Fire Dep't v. Domini

OATH Index No. 2047/11, mem. dec. (July 28, 2011)

Respondent's motion to dismiss, on the basis of defective pleadings or until a related matter is determined in federal district court, is denied.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
FIRE DEPARTMENT
Petitioner
- against -
FREDRICK DOMINI
Respondent

MEMORANDUM DECISION

FAYE LEWIS, *Administrative Law Judge*

This case involves disciplinary charges filed by petitioner, the Fire Department ("the Department"), against Frederick Domini, a marine engineer. The charges allege that respondent was insubordinate in that he refused an order to board a fireboat to participate in a training exercise. The Department referred the charges to this tribunal pursuant to section 15-113 of the Administrative Code. Respondent has moved to dismiss the charges, claiming that the charges are defective as matter of law because the Department did not conform with Department Regulation 26.1.5 and, in the alternative, that the proceedings should be delayed until a related matter in federal district court is determined.

For the reasons set forth below, respondent's motion to dismiss is denied.

ANALYSIS

*Compliance with Regulation 26.1.*5

Rule 26.1 sets forth the requirements for the institution of disciplinary charges against uniformed members of the Fire Department. Among other things, the rule provides that:

> When complainant is an individual other than the immediate supervisor officer or Bureau of Investigations and Trials staff member, the complainant must submit a

> signed statement recording full particulars of the alleged violation. The complainant will also be required to give a sworn statement to the Bureau of Investigations and Trials before charges are served.

Fire Dep't Regulation 26.1.5 (Jan. 1, 1997). As clarified by the Regulation 26.3.1, the charges referred to are those prepared on form BP-115. In this case form BP-115 lists Battalion Chief James Dalton as the complainant (Resp. Ex. A).[1] In his motion to dismiss, respondent alleges that Chief Dalton did not submit the required signed statement or give a sworn statement to the Bureau of Investigations and Trials as no such materials were turned over to respondent.

This tribunal has rejected motions to dismiss based upon similar failures to strictly adhere to Department rules governing disciplinary charges. In *Fire Department v. Stegman*, OATH Index No. 765/80 (July 13, 1982), the respondent filed a motion to dismiss, arguing that the charges were deficient because they were not accompanied by a sworn affidavit as required by Department Regulation 26.1.4. In considering the motion, ALJ Charles McFaul noted that the purpose of the requirement was to prevent frivolous complaints. OATH 765/80 at 4. Analogizing the absence of an affidavit to the submission of an unverified pleading, ALJ McFaul found that objections needed to be filed with due diligence, meaning immediately or within twenty-four hours. *Id*. at 5. As the respondent failed to object to the charges until the day of the hearing, some sixteen months after receiving it, ALJ McFaul deemed the objection waived. *Id*. at 5-6.

In further support of his denial of the motion, ALJ McFaul noted that the defect was technical and did not prejudice the respondent. OATH 765/80 at 6. Citing section 3026 of New York's Civil Practice Law and Rules, which requires that pleadings be liberally construed, ALJ McFaul explained that "this rule of liberal construction in pleadings applies more so in administrative proceedings since emphasis is more on fact finding than observance of technical rules." *Id*. Thus, where a party attacks the pleadings, it bears the burden of showing prejudice, and ALJ McFaul found that the respondent did not meet his burden. *Id*. at 7.

ALJ McFaul's analysis has been applied to multiple cases since *Stegman*. For example, in *Fire Department v. Durkin*, OATH Index No. 309/90 (Mar 28, 1991), the respondent filed a

[1] The charges on form BP-115 are not the charges submitted to this tribunal; rather they are the preliminary charges issued prior to the informal disciplinary proceeding.

motion to dismiss premised on petitioner's failure to submit a sworn affidavit by the complainant with the charges, as required by Department Regulation 26.1.4. Noting the technical nature of the defect, the lack of prejudice to respondent, who was fully aware of the charges, and the relaxed pleading rule in administrative proceedings, ALJ Ray Fleischhacker denied the motion. *Durkin*, OATH 309/90 at 9-10. ALJ Fleischhacker also found no prejudice resulted from the Department's failure to follow Regulations 26.1.6 and 6.1.3. *Id*. at 7. Likewise, in *Department of Transportation v. Miro*, OATH Index No. 324/89 (Aug. 30, 1989), ALJ Rosalyn Richter denied a motion to dismiss premised upon the Department's failure to comply with agency procedures requiring that the charges be signed by the complainant or an eyewitness. As in *Stegman*, ALJ Richter relied on the fact that the respondent was not prejudiced by the defect. OATH 324/89 at 2 n.3. Similarly, in *Fire Department v. Harris*, OATH Index No. 311/85 (Dec. 20, 1985), ALJ Charles McFaul denied respondent's motion to dismiss premised upon petitioner's failure to include the full particulars of the allegations, in violation of Rule 25 (the civilian employee equivalent of Regulation 26.1.5), as there was no prejudice to respondent who had actual notice of those facts from prior related proceedings. *See also Dep't of Correction v. Pack*, OATH Index No. 1553/06, mem. dec. (June 14, 2006) (denying motion to dismiss where the Department failed to follow its command discipline procedures as the failure did not prejudice substantial rights of the respondent); *Police Dep't v. Diskin*, OATH Index No. 689/90, mem. dec. (Mar. 6, 1990) (finding the failure of the respondent's commanding officer to sign the complaint did not prejudice respondent); *Dep't of Correction v. James*, OATH Index No. 305/89 (May 31, 1990) (denying motion to dismiss as the respondent failed to show that he was prejudiced by the Department's failure to provide an informal conference as required).

In this case respondent has presented no argument as to why I should diverge from *Stegman* and its progeny. Respondent correctly contends that an agency is bound by its own rules. *See Frick v. Bahou*, 56 N.Y.2d 777, 778 (1982); *Chambers v. Coughlin*, 76 A.D.2d 980 (3d Dep't 1980). However, where a party is not prejudiced, the agency's noncompliance with its rules constitutes harmless error.[2] *See Errera v. Quinones*, 119 A.D.2d 751, 752 (2d Dep't 1986);

[2] Respondent's citation to *Police Department v. Murray*, OATH Index No. 1631/06, mem. dec. (Apr. 26, 2006) is inapplicable as that case dealt with an agency's failure to follow a court order, not its own rules. Moreover, in that case the failure resulted in prejudice to the respondent.

Bivins v. Helsby, 55 A.D.2d 230 (3d Dep't 1976); *Pack*, OATH 1553/06 at 3; *Diskin*, OATH 689/90 at 3; *James*, OATH 305/89 at 6. As stated by ALJ McFaul, "[s]ubstance should be preferred over form and mere technical defects in pleadings should not defeat otherwise meritorious claims." *Stegman*, OATH 765/80 at 7.

Here, respondent has failed to show that he was prejudiced by the procedure employed. Respondent's assertion that every action following the service of the initial charges "will be tainted with injustice" is conclusory and unsupported by any factual allegations. The charges give notice of the Department's charges and respondent's submissions indicate that he is fully aware of them.

Moreover, as in *Stegman*, respondent's objection to the charges is untimely. As indicated by respondent's affirmation, he received the charges on May 28, 2010, over a year prior to the instant motion to dismiss. By no means can this be considered immediate. *Stegman*, OATH 765/80 at 5. As such, respondent's motion to dismiss is denied.

Related Proceedings in Federal District Court

Respondent has filed a suit with the United States District Court for the Eastern District of New York which contains several allegations related to the charges in this proceeding. He argues that this proceeding should be delayed until that case is decided. While respondent refers to this motion as one to "dismiss" the petition until the district court has ruled, in substance it is a motion for an indefinite adjournment. We have consistently held that respondents are not entitled to prolonged open-ended adjournments. *Dep't of Environmental Protection v. Bellach*, OATH Index No. 1574/08 at 2 (Apr. 30, 2008); *Fire Dep't v. Silvestri*, OATH Index No. 613/05, mem. dec. at 2 (Dec. 17, 2004). Moreover, in this case the pending civil suit is not good cause for an adjournment. *See* 48 RCNY § 1-32(b) (2011) (adjournments shall only be granted upon a showing of good cause); *Askinazi v. Police Dep't of New York*, 25 A.D.2d 429 (1st Dep't 1966) (finding "it was a palpable abuse of discretion to restrain" the departmental disciplinary proceedings pending the outcome of a related civil proceeding); *Dep't of Housing Preservation & Development v. Afro Contracting Corp.*, OATH Index No. 95/1519, mem. dec. at 3 (June 27, 1995) ("We have uniformly held that the pendency of other, related litigation is not good cause for an indefinite adjournment of an OATH trial"); *see also Chaplin v. NYC Dep't of Education*,

48 A.D.3d 226, 227 (1st Dep't 2008) ("A criminal defendant does not have a right to stay a related disciplinary proceeding pending the outcome of trial"); *Watson v. City of Jamestown*, 27 A.D.3d 1183 (4th Dep't 2006) (declining to stay a disciplinary hearing pending the resolution of related criminal charges). Therefore, respondent's motion to dismiss pending the outcome of the federal lawsuit is denied.

Faye Lewis
Administrative Law Judge

July 28, 2011

APPEARANCES:

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