

Dep't of Correction v. Gayle

OATH Index No. 1051/12 (June 22, 2012)

Correction officer charged with damaging rental apartment. Administrative law judge found the uncorroborated testimony of officer's former landlord not sufficiently credible to prove the charge. Recommendation that charge be dismissed.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
CLAUDIA GAYLE
Respondent

REPORT AND RECOMMENDATION

JOHN B. SPOONER, *Administrative Law Judge*

This disciplinary proceeding was referred to me in accordance with section 75 of the Civil Service Law. Petitioner, the Department of Correction, charged that respondent Claudia Gayle, a correction officer, did more than \$250 worth of damage to her landlord's property.

At a hearing held on May 15, 2012, petitioner presented the testimony of respondent's former landlord, as well as a police officer and police detective who investigated the landlord's vandalism complaint. Respondent testified on her own behalf and also called her sister as a witness.

For the reasons provided below, I find that the evidence was insufficient to sustain the charge and recommend that it be dismissed.

ANALYSIS

Respondent has been a correction officer for four years. This case concerns allegations by respondent's former landlord, Jeffet Burke, that, on April 4, 2011, respondent vandalized the basement apartment which she had been leasing from Mr. Burke. Denying Mr. Burke's testimony that she damaged the apartment, respondent testified that she was not in the apartment

on April 4, having moved out of the apartment several days before, and further that she and her sister had observed Mr. Burke damage the apartment approximately a month earlier.

Certain facts were not disputed. Mr. Burke is a tailor and has known the Gayle family for some 15 years. He was in a relationship with respondent's mother for much of that time, although the relationship had ended at the time of the hearing. At some point, respondent's mother moved into Mr. Burke's three-room townhouse at 1455 East 102nd Street in Brooklyn. At that time, Mr. Burke lived on the second and third floors and rented out the first floor. In approximately 2008, Annesha Gayle, respondent's sister, moved into the first floor of the 102nd Street building with her young daughter. Later respondent also moved into the building. In August 2010, respondent and Mr. Burke agreed that respondent would rent the vacant basement apartment for \$700 per month and respondent moved into the space soon afterward. In March 2011, respondent stopped paying rent and announced that she was vacating the apartment. She moved out later that month, prior to April 4.

Mr. Burke provided the only direct evidence that respondent vandalized the basement apartment. He testified that, on April 4, 2011, he received a telephone call from a neighbor who reported hearing noises coming from the basement. He hurried to his house and went to the basement, where he saw respondent hitting the bathroom walls with a sledge hammer. Without speaking a word to Mr. Burke, respondent walked out of the building, got into her car, and drove away. Mr. Burke called 911 (Tr. 17).

Officer Johnson responded to Mr. Burke's call at around 1:40 p.m. She met Mr. Burke, who told her that a tenant and family friend had destroyed his property (Tr. 66). Officer Johnson observed that the interior of the basement apartment was "disheveled" (Tr. 65). There were holes in the walls of the bathroom which appeared to have been made by hitting them with a blunt object. She saw dust and debris on the floor (Tr. 66).

Detective Reyes was assigned to investigate Mr. Burke's complaint. She spoke with Mr. Burke a few days after April 4 and later visited and took photographs of the apartment (Tr. 79). At the apartment, she observed small holes in the bathroom wall and a sink and cabinet lying in the shower stall (Tr. 79). Detective Reyes delayed contacting respondent because Mr. Burke told the police that he might drop his complaint if respondent paid for the damage. Mr. Burke later telephoned Detective Reyes and told her that respondent had refused to pay. The detective then

called respondent and asked her to come in to the precinct (Tr. 77). Respondent became angry and hung up. Detective Reyes left a voice message for respondent, stating that she would go to respondent's work location and take her out in handcuffs if she refused to cooperate. Soon afterward a union delegate called the detective and told her that respondent would try to work out an arrangement with Mr. Burke (Tr. 78). Mr. Burke then called the detective again and said respondent had neither arranged for the repair of the damage nor paid Mr. Burke (Tr. 79). At the detective's request, respondent came into the precinct on June 9, 2011, and spoke briefly with Detective Reyes, making no statement about the substance of Mr. Burke's complaint. Detective Reyes arrested respondent at this time (Tr. 81, 83) and charged her with criminal mischief in the third and fourth degrees under Penal Law sections 145.05(2) and 145.05(1).

In her testimony, respondent testified that she moved out of Mr. Burke's building in March 2011 due to several improper actions by Mr. Burke and was not present in the building on April 4, 2011. Respondent stated that the original agreement with Mr. Burke for her to rent the basement was made because the basement apartment was in poor condition, with no stove, no shower, and unfinished ceiling and floors. She indicated that she wanted to save money to buy a place of her own. She therefore agreed to pay \$700 rent in exchange for performing various improvements to the apartment, including tiling the bathroom. She took out a \$4,000 pension loan in order to pay for the improvements (Tr. 145).

Respondent stated that she paid rent to Mr. Burke, as agreed, from August 2010 through February 2011. From the time she first moved into the basement, Mr. Burke used his key to enter her apartment unannounced. She could tell that he was moving objects in the bedroom and bathroom while she was not at home. One morning he entered the apartment and knocked on her bedroom door. He then made comments about condoms and other things he had found in the bathroom (Tr. 146). In February 2011, the sewer drain backed up and Mr. Burke had to call a plumber. When the plumber used a snake on the drain, the plumber evidently found some tampons. Mr. Burke left the sewage containing tampons in front of respondent's door (Tr. 147). This incident upset respondent and prompted her to announce to Mr. Burke that she was leaving. At the same time, she asked to be reimbursed for the renovation work she had done. Mr. Burke refused. Because she believed she was unfairly denied reimbursement for the improvement costs, respondent did not pay rent for March (Tr. 148). Respondent also had the locks to the

bedroom and bathroom changed to prevent Mr. Burke from entering without her permission (Tr. 150).

Respondent's sister, Annesha Gayle, described an incident which occurred on March 3, 2011, soon after respondent announced she was moving out. Ms. Gayle stated that, around 5:30 or 6:00 p.m., while respondent was at work, she heard loud banging noises in the basement. She went downstairs to investigate and saw Mr. Burke inside respondent's apartment throwing things around and banging on the walls and doors (Tr. 99). Ms. Gayle asked him what he was doing and he told her he was "tired of this" and wanted his money (Tr. 123). Ms. Gayle saw that Mr. Burke, who evidently stored materials at the house for use in his tailoring business, had deposited several large bolts of fabric both on the floor and above the door of the apartment (Tr. 127-28). She also saw garbage bags of debris stacked above the door (Tr. 123). She concluded that Mr. Burke was rigging a trap to injure her sister and she telephoned respondent at work, suggesting that she not come home that night (Tr. 99-100, 123).

Respondent testified that she returned home around 1:00 a.m. to find the entire apartment in disarray and took several photos (Resp. Ex. B1, B2, and B8) of what she saw (Tr. 149-50). Respondent testified that she left and returned with her sister the following day to inspect the damage more closely. They saw that Mr. Burke had broken two locked doors to enter the bathroom and the bedroom. There were large bolts of fabric stacked all over the hallways, making walking around difficult. New tiles respondent had purchased but not yet installed were broken. The water was turned off. The shower head and the knobs for the water supply had been removed. The top of the toilet tank had been taken off and smashed on the floor. Items were tossed around on the floor. A metal shelf was ripped from wall (Tr. 151). The electrical cords for a heater and a lamp were cut (Tr. 152). The ten date-stamped photos (Resp. Ex. B) taken by respondent both on March 4 and on March 5 show rolls of fabric piled in a hallway, a bathroom shelf unit sitting in a hallway, wall tiles coming loose from a bathroom wall, a shower pipe without a shower head, holes in some bathroom wall tiles, a door with a broken knob, and another door split open as if by a crow bar.

Respondent called 911 to report the March 4 incident. When she spoke to the officers who responded, they said that they could not file a complaint because respondent had not seen

Mr. Burke damaging the apartment (Tr. 158-59; A. Gayle: Tr. 124). Respondent then vacated the apartment and moved to Queens before the end of March (Tr. 160).

When asked about the March 4 incident, Mr. Burke admitted that he piled fabric inside respondent's apartment and removed light bulbs due to being "frustrated" by respondent's failure to pay rent and her abrupt departure from his building (Tr. 46-47, 55). He denied entering respondent's apartment at this time (Tr. 39) and could not recall whether he turned off the water (Tr. 47). As to respondent's rent payments, Mr. Burke initially agreed that respondent paid her rent on time up until March 2011. Later in his testimony he asserted that she failed to pay rent for five months (Tr. 34).

Respondent admitted that, after being notified by the police of Mr. Burke's complaint, she initially tried to settle the complaint by agreeing to pay Mr. Burke. She insisted that when she brought him a copy of the settlement agreement he refused to sign, saying he only wanted to see respondent lose her job (Tr. 174-75). Following respondent's arrest on June 9, 2011, she was suspended for 96 days, although 66 days of pay were later returned to her. The criminal charges were subsequently dismissed and the case file sealed when Mr. Burke failed to appear at the grand jury proceeding on September 5, 2011.

The resolution of the disciplinary charge here rests with a credibility analysis of the conflicting accounts of Mr. Burke and respondent. Both witnesses seemed to have some motive to lie. Respondent had the most compelling interest in the outcome of the case, since sustaining the charges would result in a significant disciplinary penalty. Mr. Burke, who admitted piling fabric inside respondent's apartment and removing light bulbs due to being "frustrated" by respondent's failure to pay rent and her abrupt departure from his building, seemed angry and motivated in part by a desire to retaliate against her.

Mr. Burke's testimony presented a number of significant inconsistencies. In his direct testimony, he indicated that, from the time she moved into the basement in August 2010, respondent paid her rent "faithfully" and on time (Tr. 15). A few moments later, on cross-examination, he indicated that respondent failed to pay rent for five months (Tr. 34) and offered no explanation for this contradiction. He admitted that, after respondent refused to pay rent, he was so "frustrated" that he piled bolts of fabric around the basement and took out light bulbs (Tr. 46), as depicted in the photos offered by respondent. He denied putting any fabric inside

respondent's apartment, an assertion at odds with the March 4 photos showing bolts of fabric inside the apartment, as well as in the hallways. He also insisted that he did not enter the apartment, although the photographs show two broken doors and other damage inside the apartment which it seemed unlikely respondent had caused. In his testimony he stated that he piled the fabric in the basement because he wanted respondent to move (Tr. 55), even though he had already admitted that respondent had previously announced that she would be moving.

Mr. Burke's motives in pursuing the criminal complaint and the disciplinary case against respondent were also a study in contradictions. On the one hand, he indicated that respondent's refusal to pay rent placed him in dire economic circumstances such that his property was facing foreclosure (Tr. 57). After the alleged vandalism by respondent on April 4, he immediately called the police and filed a criminal complaint against respondent. A few weeks later he notified the police that he wanted to pursue charges after he was dissatisfied with the settlement prospects. He apparently cooperated with the Department in seeking to have respondent penalized for disciplinary violations. At the same time, he repeatedly indicated that he wanted to "quash everything and let everything slide" (Tr. 50). It was for this reason that he did not appear at the grand jury.

Mr. Burke also suggested that respondent was responsible for attempting to intimidate him into dropping the criminal complaint. He insisted that he had received anonymous telephone threats and had his tires punctured (Tr. 20-21). Strangely Mr. Burke stated that, instead of providing further reason to abandon the criminal complaint, these threats increased his desire to cooperate with the Department in prosecuting the disciplinary charges "because something serious could happen" (Tr. 21). Once again, no explanation was offered for this bit of illogic.

It seemed quite odd that Mr. Burke took no photos of any of the damage that respondent allegedly inflicted on April 4. Evidently no photographs at all were taken until Detective Reyes visited several days later. Although respondent testified that she decided to move out due to Mr. Burke's entering her apartment without permission and then depositing sewage at her door, Mr. Burke insisted that he was unaware of any reason for her sudden refusal to pay rent and move (Tr. 32). It also seemed somewhat unusual that, upon being confronted by Mr. Burke for vandalizing the bathroom, presumably in retaliation for his treatment of her, respondent would have said nothing but simply left the building and drove away. Notably, no other evidence was

offered to corroborate Mr. Burke's allegations that respondent was in the building on April 4, 2011, or that she damaged the apartment on that date.

Respondent's testimony offered its own set of inconsistencies and implausibilities. It seemed extraordinary for a tenant to obtain a \$4,000 loan to pay for improvements to a rental apartment. While respondent insisted that Mr. Burke damaged the apartment himself on March 4, the photos she presented did not show the holes in the walls described by the police officer on April 4 or the sink and cabinet lying in the shower stall, as observed by Detective Reyes later in April.

Nonetheless, respondent's testimony that Mr. Burke inflicted some damage to the apartment a month before was corroborated by date-stamped photos as well as by the credible testimony of her sister. Mr. Burke's selective admissions as to the March 4 incident, conceding that he piled bolts of fabric and took out light bulbs, while at the same time denying that he pried open the doors despite photographic evidence to the contrary, suggested evasion and deception.

Two credibility arguments made by counsel for petitioner deserve mention. First, counsel contended that respondent's silence at the time of her arrest suggests that she is guilty of the crime with which she was charged. Respondent's testimony that she made no statements to the police at the arrest on the advice of her attorney offered a plausible and logical explanation for her silence. It would also be improper, if not unconstitutional, to infer guilt of a crime based upon a criminal defendant's silence upon being arrested and utilize such an inference to inflict discipline. *See Garrity v. New Jersey*, 385 U.S. 493, 497 (1967) (public employer requiring choice between self-incrimination and possible job forfeiture held coercive and "the antithesis of free choice to speak out or to remain silent" under the Fifth and Fourteenth Amendments). Furthermore, it is well settled that being arrested and charged with a crime is not misconduct independent from the acts that underlie the arrest. *Dep't of Probation v. Dixon*, OATH Index No. 156/11 at 2 (Nov. 30, 2010) citing *Dep't of Environmental Protection v. Torres*, OATH Index No. 194/01 at 5 (Sept. 27, 2000); *Health & Hospitals Corp. (Lincoln Medical & Mental Health Ctr.) v. Jiminez*, OATH Index No. 1381/07 at 2 (June 21, 2007).

Second, petitioner argued that respondent's offer to pay Mr. Burke for the damage indicates that she herself inflicted it. Once again respondent credibly testified that she made this offer on the advice of her attorney as a means of placating Mr. Burke and avoiding disciplinary

action. There was no indication that, in discussing possible compensation with Mr. Burke, respondent admitted that she hammered holes in the apartment walls or caused any of the other damage. The offer made by respondent was of little value in determining whether she or Mr. Burke was the more truthful. *See* CPLR § 4547 (Lexis 2012) (offer to compromise a claim is inadmissible as to the validity of the claim); 48 RCNY § 1-31(b) (settlement offers inadmissible at OATH trials); *Boychuk v. Weinstein*, 302 A.D.2d 524, 525 (2d Dep't 2003) (court erred when it considered letter offering to settle claim as proof of liability or admission of any fact).

Due to my conclusion that Mr. Burke was less credible than respondent, I do not reach the issue of whether respondent's off-duty conduct presented a sufficient nexus to respondent's employment to be disciplinable under section 75 of the Civil Service Law. *See Furst v. New York City Transit Auth.*, 631 F. Supp. 1331 (E.D.N.Y. 1986); *Dep't of Correction v. Dash*, OATH Index No. 336/06 at 9 (Mar 28, 2006), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 07-66-SA (June 13, 2007) (criminal acts by correction officer held to be subject to discipline due to nexus to officer's law enforcement responsibilities); *Arancio v. Dep't of Sanitation*, NYC Civ. Serv. Comm'n Item No. CD 87-33 (Mar. 4, 1987).

In sum, I find that Mr. Burke's uncorroborated testimony was insufficient to establish that respondent inflicted damage to the basement apartment with a sledge hammer on April 4, 2011, as charged. I recommend that the charge be dismissed.

June 22, 2012

John B. Spooner
Administrative Law Judge

SUBMITTED TO:

DR. DORA B. SCHIRO
Commissioner

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