Health & Hospitals Corp. (Kings County Hospital Ctr.) v. Saavedra

OATH Index No. 1404/11 (Apr. 12, 2011), *modified on penalty*, Exec. Dir.'s Dec. (May 10, 2011), **appended**

60-day suspension recommended for community associate who knowingly accepted a duplicate pension loan payment from NYCERS.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
HEALTH AND HOSPITALS CORPORATION (KINGS COUNTY HOSPITAL CENTER)
Petitioner
-against-
ZORAIDA SAAVEDRA
Respondent

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, the Health and Hospitals Corporation (Kings County Hospital Center), pursuant to section 7:5 of the Personnel Rules of the Corporation. The charge alleges that respondent, Zoraida Saavedra, a community associate, engaged in criminal activity and on April 12, 2010, pleaded guilty to petty larceny and disorderly conduct. An additional charge, relating to unsatisfactory performance evaluations, was withdrawn at the beginning of trial (Tr. 5; ALJ Ex. 1).

At trial, petitioner presented documentary evidence and the testimony of two witnesses, while respondent testified in her own behalf. Post-trial, petitioner submitted the minutes of respondent's Criminal Court allocution into evidence and also presented written closing statements (Pet. Ex. 9; ALJ Exs. 2, 3). For the reasons set forth below, I find that the charge is sustained, and I recommend that respondent be suspended for 60 days.

ANALYSIS

It was not disputed that on April 12, 2010, respondent pleaded guilty in Criminal Court to petit larceny, Penal Law section 155.25, an A misdemeanor, and disorderly conduct, Penal Law section 240.20, a violation. In her plea allocution, she acknowledged committing larceny by knowingly taking $4,680 which she knew did not belong to her from the New York City Employees Retirement System ("NYCERS") on or about September 8, 2009. She was sentenced to a conditional discharge where, if she made restitution plus a five percent surcharge, the misdemeanor plea would be vacated. Only the plea to disorderly conduct would stand. The sentencing judge warned that if she failed to make restitution, she could "technically" face a year in jail (Pet. Exs. 9, 1, 2; Resp. Ex. A).

Respondent acknowledged that she applied for a pension loan from NYCERS in August 2009. She explained that she had taken out a pension loan every year since her appointment as a community associate at Kings County Hospital in 2001. Around that time, she was having "domestic problems" at home and not getting along with the person she lived with. She moved out and moved into her daughter's house (Tr. 48). When the loan check did not arrive in the mail, she went to NYCERS to investigate, and learned that the check had been sent to the wrong address. NYCERS agreed to electronically deposit the loan amount of $4,680 in her credit union account. However, NYCERS also sent a check for $ 4,680 to her daughter's home address (Tr. 45-47).

When the check came in the mail, respondent cashed it at a check cashing business. She testified that she understood at the time that she was not entitled to that money, because it was a duplicate payment (Tr. 47, 59). Respondent explained that she did so because she was "going through a lot" at the time (Tr. 47). "I had just lost my father, and I was going through problems at home, and I needed to move and I needed to bury my dad . . . I was against the wall and I just act[ed] stupidly" (Tr. 47-48). Respondent testified that her father had died in Panama and she had to make funeral arrangements (Tr. 57).

The Inspector General's investigative report on the incident states that although respondent was able to cash the duplicate check at the check cashing business, prior to the check clearing NYCERS had placed a stop payment on the check, because it realized that an electronic

transfer of funds had already been made (Pet. Ex. 5). The check cashing establishment was not able to recover the funds from NYCERS for its payment to respondent. Hence, the check cashing business, not NYCERS, bore the financial loss on the duplicate payment (Pet. Ex. 5).

When respondent was asked what she thought would happen as a result of her cashing the check, she testified, ". . . if they had came to me, I would have just paid back like I'm doing now" (Tr. 48). Expressing remorse, she apologized and said she knew she had done something wrong (Tr. 53). She acknowledged that she did not inform NYCERS that she had cashed the pension check even though she had also received an electronic deposit of the money (Tr. 61).

Respondent testified that she thought from speaking with her criminal defense attorney when she pled guilty in Criminal Court that she would not lose her job so long as she made restitution on a regular basis. However, the sentencing judge did not address whether she would be able to keep her job (Tr. 49; Pet. Ex. 9). Nor did anyone from the hospital tell her she would be able to keep her job (Tr. 58). She has been making payments monthly, but the amount varies depending on how much she can afford (Tr. 56).

Respondent was interviewed by the Office of the Inspector General for the Health and Hospitals Corporation ("the Inspector General") and the Department of Investigation ("DOI") on January 25, 2010. In that interview, which was recorded (Pet. Ex. 6), she acknowledged receiving the funds from the pension check twice: once through a check sent in the mail, and once by deposit to her credit union account. Respondent admitted that she knew that NYCERS had made a duplicate payment into her credit union account but withdrew money from that account anyway because she needed to pay some bills (Pet. Ex. 6). She also acknowledged not immediately responding to the DOI investigator's request to meet with her, asserting somewhat implausibly that she did not know the purpose of the meeting (Pet. Ex. 8). However, she said that she wanted to repay the money and was told that the DOI investigators would be in touch with her (Pet. Ex. 6).

Respondent was arrested on March 9, 2010, about six weeks after her interview with the Inspector General and DOI. She testified that she had not taken any steps to repay the money beforehand because the DOI investigators had not gotten back to her (Tr. 63).

Petitioner seeks to discipline respondent under section 7.5 of the HHC Personnel Rules and Regulations for her off-duty criminal conduct. In general, an agency may discipline an employee for off-duty misconduct when there is a sufficient nexus between the off-duty misconduct and the employee's ability to effectively perform his job. *Furst v. New York City Transit Auth.*, 631 F. Supp. 1331, 1338 (E.D.N.Y.1986) (finding blanket policy requiring discharge of ex-felons to be unconstitutional under the Equal Protection Clause and requiring some nexus between conviction and job responsibilities); *compare Villanueva v. Simpson*, 69 N.Y.2d 1034, 1035 (1987) (in upholding dismissal of subway conductor for off-duty assault, stating "A municipality may discipline its employees for actions occurring off duty and off the employer's premises").

Here, respondent pleaded guilty to petit larceny and disorderly conduct, and acknowledged stealing more than $4,000 from NYCERS. Respondent's plea to petit larceny may ultimately be vacated, depending on whether she makes full restitution. However, even if the plea is vacated so that she is ultimately convicted only of a violation, not a crime, her admissions before this tribunal, the Inspector General, and the Criminal Court are sufficient to establish that she committed a crime by taking loan money which did not belong to her. *Compare Human Resources Admin. v. Williams*, OATH Index No. 1114/05 at 14 (Sept. 21, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD06-60-SA (May 2, 2006) (misconduct not established where there was a plea to disorderly conduct but no proof as to what respondent admitted in the plea allocution).

The remaining issue is whether there is any nexus between respondent's theft of money from NYCERS and her employment. Respondent is a community associate who gives out nicotine patches and helps counsel people who want to stop smoking (Tr. 55-56). Thus, as respondent's attorney notes, the nexus between respondent's crime and her job responsibilities is not as clear as in the many cases involving law enforcement agents, for whom committing a crime is "inherently contrary" to their law enforcement duties. *See Dep't of Correction v. Saranza*, OATH Index No. 973/94 at 3 (June 14, 1994). It is true that equipment and medication are maintained in the hospital and that respondent dispenses nicotine patches which have an economic value (Tr. 27, 65). However, it is entirely speculative to suggest, as did petitioner in

its post-trial brief (ALJ Ex. 3 at 4), that respondent might misappropriate the nicotine patches and sell them for her own benefit, or otherwise steal property from the hospital. Yet to deny that a nexus, however attenuated, exists is to ignore that larceny is at its essence an act of dishonesty and respondent must be trusted to perform her duties in the field as well as in the hospital (Tr. 27).

More to the point, a nexus exists because respondent was able to apply for and receive a pension loan from NYCERS by virtue of her employment with the City. And because of her City employment, she was able to seek help from NYCERS when she did not receive the original loan check, and to take advantage of the situation when NYCERS responded by mistakenly disbursing the loan funds both electronically and by duplicate check.

In this respect this case is similar to *Malderelli v. Doherty,* 40 A.D.3d 470 (lst Dep't 2007), which affirmed a determination terminating a sanitation worker's employment following his conviction for insurance fraud. The sanitation worker had filed a claim for lost earnings against a private insurer by submitting forged documents and memorandum on Department letterhead, falsely indicating that he was not entitled to sick leave through his job. The First Department noted that although the crime did not involve the sanitation worker's employment duties, "it was sufficiently related to his employment in that he misused his job status to perpetrate this fraud." 40 A.D.3d at 471, *aff'g, Dep't of Sanitation v. Maldarelli,* OATH Index No. 1495/05 (Dec. 13, 2005), *adopted,* Comm'r Dec. (Dec. 29, 2005).

This case is also similar to *Human Resources Administration v. Risper,* OATH Index Nos. 1952/04 & 1954/04 (Nov. 23, 2004), in which clerical associates falsely claimed on applications for relief benefits after the September 11, 2001 terrorist attacks that they had lost wages because of the attacks. Stressing that the employees identified themselves as ACS employees in their applications, submitted ACS pay stubs to substantiate their eligibility status, and provided the names of their supervisors to verify their employment, Judge Maldonado concluded, "That the receipt of relief benefits was directly tied to respondents' representations about their City job is sufficient to establish a nexus with their employment." *Risper,* OATH 1952/04 at 7. *See also Human Resources Admin. v. Palmer-Davis,* OATH Index No. 2968/10 (Dec. 2, 2010) (HRA supervisor committed petit larceny by falsely asserting in housing subsidy

applications that she worked full-time as a babysitter rather than disclosing her employment with HRA); *Dep't of Sanitation v. Rosario*, OATH Index No. 2301/10 (June 11, 2010) (sanitation worker convicted of theft of public funds falsified application for housing subsidy by failing to list his city employment); *Health & Hospitals Corp. (Elmhurst Hospital Ctr.) v. Williams*, OATH Index No. 1818/01 (Oct. 12, 2001) (hospital worker embezzled public money by accepting disability benefits while working at the hospital and failing to disclose her employment at the hospital on disability forms).

Moreover, this tribunal has consistently held that crimes of larceny, including fraud, are indicative of moral turpitude and constitute a basis for discipline. *See Dep't of Sanitation v. Rosario*, OATH Index No. 2301/10 (June 11, 2010) (theft of public funds by falsifying application for housing subsidy); *Human Resources Admin. v. Finley*, OATH Index No. 947/05 (Oct. 12, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD06-53-SA (Apr. 24, 2006) (insurance fraud); *Dep't of Transportation v. Delprete*, OATH Index No. 506/95 (Feb. 17, 1995) (petit larceny by stealing cobblestones from Department yard); *but cf. Dep't of Health v. Lloyd*, OATH Index No. 388/86 (Dec. 30, 1986) (guilty plea to petit larceny insufficient to establish moral turpitude where there was no evidence of the factual basis underlying the plea, such as the misdemeanor information, plea allocution minutes, or trial testimony). These cases are consistent with the comment by the First Department in *Maldarelli*, 40 A.D.3d at 471, that "unethical conduct could be construed as an act of moral turpitude or, at the very least, one that would bear on [the employee's] fitness to continue in that position."[1]

In sum, respondent's knowing acceptance of duplicate loan payouts from the pension system is disciplinable as off-duty misconduct. Accordingly, the charge of misconduct is

[1] In *Malderelli*, the First Department also cited Mayoral Executive Order No. 16 of 1978, as amended by Executive Order No 105 of 1986, which, absent "compelling mitigating circumstances," calls for dismissal of any City employees "convicted of a crime relating to their office or employment, involving moral turpitude, or which bears upon their fitness or ability to perform their duties or responsibilities." Mayor's Executive Order No. 105 § 5(b) (Dec. 26, 1986), *amending*, Mayor's Executive Order No. 16 § 5(c) (July 26, 1978). The Court noted that it was unclear whether this Executive Order permitted dismissal to be based upon any of these three categories or required that the crime be related to the employment and involve either moral turpitude or fitness to perform. The Court did not decide this issue, finding that the sanitation worker's crime was related to his employment while also finding that it constituted moral turpitude, or at least, "unethical conduct." 40 A.D.3d at 471.

sustained.[2]

FINDINGS AND CONCLUSIONS

1. Respondent engaged in petit larceny in September, 2009 by knowingly accepting a duplicate loan payment of $4,680 from NYCERS that did not belong to her.

RECOMMENDATION

Upon making these findings, I requested and received a copy of respondent's disciplinary abstract. It indicates that respondent began her employment at the hospital in 2000. Her disciplinary record is limited to a two-day suspension on the record in 2009 to resolve a charge of insubordination.

Petitioner asserts that termination of employment is appropriate because respondent can no longer be trusted to work in a hospital setting, as she has demonstrated that "in times where she needs to, she will steal if it benefits her" (Tr. 71).

By contrast, respondent expressed contrition for taking the money and said that she had "learned her lesson" (Tr. 64). Even if she needs money, she will not take anything that is not hers: "Even if they put it in front of me, I will not touch anything that don't belong to me" (Tr. 64). She stressed that she has been making payments on the money owed on a regular basis (Tr. 65). This is despite having moved out of her daughter's house because of concerns about her daughter's lifestyle, and currently living in her car (Tr. 57).

I found respondent's expression of remorse to be sincere. Unlike many of the cases in which we have recommended termination for larcenous or fraudulent conduct, *see, e.g, Human Resources Admin. v. Palmer-Davis,* OATH Index No. 2968/10 at 6 (Dec. 2, 2010) (employee "engaged in a deliberate, repeated, and fundamental breach of trust" by submitting false affidavits for a rent subsidy for a two year period), there is no evidence that respondent intended

[2] The misconduct charge has two specifications. Specification two alleges that respondent engaged in criminal activity. This was proven both by respondent's plea to petit larceny, her trial testimony, and her admissions before the Inspector General. Specification one alleges that respondent pleaded guilty to petit larceny and disorderly conduct. The plea itself is not misconduct; rather, it is only evidence of misconduct. *See Fire Dep't v. Murolo,* OATH Index No. 560/95 at 5 (Feb. 24, 1995), *aff'd,* 246 A.D.2d 653 (2d Dep't 1998); *Dep't of Health v. Protzel,* OATH Index No. 613/98 at 10-11 (July 15, 1998).

to commit fraud or larceny when she initially applied for the pension loan. Rather, her offense was a crime of opportunity. And her behavior in knowingly taking the duplicate payment appears to be an isolated, albeit grievous one-time error in judgment in an otherwise solid career. Moreover, respondent is not a law enforcement officer or someone with access to a confidential database, and there is no evidence that she ever stole or misappropriated anything from the hospital. It is notable that at the time, respondent was experiencing "domestic problems" at home, which required her to move to her daughter's residence, and that she had funeral expenses for her father (Tr. 49, 57). Respondent candidly acknowledged that she acted "stupidly" (Tr. 49).

Respondent's sentence to a conditional discharge, giving her the opportunity to avoid a criminal record if she makes restitution, is reflective of the peculiar circumstances of her offense. It is foreseeable, as respondent testified, that if she loses her job, she will not be able to continue making the required restitution (Tr. 65). Thus, firing respondent is likely to thwart the intent of the sentencing court by resulting in her inability to make restitution. This would also frustrate the purpose of the Penal Law in "the rehabilitation of those convicted." Penal Law § 1.05(6), cited in *Acosta v. NYC Dep't of Education*, 2011 N.Y. Slip Op 02073 (Ct. of App. Mar. 24, 2011) (discussing Correction Law as applicable to licensing of ex-offenders); *see also Islam v. NYC Taxi and Limousine Comm'n*, 2008 N.Y. Misc. LEXIS 7491, at 4 (Sup. Ct. N.Y. Co. 2008)(in case involving licensing of ex-offender, citing "strong public policy and law which require that foreclosing public employment based on criminal record be closely scrutinized").

These factors all suggest that some leniency is warranted for respondent, a community associate with eleven years tenure who under financial pressure took advantage of an error made by NYCERS and knowingly accepted a duplicate payment on a loan. *See Dep't of Sanitation v. Iocovello*, OATH Index No. 195/09 (Dec. 10, 2008) (in recommending a 30-day suspension for supervisor convicted of a federal felony conspiracy charge involving gambling, noting mitigatory factors including the employee's contrition, the nature of the offense, and employee's prior exemplary work history); *compare with Palmer-Davis*, OATH 2968/10 at 6 (in case involving repeated fraudulent submission of rent subsidy applications, finding that '[r]espondent has presented a good deal of mitigation, but it did not outweigh the Department's legitimate concerns") (citing cases).

It is regrettable that respondent did not inform NYCERS of her misdeed, or attempt to make restitution prior to her arrest in March 2009. However, her interview with the Inspector General suggests that she understood the seriousness of her actions and was willing to make restitution, but was expecting one of the investigators to call her after the interview to follow up (Pet. Ex. 6). Instead, a decision was made to pursue criminal charges and respondent was arrested. Respondent's passivity in the face of a formal investigation was more likely indicative of not knowing what to do than of any deliberate plan or scheme to avoid repaying the money, which respondent knew would be required whether or not criminal charges were brought.

Considering all the circumstances, including the unusual circumstances of respondent's offense, I find that a penalty short of termination is sufficient to serve the twin purposes of punishment and deterrence. Thus, I recommend that respondent be suspended for 60 days, the maximum penalty for misconduct short of termination.

Faye Lewis
Administrative Law Judge

April 12, 2011

SUBMITTED TO:

ANTONIO D. MARTIN
Executive Director

APPEARANCES:

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Executive Director's Decision (May 10, 2011)

As the designee of Antonio Martin, Kings County Hospital Center's Executive Director, I have reviewed Administrative Law Judge Faye Lewis' April 12, 2011 Report and Recommendation, the entire record and respondent's counsel's April 12, 2011 *Fogel* letter. Based on this review, I agree with Judge Lewis that respondent engaged in petit larceny in September 2009, by knowingly accepting a duplicate loan payment of $ 4,860 from NYCERS that did not belong to her. However, I disagree with Judge Lewis' recommended penalty of a sixty (60) day suspension. Therefore, after careful consideration, I am modifying the sixty (60) say suspension to termination for the reasons set forth below.

The disciplinary charges against respondent concern the cashing of a NYCERS' loan check in September 2009, even though she had previously received her NYCERS' loan money via an electronic transfer of funds. It is undisputed that as a result of respondent's actions she was arrested for Grand Larceny and that on or about April 12, 2010, she pled guilty to petit larceny and disorderly conduct and was given a one year conditional discharge and was required to pay restitution.

I agree with Judge Lewis that there is both a nexus to respondent's employment and that her criminal conduct constitutes a crime of moral turpitude and dishonesty. Accordingly, I find that it is appropriate for respondent to be disciplined for her off-duty criminal conduct. However, I disagree with Judge Lewis that there are any mitigating factors and her recommendation of a sixty (60) day suspension. Because respondent committed a crime of moral turpitude, termination is the appropriate penalty absent compelling mitigating circumstances. There are no compelling mitigating circumstances in this case which prevent the imposition of the penalty of termination.

Judge Lewis stated in her recommendation that respondent expressed remorse and was contrite. However, respondent's actions during the investigation and her testimony at the hearing do not support Judge Lewis' findings. In fact, respondent's actions and testimony demonstrate that she had no intention of voluntarily returning the wrongly obtained funds of $ 4680. Respondent clearly testified that "If they had came to me, I would have just paid back." It was not until after she was caught that she acknowledged her wrongdoing. This is entirely insufficient and does not demonstrate contrition or remorse. Moreover, it is quite easy to state in the face of a criminal penalty and discipline that respondent learned her lesson. However, these words are simply insufficient to overcome respondent's intentional criminal conduct. Additionally, stating that she would not commit a crime in the future does not diminish the seventy of respondent's criminal conduct and it certainly is not the basis to mitigate her disciplinary penalty.

In recommending a penalty less than termination Judge Lewis wrote that to terminate respondent's employment would thwart [the] intent of the sentencing court by resulting in her inability to make restitution. Judge Lewis' basis for recommending a penalty less than termination is without merit.

First, the one year conditional discharge tune has passed. Therefore, if you were making regular payments as stated during your testimony you should have completed making the restitution. Second, complying with a criminal court sentence has no bearing on the decision by a public employer to terminate an employee for committing a crime of moral turpitude and dishonesty. It is not Kings County Hospital Center's responsibility to assist or ensure that you comply with the criminal court sentence or that you make restitution for your crime. The fact that you might not be able to pay restitution is not grounds to force Kings County Hospital Center to continue to employ a person who has committed a crime of moral turpitude and dishonesty.

I disagree with Judge Lewis' reliance on the Penal Law § 1.05(6), *Acosta v NYC Dep't of Educ*, 2011 NY Slip Op 02073 (Ct. of App. Mar 24, 2011) and *Dep't of Sanitation v Iocovello*, OATH Index No 195/09 (Dec 10, 2008) and do not find that these cases support her penalty Recommendation. These cases are different from respondent's case and I do not agree that they support the position that a penalty less than termination is warranted.

Judge Lewis further states that there are unusual circumstances with regard to respondent's criminal offense. I simply disagree. This is a case of respondent taking $ 4680 that was not rightfully hers. There is no justification for her theft. Therefore, respondent's allegations of domestic problems, having to move, and funeral expenses for her father do not provide a compelling mitigating circumstance and fail to demonstrate that her penalty should be less than termination. Moreover, respondent failed to produce any evidence at trial explaining why she could not resolve her problems without resorting to stealing.

Respondent has admittedly committed a came of moral turpitude and dishonesty. As a result, she has breached Kings County Hospital Center's trust which is essential to anyone's employment. Respondent's actions were and are inimical to her continued employment. Accordingly, even though she committed this crime while off-duty, there is also no doubt that termination is the appropriate penalty. Therefore, respondent's employment with Kings County Hospital Center is hereby terminated effective close of business Wednesday, May 11, 2011.

Respondent may appeal this decision by application to the Personnel Review Board or in accordance with Article 78 of the Civil Practice Law and Rules.

Raquel Ayala