality control work and provided troubleshooting assistance in the northeast Bronx (Tr. 10). According to a route sheet completed by respondent, he went to eighteen locations that day and all but four of those locations were within a few blocks of each other, from East 211th to East 221st Streets (Pet. Ex. 1). At the end of his route, respondent returned the truck to the Jerome Avenue lot (Pet. Ex. 1; Tr. 57, 59).

Chief inspector Shirley testified that, based upon the assigned route, respondent's reported mileage of 56 miles for that day was unusually high (Tr. 29). After receiving the 311 complaint, Shirley drove along respondent's assigned route and found that it was only 18.2 miles (Tr. 29). Using www.mapquest.com, Shirley estimated that it was about 40 miles, roundtrip, from respondent's route to the Brooklyn location referred to by the 311 caller (Tr. 34). *See Human Resources Admin. v. Allen*, OATH Index No. 212/06 at 21-26 (June 28, 2006) (discussing admissibility of MapQuest search results). Thus, Shirley concluded, respondent's total reported mileage of 56 miles was sufficient to cover the assigned route plus an unauthorized trip to Brooklyn (Tr. 34).

In contrast to Shirley's clear and persuasive testimony, respondent offered unconvincing denials. For example, respondent suggested that he drove extra miles during his route to keep the truck cabin cool, avoid excessive idling, and check fire hydrants (Tr. 69). Respondent's route sheet for August 10 shows that there was little free time between locations. Even if respondent drove a few extra blocks to keep cool or to check on fire hydrants, it is not likely that he did so for 40 miles. Similarly, there was evidence that respondent was permitted to drive the truck during his lunch break, but there was no credible proof that he drove on a 40-mile trip during the 30 minutes that he took for lunch that day (Pet. Ex. 1, 46).

Respondent also tried to explain the mileage discrepancy by suggesting that he made a mistake in his paperwork. He testified that there were some days that he was too busy to write down the ending mileage and he would estimate or wait until the next day to check the odometer to record the starting mileage (Tr. 60-61). Conceivably, respondent made a 40-mile error or failed to make a routine entry at the end of his tour on August 10. But it is not likely that he made such a significant mistake on the same day that someone else took the truck for an unauthorized after-hours ride to Brooklyn.

The evidence also proved that respondent allowed an unauthorized passenger in the truck. With vivid detail, the 311 caller described a gesture made by the passenger (Pet. Ex. 3). Trying to rebut that evidence, respondent testified that there was no room for a passenger because of all the paperwork and equipment in the truck cabin (Tr. 57-58). I did not credit that testimony. The equipment consisted of a wrench, screwdrivers, wires, meters, jumper cables, and one or two bags (Tr. 41, 57). It is difficult to believe that respondent could not have made room for a

passenger by brushing aside papers or moving some equipment to another part of the cabin or the open rear of the truck.

Petitioner's evidence further established that respondent made a false entry on an agency document. Respondent wrote on his route sheet that he returned the truck to the Jerome Avenue lot at 4:30 p.m. (Pet. Ex. 1). As noted above, however, the evidence showed that the truck was in Brooklyn at 5:15 p.m. that day. Hence, it is not likely that respondent parked the truck in the Jerome Avenue lot, in the northwest Bronx, at the end of his tour (Tr. 6). Thus, respondent's route sheet was false.

Respondent claimed that a log maintained by overnight security guards would have shown that the truck had been returned prior to 4:30 p.m. (Tr. 6). He testified that a security guard named "Rosa" or "Sonya Sanchez" was on duty beginning at 3:30 p.m. that day (Tr. 34). Respondent further claimed that, after the charges were amended to reflect the August 10 date, he went back and checked the security log and it showed that he returned the truck at "3:50 or something" (Tr. 59, 71). In contrast, chief inspector Shirley testified that, within two or three weeks of receiving the 311 complaint, he looked for the security log and it was missing (Tr. 40). Shirley spoke with the site manager and the Department's head of security to confirm that the log was missing (Tr. 40). Shirley also testified that security guards did not track the movement of trucks during the day; instead, they made entries in the log after locking the Jerome Avenue lot, which usually took place after 6:00 or 7:00 p.m. (Tr. 51-52). I am not convinced that the log would have aided respondent's case and, in any event, I credit Shirley's credible testimony that the log disappeared early on in the investigation, rather than respondent's self-serving claim that he reviewed the log earlier this year.

Despite some weaknesses in petitioner's case, the evidence was sufficient to prove the following: (1) a Department truck with a specific license plate was assigned to respondent; (2) respondent reported that he drove the truck 56 miles on a day when he was assigned to an 18.2 mile route in the Bronx; and (3) a bystander spotted the truck after 5:00 p.m. in Brooklyn and identified it by its license plate number. This evidence showed that respondent used a Department truck without authority. *See Dep't of Environmental Protection v. Freeman,* OATH Index No. 166/09 at 18-20 (Jan. 5, 2009), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 09-69-SA (Nov. 12, 2009) (unauthorized use of vehicle proved, in part, by discrepancy between reported mileage and actual route); *Allen*, OATH 212/06 at 21, 26-27 (excessive mileage proved

that employee misused agency vehicle for personal travel); *Dep't of Health v. Fuseyamore*, OATH Index No. 295/88 at 7-8 (Aug. 25, 1988) (unauthorized use of a vehicle proved where there was an unexplained discrepancy in mileage). Accordingly, the charges are sustained.

FINDINGS AND CONCLUSIONS

1. Petitioner proved that respondent used a Department vehicle without authorization, as alleged in Charge 1.

2. Petitioner proved that respondent used a Department vehicle for an unauthorized purpose and allowed a passenger to ride in the vehicle, as alleged in Charge 2.

3. Petitioner proved that respondent made a false entry in a Department document, as alleged in Charge 3.

RECOMMENDATION

After making the above findings, I requested and received a summary of respondent's personnel history. Petitioner hired respondent in 1995. He has been charged with disciplinary violations on four prior occasions and he accepted the following penalties: a three-day pay fine in 2001 for failure to complete route sheets properly; a five-day suspension in 2002 for use of an unauthorized parking placard; an eight-day pay fine in 2003 for incorrect or negligent paper-work, neglect of duty, and disrespectful conduct; and a five-day suspension in 2009 for violating agency parking rules and use of improper language. Respondent's performance evaluations range from good to very good.

Petitioner now seeks a penalty of twelve days' suspension. That penalty request is reasonable because it appears to give appropriate weight to respondent's prior disciplinary history, his lengthy tenure with the Department, the isolated nature of the present misconduct, and his favorable performance evaluations. *See, e.g., Dep't of Sanitation v. Gallo*, OATH Index No. 168/01 (Oct. 26, 2000) (twelve-day suspension recommended where employee was absent from worksite without authority and used agency vehicle without permission). Respondent is a valuable, experienced employee who is capable of performing very good work. At the same time, he must recognize that misuse of Department resources is a serious form of misconduct.

In light of all of the circumstances, I recommend a penalty of twelve days' suspension without pay.

Kevin F. Casey
Administrative Law Judge

May 13, 2010

SUBMITTED TO:

CASWELL F. HOLLOWAY
Commissioner

APPEARANCES:

ALLISON GILGORE, ESQ.
Attorney for Petitioner

TODD RUBINSTEIN, ESQ.
Attorney for Respondent

THE CITY OF NEW YORK
CITY CIVIL SERVICE COMMISSION
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IN THE MATTER OF THE APPEAL OF:
NICHOLAS JOHNSON **DATE: 04/19/11**
Appellant
-against-

NYC DEPT. OF ENVIRONMENTAL PROTECTION
Respondent

Pursuant to Section 76 of the New York
State Civil Service Law
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PRESENT:
NANCY G. CHAFFETZ, COMMISSIONER ACTING CHAIR
RUDY WASHINGTON, COMMISSIONER

ALINA A. GARCIA, DIRECTOR/GENERAL COUNSEL
AMANDA WISMANS, AGENCY ATTORNEY

DORIS G. TRAUB, ESQ.
REPRESENTIVE FOR APPELLANT
ALISON K. GILMORE, ESQ.
REPRESENTATIVE FOR RESPONDENT

APPELLANT PRESENT

STATEMENT

On Thursday, February 24th 2001 the City Civil Service Commission heard oral argument in the appeal of **NICHOLAS JOHNSON** Water Use Inspector, NYC Dept. of Environmental Protection (DEP), from a determination by the NYC Dept. of Environmental Protection, finding him guilty of charges of incompetency or misconduct and imposing a penalty of **12 DAYS SUSPENSION** following an administrative hearing conducted pursuant to Civil Service Law Section 75.

NEW YORK CITY CIVIL SERVICE COMMISSION
NICHOLAS JOHNSON
COMMISSIONERS FINDINGS:

NICHOLAS JOHNSON appealed from a determination of the Department of Environmental Protection (DEP), finding him guilty of incompetence and/or misconduct, imposing a penalty of 12 days suspension.

On March 14, 2011, the Civil Service Commission received a stipulation entered into between the parties of the above action, whereby the Department of Environmental Protection rescinded its disciplinary determination.

Accordingly, pursuant to this stipulation, the Appellant's appeal is withdrawn.

Nancy G. Chaffetz, Commissioner, Acting Chair
Rudy Washington, Commissioner
Matthew W. Daus, Commissioner
Charles D. McFaul, Commissioner

Date: 04/19/11