Dep't of Correction v. LaSonde

OATH Index No. 2526/11, mem. dec. (July 8, 2011)

Respondent's motion to dismiss is denied in part without prejudice and the remainder held in abeyance pending the conclusion of trial. Respondent's request for subpoenas is granted in part and denied in part without prejudice.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
CHANDRA LASONDE
Respondent

MEMORANDUM DECISION

ALESSANDRA F. ZORGNIOTTI, *Administrative Law Judge*

This employee disciplinary proceeding was referred by the Department of Correction ("DOC") pursuant to section 75 of the Civil Service Law against respondent Chandra LaSonde, a correction officer. Petitioner alleges that respondent engaged in misconduct in that she refused to answer questions on May 26, 2011, in an interview conducted under Mayor's Executive Order Number 16 ("MEO-16").[1]

Prior to the MEO-16 interview, respondent attempted, unsuccessfully, to enjoin petitioner from conducting the interview in both State and Federal court. *See LaSonde v. O'Leary*, 2011 NY Slip Op 30837U (Sup. Ct. N.Y. Co. Apr. 6, 2011); *LaSonde v. O'Leary*, No. 11-CV-02375 (SLT) (E.D.N.Y. May 25, 2011).

The interview concerned an allegation that respondent, who was also a union representative for the Correction Officers Benevolent Association ("COBA"), engaged in

[1] MEO-16 section 4(b) provides in relevant part that certain officials "may require any officer or employee of the City to answer questions concerning any matter related to the Performance of his or her official duties . . . after first being advised that neither their statements nor any information or evidence derived therefrom will be used against them in a subsequent criminal prosecution other than for perjury or contempt arising from such testimony. The refusal of an officer or employee to answer questions on the condition described in this paragraph shall constitute cause for removal from office or employment or other appropriate penalty."

insurance fraud by submitting a fraudulent claim on October 23, 2009, on behalf of another correction officer. The issue at the disciplinary hearing will be whether respondent was asked questions under MEO-16 that she refused to answer, and, if so, whether there was a legitimate basis for such a refusal.

Respondent's Motion to Dismiss

Respondent filed a motion to dismiss this proceeding. Although the motion is inartfully drafted, respondent appears to be arguing that this tribunal lacks jurisdiction because the conduct under investigation was not part of her official duties as a correction officer but rather involved her duties as a COBA representative, as to which she had a Fifth Amendment right not to answer any questions. Respondent seems to further argue that this proceeding is in violation of her First Amendment rights to freely associate with others and that it constitutes impermissible retaliation for her union activity. Petitioner opposes the motion arguing that respondent's union activities did not insulate her from questioning under MEO-16.[2]

Respondent's motion to dismiss is denied in part without prejudice and the remainder held in abeyance pending the conclusion of trial.

After careful review of the parties' submissions, I reserve decision on the merits of respondent's motion to dismiss pursuant to OATH Rule section 1-50. 48 RCNY § 1-50 (Lexis 2011). Pre-trial motions to dismiss are disfavored in practice at OATH and have only been granted in the clearest cases of failure by petitioners to state a viable claim. *Comm'n on Human Rights ex rel. Hsu v. HSBC Bank*, OATH Index No. 522/09, mem. dec. at 4 (Jan. 22, 2010); *Fire Dep't v. Zollner*, OATH Index No. 623/92 at 3 (June 12, 1992). Moreover, the burden of establishing the legal necessity of dismissal is particularly high in a case such as this because the tribunal makes recommended findings that are submitted to the referring agency for final decision. *See Matter of Tenants of 51-55 West 28th Street*, OATH Index No. 2877/09, mem. dec. at 2 (June 26, 2009), *adopted*, Loft Bd. Order No. 3580 (June 17, 2010).

Here, petitioner has raised legal arguments in opposition to the motion as to which I am reserving decision. In any event, respondent stated in her reply papers that there are issues of

[2] The motion and copies of all relevant e-mails will be incorporated into the record at the conclusion of the hearing as ALJ exhibits.

fact to be determined and witnesses that need to be presented in support of her legal arguments. Thus, by respondent's own admission, the motion is premature. Accordingly, a decision on the merits of respondent's motion will be rendered after the trial is concluded and with the benefit of a full record.

However, to the extent respondent argues that this tribunal lacks subject matter jurisdiction to hear this disciplinary proceeding, the motion is denied. It is clearly within this tribunal's purview to make recommendations on whether or not a DOC employee is subject to discipline. *See* Civ. Serv. Law § 75 (Lexis 2011) (stating that an employee shall not be removed or otherwise disciplined without a hearing); Mayoral Executive Order No. 32 § 2(a) (July 25, 1979) ("Except as otherwise provided by law or agreed by [OATH's] Chief Administrative Law Judge, all agency heads shall delegate to the Chief Administrative Law Judge the authority to conduct disciplinary, disability or other trials and hearings permitted or required by the New York State Civil Service Law and to make written reports and recommendations with respect to such trials and hearings."); Charter § 1048(2) (Lexis 2011) (OATH is the tribunal for "the impartial administration and conduct of adjudicatory hearings for violations of this charter, the administrative code of the city of New York, rules promulgated pursuant to this charter or such code and any other laws, rules, regulations or other policies enforced or implemented by the agencies of the city"); *Dep't of Correction v. Auguste,* OATH Index No. 2770/08 at 3-9 (Apr. 17, 2009) (finding OATH has jurisdiction to conduct disciplinary hearing for Department of Corrections employees); *Dep't of Correction v. Malone,* OATH Index No. 882/06 at 6-8 (Jan. 11, 2007), *adopted,* Comm'r Dec. (Mar. 8, 2007), *aff'd sub nom. Malone v. Horn,* No. 108250/2007 (Sup. Ct. N.Y. Co. Jan. 14, 2008) (same). The denial is without prejudice; respondent may renew this argument at the conclusion of the trial.

Respondent has also alleged that this tribunal: has denied her due process, has unfairly expedited this matter, and has not provided her with a pre-trial conference. There is no merit to any of these assertions.

Petitioner filed this case on June 3, 2011, and requested a conference date of June 8, and a trial date before June 27, 2011. Pursuant to OATH rule section 1-26(d) a party may docket and select trial and conference dates *ex parte* and must serve notice of those dates promptly on the opponent. 48 RCNY § 1-26(d). OATH's calendar unit scheduled a conference for June 8, and a

trial for June 27, 2011. On June 7, 2011, respondent's counsel's request to adjourn the trial to June 29, 2011, was granted. On June 8, neither respondent nor her counsel appeared for the conference. Another conference was scheduled for June 22, 2011, on notice to counsel but respondent did not appear. Because respondent's counsel objected to the expedited nature of these proceedings and because there were applications from respondent pending, the June 29 trial was converted to a conference and the trial rescheduled for dates in late July that respondent's counsel had previously indicated were preferable. Counsel for both parties appeared for the June 29, 2011, conference but respondent did not.

The parties have been notified that a settlement conference will be held the morning of trial. In addition, even though petitioner's counsel requested one day for trial, this tribunal scheduled three days to allow respondent additional time, if necessary, to present her defenses.

Finally, respondent's counsel has made allegations in recent e-mails that this tribunal has not handled this matter in the ordinary course of business and that there have been improper *ex parte* communications between the tribunal and petitioner. As shown by the extensive e-mail correspondence that is hereby incorporated into the record, these claims are baseless and without merit. This case has and will continue to be conducted consistent with OATH's rules of practice and procedure as well as the applicable codes of conduct. *See* Rules of Practice Applicable to Cases at OATH Generally, 48 RCNY §§ 1-01 to 1-52 (2011); Rules of Conduct for Administrative Law Judges and Hearing Officers of the City of New York, 48 RCNY Appendix A §§ 100-107 (Lexis 2010); Code of Judicial Conduct, Jud. Law Appendix §§ 100.0-100.6 (Lexis 2011).

Respondent's request for subpoenas

In support of respondent's legal arguments, respondent seeks to compel the testimony of approximately 19 witnesses. In an e-mail dated June 15, 2011, respondent's counsel set forth an offer of proof for 17 witnesses. There was no offer concerning two other witnesses for whom subpoenas were requested.[3] Petitioner objects to the proposed witnesses being compelled to appear for trial. The request for subpoenas is granted in part and denied in part without prejudice.

[3] These individuals, Robert Gigante and Jacqueline MaQuine, are Inspectors General for the Department.

According to counsel's e-mail, 12 witnesses will testify that official union duties are not the same as official correction officer duties and/or that COBA and DOC are separate and independent entities. The offer of proof is essentially the same for each of the 12 witnesses identified. These witnesses consist of: eight COBA executive board members, two attorneys who represented COBA and DOC in related court actions who allegedly made representations to this effect, and two agency employees who will testify to the same, one from DOC and the other from the Department of Citywide Administrative Services. In the e-mail respondent's counsel also indicated that respondent has two to five other witnesses who will testify on these same subjects.

Although respondent claims that the witnesses' testimony will address contested issues of fact, petitioner does not seem to dispute that COBA and DOC are distinct entities or that there are differences between the official duties of a union delegate and a correction officer. Moreover, these facts could likely be established through documentary evidence. It is also questionable whether these facts have any relevance to whether respondent had a right to refuse to answer questions posed under MEO-16. Nevertheless, these assertions go to the heart of respondent's defense and testimony on these subjects will be allowed. However, it is unnecessary to have multiple witnesses give cumulative testimony on the same subjects. Accordingly, one witness with personal knowledge of these matters will be subpoenaed, Benny Boscio. Mr. Boscio is a correction officer who has served as a union delegate and a member of COBA's executive board. Respondent can also testify about these issues. If not cumulative, she may also call, as her counsel has announced, other witnesses not listed in the request for subpoenas who have agreed to testify regarding these matters.

According to counsel's offer of proof, respondent also seeks to subpoena Steve Isaacs, counsel to COBA as well as two other individuals, Mr. Coppola and Ms. Elliot, to demonstrate COBA's bias against respondent. Mr. Isaacs would allegedly testify that despite being an attorney for COBA he provided evidence to investigators about respondent, and Mr. Coppola and Ms. Elliot would demonstrate that COBA offered false and negative information about respondent concerning the underlying insurance fraud claim. Respondent has failed to show that even if these witnesses gave such testimony, it has any relevance to the question whether respondent had an obligation to answer questions under MEO-16. It bears noting that in a

separate proceeding, respondent brought claims against COBA alleging, *inter alia*, that COBA falsely accused her of insurance fraud and forced her to resign from its executive board. These claims were dismissed pursuant to Federal Rules of Civil Procedure 12(b)(6). *See LaSonde v. Correction Officers Benevolent Assoc.*, 2010 U.S. Dist. Lexis 78698 (S.D.N.Y. July 26, 2010). To the extent respondent is arguing that COBA and or counsel breached its duty of fair representation to her, this tribunal does not have authority to hear such claims. *Fire Dep't v. Mondello*, OATH Index No. 286/80 at 16-17 (July 31, 1980) (designation authorizing OATH to hear disciplinary case limited to determining whether respondent is guilty of misconduct).

Finally, respondent seeks to subpoena DOC Assistant Commissioner Robert O'Leary and DOC General Counsel Lewis Finkleman to demonstrate that these disciplinary charges were filed in retaliation for her exercising her First Amendment right to engage in union activity. The offer of proof concerning Commissioner O'Leary states that he would testify to signing an earlier set of charges concerning the insurance fraud. However, this fact is not in dispute and the explanation why this is relevant is unclear. With regard to Mr. Finkleman, respondent alleges that he will testify that he denied her request to disseminate flyers on DOC property and that this demonstrates animus against her.

Respondent's assertion that these disciplinary charges were motivated by impermissible animus based on her First Amendment right to engage in union activity is conclusory and speculative. Even if true it is well settled that a selective enforcement or retaliation claim is not a proper defense in an administrative proceeding. *See, e.g., 303 W. 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 693 n.5 (1979) (noting that a selective enforcement claim was not before the administrative tribunal, rather it was "properly brought only before a judicial tribunal"); *Bell v. NYS Liquor Auth.*, 48 A.D.2d 83, 84 (3rd Dept. 1975) ("The proper manner in which to develop [a selective enforcement] defense is to raise it initially in an article 78 proceeding subsequent to the administrative hearing"); *Dep't of Finance v. Rodriguez*, OATH Index No. 430/10 at 2 (Mar. 5, 2010) (OATH does not have jurisdiction to hear respondent's retaliation claim); *Dep't of Sanitation v. Yovino*, OATH Index No. 1209/96 at 3 (Oct. 9, 1996), *aff'd in part, rev'd in part*, NYC Civ. Serv. Comm'n Item No. CD 97-109-O (Dec. 4, 1997) (defense of selective enforcement only available if based upon claim of constitutionally suspect criteria and can be asserted only upon judicial review of an adverse administrative determination).

Because the proposed DOC witnesses would be called to testify in support of a claim that is not in this tribunal's jurisdiction to hear, they will not be compelled to testify. "An employee defending administrative charges may adduce evidence to establish that no misconduct was committed, but may not adduce evidence to show that any misconduct resulted in administrative charges only because of misconduct by the employer." *Dep't of Education v. Kielbasa,* OATH Index No. 658/05 at 5 (July 11, 2005); *see also Brey v. Bd. of Education*, 245 A.D.2d 613, 615 (3rd Dep't 1997) (retaliation defense does not apply if employer has an independent basis for disciplinary action); *Health & Hospitals Corp. (Seaview Hospital Rehabilitation Center & Home) v. Cantres*, OATH Index No. 1142/03 at 2 (May 29, 2003), *modified on penalty*, Chief Operating Officer's Determination (July 1, 2003), *aff'd sub. nom. Cantres v. NYC Health & Hospitals Corp.*, 30 A.D.3d 164 (1st Dep't 2006); *Yovino,* OATH 1209/96 at 3-4.

The decision to deny respondent's request to subpoena other witnesses is without prejudice. If at trial respondent wishes to renew any of these requests and can make a showing that these witnesses are relevant, such an application will be considered. Moreover, respondent will be given considerable leeway to testify on her own behalf regarding all her defenses and will be allowed to present voluntary witnesses and documentary evidence to the extent the evidence is relevant and not cumulative.

The signed subpoena for Benny Boscio can be picked up from the OATH calendar unit and should be served promptly on Mr. Boscio.

The parties shall exchange discovery and witness lists by July 15, 2011.

This proceeding is scheduled to begin promptly with a pre-trial conference at 9:30 a.m. on July 20, 2011. In the event the case does not settle at the conference, the parties should have their witnesses and evidence ready to proceed immediately to trial as scheduled.

Alessandra F. Zorgniotti
Administrative Law Judge

July 8, 2011

SUBMITTED TO:

DORA B. SCHRIRO
Commissioner

APPEARANCES:

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Attorney for Petitioner

CARTER & ASSOCIATES
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