Dep't of Sanitation v. Torrence

OATH Index No. 2515/10 (July 22, 2010)

Where respondent denied knowing his driver's license was suspended, and petitioner failed to produce proof of notice of license suspension, charge that respondent violated Rule 3.4 of the Code of Conduct by failing to maintain valid driver's license during long-term medical leave should be dismissed.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
-against-
LEO TORRENCE
Respondent

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

This is a disciplinary proceeding brought by the Department of Sanitation pursuant to section 16-106 of the Administrative Code. Petitioner alleges that respondent, sanitation worker Leo Torrence, failed to have a valid commercial driver's license for 434 days commencing May 2, 2008, in violation of Rule 3.4 of the Code of Conduct.

Trial was held on June 9, 2010. Petitioner presented one witness, Chief Stephen Harbin, while respondent testified on his own behalf. As set forth below, I find that the charge should be dismissed.

ANALYSIS

It was not disputed that respondent was on medical leave, stemming from a line of duty injury ("LODI"), during the period of time that his commercial driver's license was suspended. By the time he returned to work he had reinstated his license. More specifically, respondent was on medical leave from March 17, 2008, when he sustained an injury at work, until December 24, 2009, when the Sanitation Clinic approved his resumption to work (Tr. 45). According to a

Department of Motor Vehicle ("DMV") abstract of his driving record (Pet. Ex. 1),[1] his commercial driver's license was suspended on May 2, 2008. The suspension was cleared on July 10, 2009. Thus, by the time respondent returned to work, over five months later, his license was in effect.

Invoking the basketball maxim of "no harm, no foul" (Tr. 65), counsel for respondent urges that the charge should be dismissed because no harm ensued to the Department from his not having his license while he was out on medical, line of duty injury ("LODI") leave. I agree with counsel that no prejudice inured to the Department. However, this is not basketball. The issue before me, at least for purposes of liability, is whether respondent is in violation of a disciplinary rule or procedure. I can not agree with counsel that the Rule 3.4 of the Code of Conduct, under which respondent is charged, is limited to those periods when a sanitation worker is on active duty, as opposed to medical leave. The plain language of Rule 3.4 is ". . . All required licenses must be kept valid at *all times*" (emphasis added). Chief Harbin, who is in charge of the Division of Safety and Training, testified that the requirement that sanitation workers maintain a valid driver's license extends to those periods of time when they are out on medical leave (Tr. 9).

Counsel for respondent further asserts that the charge should not be sustained because the Department failed to show that respondent received notice that his license was suspended, and thus failed to show that he knowingly or intentionally committed misconduct. Petitioner, conversely, contends that petitioner does not have the burden of proving that respondent received notice that his license was suspended (Tr. 74). Instead, petitioner asserts, respondent has the burden of establishing that he did not get notice (Tr. 74). Petitioner argues that respondent did not meet this burden, and that the presumption of regularity that an official agency will act in accordance with its duties should be applied to establish that the DMV in fact notified respondent of the license suspension (Tr. 71).

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[1] The driving record abstract was admitted over respondent's objection. Respondent asserted that the abstract was not a business record and was only a photocopy (Tr. 17). According to respondent, the abstract "could be printed on anybody's computer" (Tr. 16). However, compliance with the strict rules of evidence, including hearsay rules, is not required by this tribunal. 48 RCNY § 1-46(a). Moreover, the abstract contains a signed certification that it is a ". . . true and complete copy of an electronic record on file" with the DMV, "made in regular course" of DMV business (Pet. Ex. 1). The New York State Civil Practice Law and Rules expressly provides for the admissibility of an electronic record that is also a business record. CPLR 4518(a) (Lexis 2010) ("business records"). *See also* State Technology Law § 302(2) (Lexis 2010).

There is no evidence that respondent knew that his license was suspended prior to July, 2009. The driving record abstract indicates that respondent was in an accident on February 25, 2008, that on May 2, 2008, an order was issued against him for failure to answer a summons, and that on June 20, 2008, a default hearing was held at which he was convicted of the violation of having an unregistered motor vehicle. The abstract also indicates that there was an insurance lapse on August 5, 2008, which was cured the same day (Pet. Ex. 1). Respondent acknowledged having been in an accident and said that the current insurance and registration were not in the car at the time of the accident (Tr. 52). He testified, however, that the documentation was later mailed to DMV. He thought the matter was cleared up (Tr. 53). He did not know there was any problem with his license until he went to renew it on July 8, 2009. At that time he learned there were an outstanding summons and a fee. He paid the money and his license was reinstated (Tr. 51, 52, 61).[2] Respondent does not remember ever getting mail from DMV advising him that there was a problem with his license (Tr. 54, 57). Respondent resided at his address on file with the DMV until November 2008, at which time he moved (Tr. 57).

Petitioner did not produce a witness from the DMV, nor any documentary evidence that a suspension order or notice was actually mailed, or would have likely have been mailed pursuant to the policies and procedures of the DMV. The Vehicle and Traffic Law, section 214, explicitly provides that production of a notice or order, an electronic record of entry upon the driver's license or registration file, and an employee affidavit setting forth the procedure for the issuance and mailing of such notice shall be "presumptive evidence" that such notice or order was mailed. No such evidence was introduced, despite the statutory language that it would permit a presumption that notice procedures were followed.

Moreover, because respondent was on long-term leave, there is no evidence that the Department of Sanitation ever advised him that his license was suspended. According to Chief Harbin, the Department of Sanitation and the DMV have an agreement whereby the DMV will apprise the Department of any change in the license status of its employees by sending an e-mail with the driving record abstract attached. Here, the DMV sent the abstract to the Safety Division on May 2, 2008. The Safety Division, following its normal procedures, entered the information

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[2] There is a minor discrepancy between respondent's testimony and the DMV abstract as to whether the suspension was lifted July 8, 2009, as respondent testified, or July 10, 2009, as the abstract indicates in part. The matter is complicated because the abstract indicates that there were 3 separate suspensions – one for an insurance lapse, which was cleared July 8, 2009, and two for failure to pay a fine and answer a summons, which were cleared July 10, 2009, when the abstract states "scofflaw paid" (Resp. Ex. A).

into the Department's database to restrict respondent's driving privileges the following day, May 3 (Tr. 10-12). However, Chief Harbin admitted that no one from the Safety Division ever told respondent that his license was suspended and that he did not know if anybody from the borough or the district ever notified respondent of the suspension (Tr. 25, 43). Typically, when a sanitation worker is on active duty, the Borough will notify the work location of the suspension, and the work location will then tell the worker that he is grounded or not permitted to drive (Tr. 40, 41). This was not the typical situation because respondent was on long-term medical/LODI leave and not present at his work location.

Respondent testified credibly and without rebuttal that he did not know that his driver's license had been suspended until he went to renew it in July 2009. Respondent's testimony dovetails with the DMV driving record abstract, which shows that his license suspension was lifted in July 2009. If respondent cared enough to renew his license in July to ensure it was current, it follows that he would have taken steps to lift the suspension, had he known about it earlier.

Moreover, General Order 2008-14, to which petitioner alluded and which governs driver's license requirements (Tr. 69), provides: ". . . If after 10 calendar days from the date an employee is notified by the DMV that his/her license has been suspended or revoked, the employee fails to restore the license, DST [Division of Safety and Training] will issue a disciplinary complaint (DS 249) against the employee." General Order 2008-14, § 2(C)(ii) (eff. June 23, 2008) ("license suspension for non-DWUI Related Issues) (underlining in the original). Thus, disciplinary action will not be brought unless the sanitation worker (1) knows that his license has been suspended, and (2) with such knowledge, fails to take affirmative steps within ten days to restore the license.

Therefore, in order to prove its case, petitioner must establish both that respondent knew his license was suspended and that he failed to cure the suspension within ten days. Petitioner has failed to sustain this burden. There was no proof of actual service of the notice upon respondent. Nor was there proof of the regular practices and procedures of the DMV with regard to notice, which would permit a rebuttable presumption that notice of the suspension was mailed. Petitioner contends, without pointing to a particular section of the Vehicle and Traffic Law, that notification should be presumed because that is what is required by statute. However, where the General Order provides that respondent has ten days after the DMV notifies him of the

suspension to lift the suspension, *and* where respondent credibly testifies that he did not know his license was suspended, it is erroneous to find him guilty of misconduct without some proof that he received notice of the suspension. *Cf. Dep't of Sanitation v. Wallace,* OATH Index No. 887/00 (May 15, 2000), *aff'd,* 303 A.D.2d 795 (lst Dep't 2003) (license suspension charge sustained where employee chose to remain away from his legal residence during the period of time he would have received any official notices; employee's testimony that he never received notice not credited given the cavalier attitude he displayed toward other work obligations); *Transit Auth. v. McAllister,* OATH Index No. 377/93 (Feb. 10, 1993) (respondent's testimony that he never received notice of license suspension undermined by other evidence, including testimony that the standard procedure of DMV when insurance lapses is to send out a warning letter that a suspension will ensue if the insurance lapse is not remedied).

To assert, as petitioner does, that it is not petitioner who has the burden of proving notice but respondent who has the burden of disproving it, is to impermissibly shift the burden of proof in a disciplinary case, which rests squarely upon the employer. *See Dep't of Correction v. Gordon,* OATH Index No. 275/81 at 16-17 (Feb. 3, 1982) (where directive permitted disciplinary action for loss of a firearm if investigation showed that correction officer failed to take adequate security measures to prevent loss, strict liability did not apply and it was erroneous to shift the burden of proof to the officer to prove that the firearm loss was innocent).

Moreover, any suggestion that the rule against having a suspended license is a strict liability statute runs contrary to the basic precept that a finding of misconduct requires some showing of fault on an employee's part, either that he acted willfully or intentionally, *Reisig v. Kirby*, 62 Misc.2d 632, 635 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008, 299 N.Y.S.2d 398 (2d Dep't 1969) ("Misconduct and insubordination on the part of a civil service employee implies *intentional* and *willful* disobedience") (emphasis in original), or carelessly or negligently, *McGinigle v. Town of Greenburgh*, 48 N.Y.2d 949, 951 (1979). *See also Ryan v. NYS Liquor Auth.*, 273 A.D. 576, 581 (3d Dep't 1948) ("A mere technical breach of the rules without wrongful intent is not sufficient to warrant the discharge of an officer with a record of faithful service"); *Dep't of Sanitation v. Chaudhuri*, OATH Index No. 1674/08 at 6 (May 21, 2008) ("technical rule violations do not constitute misconduct absent a finding of fault"). Strict liability does not apply in the disciplinary context. *Dep't of Environmental Protection v. Hewlett*, OATH Index No. 644/07 at 9 (Mar. 9, 2007); *Dep't of Sanitation v. Richards*, OATH Index No.

529/06 at 3 (Feb. 3, 2006); *Dep't of Transportation v. McFarland*, OATH Index No. 1482/04 at 6 (Nov. 23, 2004).

In sum, on this record petitioner has failed to establish that respondent knew that his license was suspended prior to July 2009, when he took steps to lift the suspension. Since strict liability does not apply, and since General Order 2008-14 provides that disciplinary action will be imposed only after the employee does not restore his license within ten days of notification of the suspension, the charge that respondent violated Rule 3.4 of the Code of Conduct is not sustained, and should be dismissed.

Faye Lewis
Administrative Law Judge

July 22, 2010

SUBMITTED TO:

JOHN J. DOHERTY
Commissioner

APPEARANCES:

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