Dep't of Sanitation v. Ragone

OATH Index No. 1970/11 (Aug. 9, 2011)

The Department proved that respondent, who was convicted in Criminal Court of petit larceny after fraudulent misrepresentation and cashing checks from NYCERS to which he was not entitled, was guilty of violating Executive Order 16, and multiple sections of the Department's Code of Conduct. Respondent did not testify and ALJ found no compelling mitigating factors that would warrant a penalty less than termination. ALJ recommends that respondent be terminated from his employment.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
- against -
ANDREW RAGONE
Respondent

REPORT AND RECOMMENDATION

INGRID M. ADDISON, *Administrative Law Judge*

The Department of Sanitation brought this disciplinary proceeding pursuant to section 16-106 of the New York City Administrative Code. The Department charged respondent, a sanitation worker, with fraudulently stealing, receiving and cashing checks issued by New York City Employee Retirement Systems ("NYCERS") on or about October 27 and December 24, 2008, in violation of Mayoral Executive Order 16 and sections 3.2, 4.4, 4.5, 4.6 and 4.9 of the Department's Code of Conduct, General Order No. 2002-06 (ALJ Ex. 1).

At a hearing on July 25, 2011, petitioner relied on the criminal court complaint, the minutes of respondent's guilty plea and a certificate of disposition. Respondent, who was convicted of petit larceny, did not challenge the factual allegations in petitioner's charge and did not testify. Instead, he presented the testimony of eight co-workers as character witnesses.

For the following reasons, I find that respondent engaged in misconduct by committing petit larceny. Respondent violated Executive Order 16, in that his crime was related to his

employment as a City employee, and involved moral turpitude. His conduct also violated sections 3.2, 4.4 and 4.6 of the Department's Code of Conduct, bringing discredit upon the Department and the City through his filing of a false affidavits with NYCERS, and receiving and cashing checks that he received through fraud.

I therefore recommend that respondent be terminated from his position.

ANALYSIS

The following facts, derived from the criminal court complaint against respondent (Pet. Ex. 1), are undisputed. On or around June 25, 2008, respondent applied for a pension loan from NYCERS, in the sum of $3,680. NYCERS issued a check which respondent cashed on July 10, 2008. On July 25, 2008, respondent filed a sworn and notarized affidavit in which he stated that he had not received the check. Based on that representation, NYCERS issued a supplemental check for $1,340 on October 24, 2008. Respondent cashed that supplemental check three days later, on October 27, 2008. On or around December 23, 2008, NYCERS issued and sent respondent a replacement check for the full amount of the loan initially sought by him. Respondent cashed that check on December 24, 2008. Pursuant to an investigation by the New York City Department of Investigations, respondent admitted to having cashed the original check on July 10, 2008. He was arrested on June 11, 2009, and charged with grand larceny and offering a false instrument for filing, in violation of sections 155.35 and 175.35, respectively, of the Penal Law. On December 1, 2009, respondent pled guilty in Queens Criminal Court to petit larceny, a violation of section 155.25 of the Penal Law. Petit larceny is a misdemeanor. *See* Penal Law §10.00(6) ("crime" means a misdemeanor or a felony). During his allocution, respondent was asked, "Do you admit that on or between June 25, 2008 and December 24, 2008 . . . you stole various amounts of money; are all these facts true?" He replied in the affirmative. In full satisfaction of his plea, respondent was sentenced to three years probation and restitution of $3,922.88, through deductions from his paycheck.

Respondent is charged with violating Mayoral Executive Order No. 16 ("MEO 16") of 1978. That Order, which was amended by MEO 105 of 1986, calls for the 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 . . . absent compelling mitigating circumstances set forth in writing by the head of the employing

agency." Mayoral Exec. Order No. 16, §5 (c) (July 26, 1978) (renumbered as §5 (b) by Mayoral Exec. Order No. 105 (Dec. 26, 1986)).

In *Maldarelli v. Doherty,* 40 A.D.3d 470 (1st Dep't 2007), a sanitation worker challenged the Department's decision to terminate him following his conviction for insurance fraud and a subsequent disciplinary hearing before this tribunal (*Dep't of Sanitation v. Maldarelli,* OATH Index No. 1495/05 (Dec. 13, 2005)). Noting that the fraud was not committed against the City or the Department of Sanitation as the direct employer, but against a private insurer, the First Department found that the crime "was sufficiently related to [Mr. Maldarelli's] employment in that he misused his job status to perpetrate [the] fraud, and 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." *Maldarelli,* 40 A.D.3d at 471. In the same vein, this tribunal has held that "crimes of larceny, including fraud, are indicative of moral turpitude and constitute a basis for discipline." *Health & Hospitals Corp. (Kings County Hospital Ctr.) v. Saavedra,* OATH Index No. 1404/11 at 6 (Apr. 12, 2011), *modified on penalty,* Exec. Dir's Dec. (May 10, 2011); *see,* e.g., *Dep't of Sanitation v. Rosario,* OATH Index No. 2301/10 (June 11, 2010) (theft of public funds through falsification of 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. CD 06-53-SA (Apr. 24, 2006) (insurance fraud); *Dep't of Transportation v. Delprete*, OATH Index No. 506/95 (Feb. 17, 1995) (petit larceny through theft of cobblestones from Department yard).

Here, even though respondent's crime was not committed on Department premises or related to his direct duties as a sanitation worker, his theft of money from NYCERS is related to his status as a City employee in that, through his employment with the City, he was able to apply for and receive a loan from NYCERS. Also, his status as a City employee facilitated his abuse of the system when he represented to NYCERS that he did not receive the first loan check, and cashed that and subsequent checks that NYCERS sent him, all related to the same loan request. *See Saavedra,* OATH 1404/11 at 5. Indeed, respondent's misconduct is strikingly similar to the misconduct in *Saavedra*, where an employee requested, received, and deposited a duplicate loan payment from NYCERS.

Thus, I find that respondent's criminal act of petit larceny was related to his employment and was a crime of moral turpitude, in violation of MEO 16.

Respondent was also charged with violations of several sections of the Department's Code of Conduct. Specifically, respondent was charged with violating sections: 3.2 (conduct which tends to discredit the City or Department); 4.4 (making false reports on any Department or other official record); 4.5 (stealing, attempting to steal or allowing anything to be stolen from Department premises, or property, or any equipment or vehicle belonging to the Department); 4.6 (knowingly possessing or attempting to possess any stolen property) and 4.9 (engaging in criminal activity while on duty or on Department premises or property. . . or while engaging in Department activities).

The evidence did not support a violation of sections 4.5 and 4.9, because respondent's fraudulent affidavit did not constitute a false report on the Department's records, and the crime was neither committed on Department property nor involved the Department's property or vehicles. However, I find that respondent's false affidavit was filed as part of an official City record at NYCERS and supports a violation of section 4.4. Moreover, respondent's actions of filing the false affidavit after he had cashed the original check, then cashing the supplemental and replacement checks were deliberate and intentional, and violated section 4.6. Unquestionably, respondent's criminal conduct violated section 3.2 in that it brought negative public attention in criminal court upon both the Department and the City.

In sum, respondent's conduct violated MEO 16 of 1978 and sections 3.2, 4.4 and 4.6 of the Department's Code of Conduct, but did not violate sections 4.5 and 4.9.

FINDINGS AND CONCLUSIONS

1. The Department established that respondent was convicted of petit larceny, a crime that involved moral turpitude, in violation of Mayoral Executive Order 16

2. Respondent's actions violated section 3.2 of the Department's Code of Conduct by conducting himself in a manner tending to discredit the City or the Department.

3. Respondent's actions also violated section 4.4 of the Department's Code of Conduct by making false reports on an official record.

4. Respondent also violated section 4.6 of the Department's Code of Conduct by knowingly possessing stolen property.

5. Petitioner failed to establish that respondent's activity constituted "stealing, attempting to steal or allowing anything to be stolen from Department premises, or property, or any equipment or vehicle belonging to the Department" in violation of section 4.5 of the Department's Code of Conduct.

6. Petitioner did not establish that respondent's criminal activity was conducted on Department premises or property, or during the performance of his job-related activities, in violation of section 4.9 of the Department's Code of Conduct.

RECOMMENDATION

Because respondent's guilt was not in dispute and the sole purpose of this proceeding was to determine an appropriate penalty for respondent's violation of MEO 16 and multiple sections of the Department's Code of Conduct, I permitted petitioner to submit respondent's personnel abstract at the conclusion of the hearing. Respondent raised no objection. Respondent was hired by the Department in May 2005. His evaluations for the years ending December 2008, December 2009 and December 2010 all reflect "satisfactory ratings." In 2008, he was out for nine days on sick leave, and two days, related to a line of duty injury ("LODI").

As previously mentioned, MEO 16 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 . . . absent compelling mitigating circumstances . . ." In addition, where an employee has been found guilty of any legal or criminal offense or a violation of Department rules, the Administrative Code empowers the Commissioner to forfeit or withhold the employee's pay for a period not exceeding thirty days, suspend the employee for a period not exceeding thirty days, or dismiss the employee. Admin. Code § 16-106(a) (Lexis 2011).

Respondent did not testify. Instead, his co-workers Joseph Reichling, William Stein, Robert Mattina, Steven McCarthy, James Zorich, Marcello Racca, Chad Vieco and Thomas Dwyer testified as his character witnesses. All are/were sanitation workers who have worked with the Department from six years to eighteen years, and have known respondent for at least four of his approximately six years with the Department (Reichling: Tr. 13-14; Stein: Tr. 27-28; Mattina: Tr. 48; McCarthy: Tr. 66-67; Zorich: Tr. 79-80, 89; Racca: Tr. 105-06, 108; Vieco: Tr. 117-19; Dwyer: Tr. 138).

As an initial matter, the witnesses opined that respondent's evaluation rating is not truly reflective of respondent because all sanitation workers receive similar ratings unless they have served considerable time with the Department and the Superintendent and Chief have gotten to know the employee (Stein: Tr. 37; Mattina: Tr. 54, 62; McCarthy: Tr. 72-73; Zorich: Tr. 85, 89, 94-95; Vieco: Tr. 123, 127, 129; Dwyer: Tr. 140, 147). Further, they touted respondent's work ethic as well as his willingness to accommodate them and other workers, including subordinates, by changing his shift with theirs. This was significant because workers with more seniority in terms of years are assigned the more preferable shifts and routes. Workers with less seniority often found it difficult to change shifts if they needed to. They described respondent as a reliable person who never complains and would volunteer for the most difficult shift, from midnight to 8:00 a.m., along a route where the baskets are heavy and might contain used needles from drug users. Respondent's witnesses also applauded him for never missing time from the job. When confronted with evidence that respondent was out for two days in 2008 because of a line of duty (LODI) injury, and nine sick days during the same year, they maintained that his absence was miniscule and practically unheard of because of the nature of their job (Reichling: Tr. 15-18, 24-26; Stein: Tr. 28, 31-32, 34-35, 40; Mattina: Tr. 49-53; McCarthy: Tr. 67-70, 76-78; Zorich: Tr. 81-84, 92; Racca: Tr. 108-111; Vieco: Tr. 120-23, 129-30; Dwyer: Tr. 139-144, 148-49).

Respondent's character witnesses insisted that respondent is of highest moral character and maintained that they trust him implicitly. All but two appeared to have had pre-hearing knowledge of his criminal conduct. Those two were apprised at trial. Nonetheless, the witnesses all struggled at condemning respondent's conduct (Reichling: Tr. 22; Stein: Tr. 34-35, 43; Mattina: Tr. 53-55, 57-58; McCarthy: Tr. 74; Zorich: Tr. 91-92; Racca: Tr. 112-13, 116; Vieco: Tr. 134-35; Dwyer: Tr. 145-47, 154-55). In fact, I questioned the reliability of some of the witnesses. For instance, Mr. Stein, a sanitation worker for 18 years, could not articulate whether or not he would have cashed a check and signed an affidavit that he did not receive it (Tr. 43). Mr. Zorich, an 18-year veteran with the Department and operations assistant at the garage where respondent works, was not convinced that someone who has lied on one is of poor moral character. According to him, "everybody does the wrong thing or lies on paper," but that did not necessarily implicate their moral character (Tr. 99). He suggested that in the past he had probably provided "yes" and "no" answers which might not have been entirely truthful (Tr. 99-100). Likewise, Mr. Vieco, a shop steward, and sanitation worker with the Department for about

11 years, acknowledged that what respondent did was wrong but did not think that respondent's conduct warranted termination (Tr. 125-26). Asked whether he had ever filed a false statement with the Department, Mr. Vieco admitted that "[t]here were times where I've probably written things down that weren't true" (Tr. 133). Mr. Dwyer, a supervisor for four of his six years with the Department, stated that he might consider an employee who stole from his employer to be trustworthy if the employee made amends and did not demonstrate the propensity to repeat his misconduct (Tr. 156-59).

Some of the witnesses felt that respondent had made a mistake or had exhibited poor judgment that did not warrant a penalty as severe as termination. Ironically, they interpreted respondent's repayment of the monies he had fraudulently taken as an honorable act and one that was characteristic of respondent, even though repayment was made pursuant to his stipulated plea agreement, and not voluntarily (Stein: Tr. 36; Mattina: Tr. 63; McCarthy: Tr. 75; Zorich: Tr. 91-92; Racca: Tr. 116; Vieco: Tr. 135; Dwyer: Tr. 145-47).

In *Department of Sanitation v. Iocovello,* OATH Index No. 195/09 (Dec. 10, 2008), the Department sought the termination of a sanitation worker who was convicted of conspiracy to defraud the United States by engaging in an illegal gambling business. At the time of the disciplinary trial before this tribunal, Mr. Iocovello had been with the Department for 15 years. Finding him guilty of violating MEO 16 and rule 3.2 of the Department's Code of Conduct, Judge Kara Miller nevertheless recommended a penalty less than termination because compelling mitigating factors were presented. They included "respondent's contrition, the nature of the offense, his length of service, his unblemished disciplinary history, the high esteem by which his colleagues [held] him, the Commissioner's commendation after respondent pled guilty, and the Federal Court Judge's opinion." *Iocovello,* OATH 195/09 at 11. At trial, two Department superintendents extolled Mr. Iocovello's accomplishments as a worker and the guidance that he provided subordinates. These were reflected in evaluations where he was rated as "superior" and an "asset." Mr. Iocovello was appointed as a District Snow Inspector in the Bronx and even after his arrest and guilty plea the Department's Commissioner issued a commendation to him in recognition of his exceptional performance and contribution to the Department. *Iocovello,* OATH 195/09 at 9-10.

Here, none of the proffered testimony advanced any mitigation, compelling or otherwise for respondent's actions. Respondent has a short history with the Department. I did not find

persuasive, his witnesses' explanation that everyone receives an evaluation rating of "satisfactory." As in Mr. Iocovello's case, the Department does indeed acknowledge its outstanding workers, not only through evaluations, but in commendations. Here, there was no testimony from any of respondent's immediate supervisors about the quality of his work. Nor has respondent received any commendations for outstanding work. While co-worker after co-worker echoed their fondness for him, I found their accolades to be largely self-serving, because respondent was their "go-to" person when they wished to change shifts. Above all, respondent's misconduct was deliberate, intentional, and repeated, and no plausible justification was offered for it. In addition, his failure to testify left me unable to assess whether respondent was even remorseful for his criminal conduct.

Given the absence of compelling mitigating factors, I find that the only appropriate penalty for respondent's violation of the MEO 16 and multiple sections of the Department's Code of Conduct is termination, and I so recommend.

Ingrid M. Addison
Administrative Law Judge

August 9, 2011

SUBMITTED TO:

JOHN J. DOHERTY
Commissioner

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