Fire Dep't v. Palleschi

OATH Index No. 192/11 (Dec. 20, 2010), *aff'd*, 2013 N.Y. App. Div. LEXIS 433; 2013 NY Slip Op 437 (1st Dep't 2013)

Petitioner proved that respondent EMS Lieutenant posted private and confidential patient information on his Facebook page, where 460 of his "friends" on that social network could see it, for their amusement. ALJ recommends termination of respondent's employment due to this serious breach of the public trust.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
FIRE DEPARTMENT
Petitioner
- against -
MICHAEL PALLESCHI
Respondent

REPORT AND RECOMMENDATION

JOAN R. SALZMAN, *Supervising Administrative Law Judge*

The Fire Department (the "Department") brought this employee disciplinary proceeding pursuant to section 75 of the Civil Service Law against respondent, a 12-year employee of the Department's Bureau of Emergency Medical Services ("EMS"). The Department alleges that respondent posted private patient information about an emergency call to 911 on April 8, 2010, for the purpose of amusing his friends on Facebook. Respondent is charged with bringing the agency into disrepute and showing disrespect to the public. Respondent admits the charges in all material respects and the case is all about the appropriate penalty for such misconduct.

Respondent was the only witness at the trial, on October 12, 2010. The record was held open until November 19, 2010, without objection, so that respondent could obtain his counseling records from the Department. Respondent believed that these records might tend to excuse his conduct or mitigate the penalty for the admitted misconduct.

For the reasons set forth below, I find that the Department proved the undisputed charges by more than a preponderance of the evidence. There was convincing and credible evidence of

respondent's admitted misconduct. Accordingly, I recommend that respondent's employment with the Department be terminated.

ANALYSIS

As a Lieutenant, respondent served as a liaison between the Police and Fire Departments, including the Emergency Medical Services unit of the Fire Department. On April 7, 2010, when he began his overnight shift, he was the conditions supervisor in the field. His job was to supervise, to lead, and to serve as a mentor to the paramedics on duty (Tr. 28). It is undisputed the respondent drove an agency vehicle to the address of an emergency caller, who reported a gynecological emergency by calling 911 in the early morning hours of April 8, 2010. As a Lieutenant and supervisor, it was respondent's job to meet Department ambulances on call and ensure that the proper emergency care was being delivered timely.

On that overnight shift, respondent received dispatches on a Department computer screen installed in his City vehicle for the purpose of delivering emergency services to the public. Finding the dispatch at issue amusing, respondent took a photograph of the computer screen with the camera on his personal cell phone and uploaded it to his Facebook page, about 4:00 a.m. on April 8, 2010, with the following message next to his name: "Can't make this up" (Pet. Ex. 5; Tr. 48, 51). At the time, he was still working; it was the end of his shift (Tr. 38, 43, 53; Pet. Exs. 1-4). Before uploading the message from his phone to his Facebook social network account, respondent backspaced the caller's address from the top of the screen in a failed attempt to redact at least her address from the dispatch, but he was careless: the patient's name, home address and telephone number remained in the body of the dispatch he uploaded to his "friends" -- and he had 460 friends who could view this exquisitely personal and private information online (Tr. 48-52). Respondent's wife and one of his friends posted responses that were crude and mocked the patient in profanity-laced language and modern internet-style, abbreviated lingo. A third friend wrote, presciently: "that's gonna get you in trouble . . . . " (Pet. Ex. 5).[1]

[1] Other inane and smutty material denigrating women and full of sexual innuendo was included in the messages respondent exchanged with his friends in the weeks leading up to this incident (Pet. Ex. 5). On March 18, 2010, respondent wrote to his friends on Facebook: "New summer oplympic [*sic*] event….Women in short skirts..high heels running and dodging traffic…instead of Frogger we could call it Hoochie.' If you coulde [*sic*] traffic… Go. Balls Deep!!!' … who would watch.. I for one want season tixx.." A friend said he "likes this." And respondent wrote back: "Ok I realized I choud [*sic*] have checked for typos's but one handed while driving didn't care." A second friend said, "Am in for season tickets," while a third wrote, "Don't text and drive!" (Pet. Ex. 5). I am not considering these earlier, silly Facebook entries as misconduct, as respondent was not charged for posting these, but mention them simply to show how reckless he was in his public postings on the web.

Respondent admitted at an audiotaped interview by Department counsel the next day that he did this because he thought the dispatch was "amusing," and believed his friends would also find it so (Pet. Ex. 6). Respondent was represented by his trial counsel and the President of his union at this interview, which was conducted at the Department's offices. In the key testimony, respondent admitted the improper motive that animated his misconduct:

Q.: This isn't the first time something unusual came up like that, right?

A.: No sir.

Q.: But – did you ever, before this time, take that information and post it out for, I'm assuming, for people to look at and find amusing?

A.: I don't recall. . . . .

Q.: OK, when you took that picture, at the time you said you didn't know why you did it. OK – You thought it was funny – right?

MR. BONNANO: Well – Did you think it was funny is the more appropriate question.

Q.: Did you ?

A.: Yes sir.

Q.: OK – you thought it was amusing that the way the call was phrased? Right?

A.: The way it was phrased?

Q.: That she had a [Redacted]

A.: Yes, sir.

Q.: OK – and you thought that people that would see your posting would find it amusing?

A.: Yes sir. . . .

Q.: OK – so when you did it – you knew it was against the rules – right?

A.: Yes sir.

(Pet. Exs. 6 and 7).

Respondent was upset during the interview when he saw that he had not deleted the patient's personal identifying information (Pet. Ex. 6). He admitted that even when he thought he had deleted that information, he knew it would be wrong to post a patient's information, and that patient call information is not to be used for amusement. In short, he knew that what he was doing was wrong when he did it. Asked if he had made the Facebook posting because he

believed his network of about 460 people "would see it and get a kick out of it," he admitted, "Yes sir" (Pet. Ex. 7).

The *New York Post* got hold of this posting about the patient and published a story about respondent and his "tasteless joke that violated federal medical-privacy law" (without identifying the patient) on June 27, 2010 (pet. Ex. 8). As a result of that article, entitled, "Medic big's joke is DOA," numerous members of the public posted public comments on the *New York Post's* website (Pet. Ex. 9). The commentators said respondent's conduct reflected poorly on himself and the service, and they expressed their unanimous disgust.

At the hearing, respondent admitted again that he knew he was committing a serious violation and breach of trust. He knew he was acting in violation of Department rules and other laws. (Tr. 27). He admitted that the information on the computerized dispatch screen was confidential (Tr. 37).[2] He tried to delete or "back out" the address at the top of the screen because, he acknowledged, "personal information should not be disclosed" (Tr. 45-46). He admitted further that even without the personal identifiers, he was still not allowed to post the information in the confidential dispatch (Tr. 49). Respondent conceded that he knew that information on the computer screen in his City vehicle was confidential and that he took the photograph of the screen and uploaded it to his Facebook account anyway (Tr. 82). After he got home and went to sleep, the Chief of his Division called him on the phone, woke him, and asked if he had posted something on Facebook. Respondent answered, "yeah." The Chief told respondent to take it down, and respondent did so and deleted his Facebook account (Tr. 53-54).

Respondent testified and submitted his departmental counseling records from 2004 to 2007, ending three years before this incident, as well as some records of mandatory counseling to which respondent was ordered by the Department in April 2010 because of this incident (Resp. Ex. A). There was a gap in the counseling records from 2007 to 2010, because respondent stopped going to voluntary counseling about the time he met his current wife. He also submitted four letters from supporters at the Department and from the union President about his character and good work (Resp. Ex. B). I have also included in the record as Respondent's Exhibit C additional counseling records submitted by respondent after the hearing in his attempt to show that his personal and health issues should excuse or mitigate his conduct, together with all the

[2] Respondent was not charged here with violation of Chapter 68 of the City Charter. *See* Charter §§ 2604(b)(2) (prohibiting the use of City resources and equipment for non-City purposes as specified in 53 RCNY § 1-13), (b)(3) (prohibiting misuse of office), and (b)(4) (prohibiting the disclosure or use of confidential City information).

post-hearing e-mails among counsel and me, including a better copy of one of the recommendation letters and the Department's formal, written objection to the relevance of the additional counseling records.

The Department objected that the documents were irrelevant and not probative of a mental health issue or other circumstances that would excuse or mitigate respondent's misconduct. Having reviewed these materials, I agree with the Department that the counseling records neither excuse nor mitigate the misconduct, for which respondent must accept responsibility. The records do not support respondent's contention that a diagnosed illness caused him to post confidential information on the web. The few form letters and social workers' letters produced post-hearing by respondent numbered only seven. Those dated July 26 and 27, 2010, were merely requests for his records at the Department; the rest were letters from social workers, dated September 9 and October 1, 1999, July 20, 2007, March 21, 2008, and August 6, 2009 (Resp. Ex. C). These were not medical diagnoses of conditions that support an excuse that respondent was suffering from an illness in the three years leading up to the incident that would explain or excuse his conduct. I see no need to discuss in this decision respondent's personal issues that are not germane to the poor judgment he displayed in publicly mocking a patient's misfortune, and, therefore, I am not referring to the counseling records in this decision to the extent they are irrelevant, though I am sensitive to the highly personal nature of the records respondent submitted for consideration as a defense to or in mitigation of his conduct. *See* 48 RCNY § 1-49 (Lexis 2009) (absent legally recognized grounds to omit information from a decision, all decisions shall be published without redaction).

It is noteworthy, however, that the counseling records do contain information that tends to show the opposite of the point respondent sought to use them to prove. The counseling records that respondent placed in issue here indicate that he has serious difficulty managing on-the-job stress and other forms of stress in his personal life (Tr. 73). To the extent that the counseling records are relevant to the admitted misconduct at all -- and, again, I do not discuss them in any detail -- those records aggravate the misconduct because they show that he lacks self-control with respect to pertinent, highly personal issues that put his conduct -- posting a private 911 call relating to sex -- in context. The counseling records thus belie the notion that this posting was a solitary lapse or prank that should be forgiven in light of his otherwise good career of service to the public.

Respondent was not charged here directly with violation of federal law, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. § 1320 et seq. (Lexis 2010). Nonetheless, respondent's counsel requested that I find that the Department has violated HIPAA rules by bringing this case and submitting the EMS dispatch into evidence (Tr. 110-12). I find the argument meritless. *See Dep't of Environmental Protection v. Rodriguez*, OATH Index No. 1438/08 at 4-5 (Apr. 29, 2008) ("HIPAA does not create a new evidentiary privilege for disciplinary hearings. A patient's remedy for a HIPAA violation is to notify the United States Department of Health and Human Services"), *modified on penalty*, Comm'r Dec. (May 15, 2008), *aff'd sub nom. Rodriguez v. City of New York*, 2009 N.Y. Misc. LEXIS 3962 (Sup. Ct. N.Y. Co. 2009), *aff'd*, 71 A.D.3d 512 (1st Dep't 2010). Respondent's counsel also argued that the caller was not necessarily the patient and that, therefore, there was no breach of confidentiality (Tr. 109-12). Respondent himself admitted under oath that the dispatch contained confidential information. Even assuming the patient had someone call for her, the information in the dispatch is a patient's emergency call for help. This argument is frivolous and must be rejected.

After the close of the evidence, the parties jointly asked me to seal the entire record. I declined, because this was a public hearing, 48 RCNY § 1-49 (Lexis 2009), and there was no reason to seal the entire record. *See Mosallem v. Berenson*, 76 A.D.3d 345, 348-49 (1st Dep't 2010) ("Under New York law, there is a broad presumption that the public is entitled to access to judicial proceedings and court records"; public right to access is not absolute, and confidentiality is the exception, not the rule). However, I did indicate to the parties that I was not going to identify the patient in my decision and directed them to review the transcript and exhibits and to redact her identity (meaning name, address, and phone number) from this record should it be sought for publication or filed in court. Even though that information was on the internet, I see no reason to republish it. I have marked these few identifiers of the patient in the transcript so that the parties can make appropriate redactions should they be asked to produce the record or have a need to file this case in court. Respondent's late request to seal his counseling records made by licensed social workers was rejected on the basis that, regardless of the privacy rights that may have attached to those records, it was he who placed his health in issue by way of defense and the request came after he had submitted the documents in the public record and testified about them publicly. *Rodriguez*, OATH 143/08 at 4-5 ("by submitting medical notes

and claiming that he was sick on the dates in question, respondent implicitly waived his right to confidentiality and authorized his employer to contact the medical providers to verify the authenticity of the notes"). Nonetheless, I directed the parties to review the records with sensitivity to respondent's privacy should they be called upon to produce the counseling records, which are being returned to the Department with this decision, outside this tribunal (Tr. 117-120).

Respondent is charged with violating EMS Operating Guide Procedure No. OGP No. 101-01 (1999), sections 4.2.1 (prohibiting conduct tending to bring the City of New York and the Fire Department into disrepute) and 4.1.10 (failure to be respectful to the public at all times). I find that respondent has violated these procedures.

The charges are sustained in full.

FINDINGS AND CONCLUSIONS

Respondent posted confidential patient information for 460 of his friends to see on his Facebook page. Respondent committed this misconduct in violation of law and agency procedures and in callous disregard of the most fundamental requirements of his job, to the discredit of the Department, and subjected himself and the agency to public scorn. The charges are sustained in full.

RECOMMENDATION

Having made these findings, I requested and reviewed respondent's personnel record. He has been an emergency worker or supervisor of emergency services for the City for 12 years (Tr. 13). He was appointed in 1998 as an EMT, became a paramedic in 1999, and received a promotion in November 2008 to Lieutenant. His regular performance evaluations show that over the years he has consistently been rated "good" or "very good," but for some attendance problems. It is undisputed that he received commendations for lifesaving in 2006 and for good work in 2002 and 2008 (Tr. 21-26; 101-02).

There are mitigating factors here: respondent's 12-year tenure, his good service and life-saving work, and his effort (albeit unsuccessful) to redact at least some of the confidential patient information. Respondent does seem remorseful. His attorney conceded in opening that his client would readily admit that "this is one of the stupidest things he's ever done in his life" (Tr. 18). However, these points in his favor do not excuse respondent's egregious misconduct in using extremely private patient information for sport. There is no place for him in the Department any

longer. The working relationship is, as the agency advocate argued, broken beyond repair (Tr. 14-17).

I have closely considered and rejected a lesser penalty, because as difficult as respondent's life has been, and even after reviewing his claims and documents concerning his own health issues, those personal issues really do not excuse the type of action he took in derogation of a patient's privacy rights, Departmental policy, and law. There is only a tenuous connection between the counseling records and this incident because the records essentially stop in 2007 and respondent presented no medical excuses for the period 2007 through the time of this incident. Respondent went through a painful divorce in 2007, and then met the woman who became his second wife. When he found her, he stopped going to Department counseling for about three years before this incident (except for one visit in 2008 and one in 2009), and was doing better because he had his second wife to comfort him (Tr. 87, 99, 107). None of the personal recommendations he submitted as character references from co-workers and superiors who vouch for him says anything about personal difficulties or health or mental health problems that might excuse this conduct (Tr. 102-05; Resp. Exs. B, C).

As Administrative Law Judge Tynia D. Richard noted in *Fire Dep't v. Prosper*, OATH Index No. 294/08, at 8 (Nov. 28, 2007), *aff'd*, Comm'r Dec. (Dec. 7, 2007), "patient care is an EMT's highest responsibility." Respondent breached that paramount duty here. Similar misuse of patient information has led to termination of employment in prior precedents. *See, e.g.*, *Coler/Goldwater Memorial Hospital v. Fievre*, OATH Index No. 1763/97 at 8 (Aug. 15, 1997) (despite good record, employment terminated due to serious breach of trust, "disturbing indifference to patient welfare," and lack of integrity shown when hospital technician violated a patient's confidentiality by looking at clinical records she was not authorized to see); *Admin. for Children's Services v. Jones-Boakai*, OATH Index No. 1926/07 (July 3, 2007), *adopted*, Comm'r Dec. (July 30, 2007) (child protective specialist who removed confidential agency records from the workplace dismissed from the service).

Respondent has demonstrated that he lacks the kind of mature judgment and self-control required of an emergency medical technician and a supervisor of paramedics, who must routinely work under stress and are obligated to handle and protect private patient information. He has shown himself to be reckless. The conduct here is worse than in the cited cases in the sense that respondent exposed private patient information publicly for the entertainment of his friends. As

a supervisor, respondent knew what he did was wrong even as he was doing it. Given his position as a role model, his conduct was inexcusable.

Accordingly, I recommend that respondent's employment with the Department be terminated.

Joan R. Salzman
Supervising Administrative Law Judge

December 20, 2010

SUBMITTED TO:

SALVATORE J. CASSANO
Commissioner

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