Dep't of Transportation v. Pierre

OATH Index No. 2112/11 (Oct. 3, 2011)

Termination of employment recommended where respondent has been absent from his job due to pretrial incarceration since early December 2010 and there is no evidence that he will be released in the foreseeable future.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF TRANSPORTATION
Petitioner
-against-
ALVIN PIERRE
Respondent

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

This is a disciplinary proceeding commenced by the petitioner, the Department of Transportation ("DOT"), against respondent, Alvin Pierre, a highway repairer. The charges allege that respondent has been absent without official leave and excessively absent since January 3, 2011 (charges one and two), and that, as a result of his arrest for various crimes on November 30, 2010, respondent has engaged in conduct "prejudicial to the good order and discipline of DOT" and "tending to bring the City . . . into disrepute" (charges three and four) (ALJ Ex. 1).

A hearing was held on July 19, 2011 and August 9, 2011. The hearing went forward on July 19 despite the absence of respondent, who has been incarcerated pre-trial because of his arrest. Respondent's counsel, who appeared on his behalf, asked on July 19 that the matter be adjourned, representing that respondent's criminal defense attorney believed that the grand jury hearing respondent's case would vote not to indict. I denied the application as speculative.

The case was continued until August 9. Respondent was still incarcerated, the grand jury having met and indicted. However, respondent's counsel requested an adjournment on the basis that respondent's family believed that they would raise bail for his release in the near future.

This adjournment application was denied, also as speculative. Trial concluded on August 9. The record was left open until August 19 for counsel to inform me of any new developments. Counsel did not do so, but informed me by e-mail in late September that respondent continues to be incarcerated pre-trial.

At trial, petitioner presented documentary evidence while respondent's counsel presented the testimony of respondent's sister, Catherine Pierre. Petitioner then presented a rebuttal case, calling as witnesses respondent's supervisor, Louis DeSio, Disciplinary Counsel Erica Caraway, and Chief Investigator Frances Mendez. Ms. Caraway had appeared on behalf of the Department on the first day of trial, but withdrew as counsel prior to the continued date because of the possibility that she might be needed to rebut Ms. Pierre's testimony.

For the reasons below, I find that the charge is sustained and recommend that respondent's employment be terminated.

ANALYSIS

Charges three and four

Charges three and four allege that, by virtue of respondent's arrest on November 30, 2010 for three different crimes, he has engaged in conduct "prejudicial to good order and discipline" and "tending to bring the City into disrepute." These charges must be dismissed. It is undisputed that respondent was arrested on November 30, 2010 (Pet. Ex. 1, New York State Unified Court System WebCrims case details summary). However, we have long held that an employee can not be found to have committed misconduct simply because he has been arrested. The acts underlying an employee's arrest may constitute misconduct, but an arrest, standing alone, "amounts to an accusation only." *Dep't of Sanitation v. Lowe*, OATH Index No. 1499/06 at 5 (Sept. 22, 2006 (citing *Dep't of Transportation v. Jagdharry*, OATH Index No. 1702/04 at 14 (Nov. 24, 2004); *Dep't of Correction v. Holston*, OATH Index No. 592/04 at 11 (Sept. 29, 2004); *Admin. for Children's Service v. Bass*, OATH Index No. 902/03 at 2 (Apr. 10, 2003); *Fire Dep't v. Mangravito*, OATH Index No. 499/92 at 8 (May 6, 1992)); *see also Dep't of Probation v. Dixon*, OATH Index No. 156/11 at 2 (Nov. 30, 2010) ("being arrested and charged with a crime is not misconduct independent from the acts that underlie the arrest"); *Health & Hospitals Corp. (Lincoln Medical & Mental Health Ctr.) v. Jiminez*, OATH Index No. 1381/07 at 2 (June 21,

2007), *modified on penalty*, Hosp. Dec. (July 19, 2007) ("It is well settled that an arrest, standing alone, is not punishable as misconduct.").

Here, petitioner did not produce any evidence of the conduct underlying respondent's arrest. Hence, charges three and four, which are solely predicted upon his arrest, are insufficient as a legal matter to allege misconduct and should be dismissed.

Charges one and two

Charges one and two allege an unauthorized absence/excessive absences since January 3, 2011. There is no dispute that respondent has been incarcerated since his arrest on November 30, 2010. The agency suspended him without pay from December 1, 2010 through December 30, 2010 (Pet. Exs. 2, 3), and afterwards, deemed him to be in AWOL status because he was not at work (Pet. Exs. 4, 5, 6). Respondent's supervisor, Louis DeSio, also testified that respondent did not report for duty since about Thanksgiving of 2010 and that he did not approve any leave for respondent (Tr. 94).

Where, as here, an employee is incarcerated prior to trial, and there has not yet been any disposition on the criminal case, his absence from work may still be sanctionable under the Civil Service Law, either on a misconduct or incompetence theory. As Judge Raymond Kramer noted in *Department of Sanitation v. Meija,* "sufficient fault has been found to justify sanctioning an incarcerated employee for unauthorized absence from work where the employee, notwithstanding his incarceration, failed to follow agency leave regulations or contact his agency to indicate his whereabouts and his circumstances." OATH Index No. 317/03 at 3-4 (citations omitted); *see also Health & Hospitals Corp. (Coler-Goldwater Specialty Hospital & Nursing Facility) v. Randall,* OATH Index No. 1487/06 at 3-4 (June 28, 2006) (AWOL sustained where respondent was absent without authorization for almost a year because of his pretrial incarceration, remained held without bail pending his trial, and made no effort to request, or have someone on his behalf, request leave within a reasonable period of time after his incarceration); *Dep't of Environmental Protection v. Torres,* OATH Index No. 194/01 at 5 (Sept. 27, 2000) (where respondent had been incarcerated for almost ten months subsequent to his arrest and indictment, and was still in jail pending resolution of his criminal charge, he may be found to have committed misconduct where he "made no attempt to comply with the agency's leave regulations. . .").

Even if the employee has made efforts to contact the agency regarding his incarceration, section 75 of the Civil Service Law permits discipline from office for "incompetence," in addition to misconduct. Civ. Serv. Law § 75(1) (Lexis 2011). As Judge Kramer noted in *Mejia,* incompetence does not require a showing of fault by the employee, "but just a demonstration that the employee is unable to perform the duties of the position at a minimum level of competence, including, for example, due to chronic or excessive absenteeism." OATH 317/03 at 4 (citing *Romano v. Town Board of the Town of Colonie,* 200 A.D.2d 934 (3d Dep't 1994) (fact that employee may have had valid reason for absence is irrelevant to the ultimate issue of whether his unavailability, and its disruptive effect on the employer, rendered him incompetent to continue his employment)). Relying on *Romano* and also on prior OATH precedent on excessive absenteeism, Judge Kramer found an absence of over six months sufficient to demonstrate that the employee was unable to perform his job, particularly since the employee was incarcerated pre-trial and appeared "likely to be absent from work for the foreseeable future because of his ineligibility for bail." OATH 317/03 at 5.[1] *See also Dep't of Sanitation v. Emma,* OATH Index No. 1034/10 at 2 (Nov. 20, 2009) (four month pre-trial incarceration found sufficient to establish AWOL charge); *Health & Hospitals Corp. (Coler-Goldwater Specialty Hospital & Nursing Facility) v. Randall,* OATH Index No. 1487/06 at 3 (June 28, 2006) (lengthy pre-trial incarceration of almost a year rendered respondent incompetent to report to work).

Here, the record established that respondent, and his sister, Ms. Pierre, made certain attempts to notify his supervisors of his incarceration. Mr. DeSio, respondent's supervisor, acknowledged that respondent told him prior to his arrest that he had been summoned by a police department in Long Island for interrogation (Tr. 93). Ms. Caraway, similarly, acknowledged that Mr. Pierre had notified her on approximately November 29 that he would be reporting to a police department for questioning (Tr. 108). She did not recall respondent saying specifically that he might be arrested (Tr. 113). Respondent submitted an affidavit attesting that he had notified Ms.

[1] While Judge Kramer found respondent, a sanitation worker, "incapacitated" under section 16-106(a) (5) of the Administrative Code, which governs the discipline of sanitation workers, rather than "incompetent" under Section 75 of the Civil Service Law, his discussion of governing state law and OATH precedent made clear that the standard for determining incompetence or incapacity is the same: whether or not "the employee is unable to perform the duties of the position at a minimum level of competence." *Meija*, OATH 317/03 at 4. Thus, any suggestion that *Meija* is inapplicable to this case (*see* Tr. 18) is misplaced.

Caraway, his supervisor, Mr. DeSio, and another supervisor, Mike Coppell, of his incarceration prior to his arrest (Resp. Ex. A).

Mr. DeSio further acknowledged that Ms. Pierre had called him a week or two later asking how she could pick up respondent's paycheck (Tr. 95), although he denied that they spoke regarding his arrest (Tr. 94). By contrast, Ms. Pierre claimed that she spoke to Mr. DeSio and Mr. Coppell soon after respondent's arrest and told them that he was incarcerated, as her brother had requested (Tr. 72, 78, 84, 85).

Ms. Caraway testified that because she had not heard from or seen respondent since November 29, she asked her chief Investigator, Frances Mendez, to pull up his name on the Unified Court System to determine whether he had been arrested and charged with a crime (Tr. 110). It was only in this manner that the Department learned of respondent's arrest (Tr. 110). The Department's arrest notification policy requires that every employee must notify the agency of all arrests, and all future developments related to the arrest, and must provide details including the arrest date, time of arrest, arrest location, and arresting authority (Tr. 104-05; Pet. Ex. 13).

Several months later, Ms. Pierre visited Ms. Caraway in Ms. Caraway's office and discussed respondent's incarceration (Tr. 85). Ms. Caraway and Investigator Mendez recalled that Ms. Pierre said that she had received documentation relating to disciplinary charges filed against respondent, who was still incarcerated. Ms. Pierre asked that any documents relating to her brother be forwarded to her and they discussed the scheduling of the informal conference (Caraway: Tr. 111, 112, 113; Mendez: Tr. 124). Ms. Pierre insisted that the meeting had occurred in the second or third week in February, some time prior to her birthday in early March (Tr. 85), while Ms. Caraway and Investigator Mendez said the meeting was in March (Caraway: Tr. 110, 113; Mendez: Tr. 123, 125; Pet. Ex. 14).

In sum, it is unclear whether respondent gave Ms. Caraway and his supervisors prior notice of his pending incarceration, or indicated only that he would be reporting to a police precinct for questioning. It is also unclear whether Ms. Pierre advised Mr. DeSio of her brother's incarceration soon after his arrest. However, it is undisputed that Ms. Pierre advised Ms. Caraway of her brother's incarceration, but not until February or March of 2011. I conclude that respondent, and his sister, made some attempts to notify the agency of respondent's incarceration, although they fell short of that required by the agency's arrest notification policy.

There is also no evidence that respondent, Ms. Pierre, or anyone else on his behalf, submitted or attempted to submit a leave request.

Ultimately, however, whether or not respondent provided sufficient notice to the agency or his arrest or attempted to submit a leave request is not dispositive. Although there has been no finding that respondent has committed a crime, he has been incarcerated pre-trial since his arrest on November 30, 2010. Respondent has been indicted and attempts to raise bail have been unsuccessful. Respondent has made no showing that he will be released at any time in the foreseeable future. His lengthy absence -- considered an absence without authorization since January 3, 2011 -- has rendered him incompetent to perform the duties of his position within Section 75 of the Civil Service Law. *See Mejia*, 317/03 at 4; *Romano*, 200 A.D. 2d at 934-35; *see also Randall*, OATH 1487/06 at 3. Accordingly, charges one and two, that respondent has been absent without authorization, and that he has been excessively absent, are sustained.

FINDINGS AND CONCLUSIONS

1. Respondent was properly served with the petition and notice of hearing.

2. Respondent has been absent without authorization and excessively absent since January 3, 2011, as alleged in charges one and two.

3. Petitioner failed to prove that respondent committed misconduct as a result of his arrest on November 30, 2010, as alleged in charges three and four.

RECOMMENDATION

Upon making these findings, I requested and reviewed a copy of respondent's disciplinary abstract. It indicates that respondent began his career as an assistant city highway repairer in 1998 and was promoted to highway repairer in 2006. He has three prior incidents of discipline: a one-day suspension in November 2005 for insubordination, a three-day suspension in April 2007 for a verbal altercation and insubordination, and a one-week suspension in December 2009 for insubordination and improper performance of duty.

In this case, respondent has been absent from work without authorization for ten months. He remains incarcerated pending trial. There is no indication as to when he might be released. Under these circumstances, termination of his employment is appropriate. Accordingly, I so recommend.

Faye Lewis
Administrative Law Judge

October 3, 2011

SUBMITTED TO:

JANETTE SADIK-KHAN
Commissioner

APPEARANCES:

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