Dep't of Consumer Affairs v. Mirro

OATH Index No. 876/14, mem. dec. (Jan. 31, 2014)

Where respondent voluntarily agreed to answer interrogatories, which are an extraordinary discovery device permissible only upon application for good cause shown, agency's motion to preclude respondent from offering defense, based upon purported incomplete and unresponsive answers to those interrogatories, is denied.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CONSUMER AFFAIRS
Petitioner
-against-
MICHELLE MIRRO
Respondent

MEMORANDUM DECISION

FAYE LEWIS, *Administrative Law Judge*

This is a disciplinary proceeding brought by petitioner, the Department of Consumer Affairs ("DCA"), pursuant to section 75 of the Civil Service Law, against Michelle Mirro, an administrative law judge ("ALJ") holding the civil service title of "attorney." The charges against respondent allege that she was incompetent in her duties and that she performed her work inefficiently, negligently, or carelessly. The charges further allege that respondent failed to notify her supervisor that she could not timely submit her decisions for review, respond promptly to her supervisor's inquiries about her work, and maintain and update a master case log.

Trial is scheduled for eight days, to commence on Tuesday, February 4. Presently pending before me is petitioner's motion to preclude respondent from offering any evidence relating to a defense that DCA retaliated against her because of complaints she made to various public officials and other entities about DCA's alleged practice of pressuring ALJs to issue decisions in favor of DCA and impose maximum fines. It is not disputed that respondent has commenced a state court action alleging such improper practices by DCA.

On January 2, 2014, petitioner served and filed a motion to compel respondent to answer eleven detailed interrogatories about cases in which improper pressure was purportedly asserted, communications she had with various public officials and organizations (the Office of the Public Advocate, the Office of Assemblyman Dov Hikind, the New York State Bar Association, and the New York City Department of Investigation), and DCA employees who had knowledge of such communications. On January 7, 2014, I held a conference call with counsel in which respondent agreed to answer a more narrowly focused set of interrogatories that petitioner would draft. Respondent submitted an answer to the interrogatories late in the day on January 28, 2014. Petitioner asserts that the response to the interrogatories was "plainly non-responsive" and asks that respondent be precluded from offering any evidence at trial relating to the defense of retaliation (Ashley Kim E-mail of Jan. 28, 2014). Respondent disagrees (Thomas Ciantra E-mail of Jan. 31, 2014).

For the following reasons, petitioner's motion to preclude respondent from putting forth evidence of retaliation is denied.

First, discovery before this tribunal is governed by Rule 1-33 of the OATH Rules of Practice. Under Rule 1-33 (e), the failure to comply with an order compelling discovery may result in imposition of appropriate sanctions, including the preclusion of witnesses or evidence. 48 RCNY § 1-33(e) (Lexis 2013). Here, respondent did not fail to comply with an order to compel. Rather, respondent voluntarily agreed to comply with a request for interrogatories, which are not generally contemplated under the OATH Rules, but are instead an "extraordinary" discovery device permitted only upon consent of the parties or upon application to the administrative law judge, upon "good cause" shown. *Matter of Prince,* OATH Index No. 1506/95, mem. dec. at 2 (Sept. 12, 1995); 48 RCNY 1-33(b). The "good cause" standard is viewed as "manifestly stricter" than the "material and necessary" standard applicable to "as of right" discovery, such as requests for document production, *Tenants of 51-55 West 28th Street v. Jo-Fra Properties, Inc.,* OATH Index No. 1019/05, mem. dec. at 2 (July 19, 2005) (*citing Human Resources Admin. v. Ben-Siyon Man of Jerusalem,* OATH Index No. 790/91, mem. dec. at 9 (Nov. 12, 1991)). We have generally declined to issue a sanction for refusal to comply with discovery where a discovery order has not been issued. *See Comm'n on Human Rights ex rel. Latif v. New Master Nail, Inc.,* OATH Index Nos. 1576/10 & 1577/10 (Aug. 10, 2010), *adopted,* Comm'n Dec. & Order (Nov. 16, 2010); *Dep't of Correction v. Altreche,* OATH Index Nos.

1377-8/98, 1384-6/98, 492/99, mem. dec. at 3 (Sept. 22, 1998) ("as a general matter, OATH discovery rules provide for the preclusion of evidence from a party only after that party fails to comply with a prior order compelling a response to a discovery request."); *cf. Dep't of Transportation v. Jones*, OATH Index No. 1517/07, mem. dec. at 7 (May 10, 2007) (imposing formal admonishment under OATH rule 1-13(e) for the willful failure of agency counsel to comply with respondent's discovery request). The sanction rule was not intended for the situation here, where respondent voluntarily agreed to comply with interrogatories, an extraordinary discovery device rarely utilized in disciplinary cases before this tribunal.

More substantively, I am not convinced that respondent failed to comply with petitioner's request for interrogatories. Respondent in fact replied to the interrogatories, albeit not to petitioner's satisfaction. Petitioner has highlighted that respondent was asked to state how various DCA officials gained knowledge of respondent's complaints to public agencies and officials, and alleges that respondent did not do so, satisfactorily. For example, when asked how the DCA officials obtained knowledge of respondent's complaints to the Office of the Public Advocate, respondent replied, "upon information and belief, from phone calls, emails and referral by the Civil Service Bar Association, affiliated with City Employees Union Local 237. . . to the Office of the Public Advocate . . . between March 2012-August 2012." Respondent did not provide any additional information about how DCA officials learned of this or similar communications. From this petitioner asserts that it is "evident" that respondent is either withholding evidence or has no evidence in support of her retaliation claim (Kim E-mail of Jan. 28, 2014). I have not formed any opinions from the pretrial motion practice as to the strength of respondent's evidence of retaliation or the extent to which such retaliation could be a defense to the incompetence and poor performance charges. However, there is no basis at this juncture for me to conclude that respondent is deliberately withholding evidence, such that a discovery sanction would be appropriate.

Accordingly, respondent's motion to preclude respondent from offering any evidence as to retaliation as a sanction for failure to provide answers to interrogatories is denied.

Faye Lewis
Administrative Law Judge

January 31, 2014

APPEARANCES:

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THOMAS N. CIANTRA, ESQ.
Attorney for Respondent