Dep't of Finance v. Slabinsky

OATH Index Nos. 1125/12 & 1126/12 (Aug. 7, 2012), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 13-03-SA (Feb. 6, 2013)

Petitioner proved that respondents improperly double-billed by submitting false expense reports to obtain separate car allowances, even though they travelled together in the same car for field visits. Termination of employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF FINANCE
Petitioner
- against –
KAREN SLABINSKY AND LAURA SLABINSKY
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner, the Department of Finance, brought this employee disciplinary action against respondents, tax assessor Karen Slabinsky and supervisor Laura Slabinsky, under section 75 of the Civil Service Law. The charges alleged that, for a year or more, respondents submitted false documents by submitting separate expense reports for car allowances, even though they travelled together in the same car (ALJ Ex. 1). Charges alleging that respondents' conduct also violated the Penal Law were dismissed at respondents' request at the beginning of the hearing on the ground that this tribunal lacks criminal jurisdiction (Tr. 9). *See Office of Comptroller v. Lattanzio*, OATH Index No. 1029/04 at 11, 13 (Oct. 13, 2004) (dismissing, on jurisdictional grounds, alleged violations of the Penal Law, while sustaining related charges of misconduct).

At a two-day hearing that ended on May 15, 2012, petitioner relied on documentary evidence and testimony from four witnesses: Donna Billups, Robert Freeman, Rose Horton, and Matthew Joseph. Respondents offered documentary evidence, testified in their own behalf, and presented testimony from Angelo Santoro. Following receipt of post-hearing submissions, the record was closed on June 20, 2012. For the reasons below, I find that petitioner proved the charges and recommend termination of respondents' employment.

ANALYSIS

Respondents are sisters and long-time Department employees who work in the Queens property tax unit. Their responsibilities include making field visits to inspect properties. Karen Slabinsky is a tax assessor who calculates property values. Laura Slabinsky supervises other assessors and reviews their property valuations. She does not supervise her sister.

The charges stem from the 28 cents per mile car allowance that the Department pays employees who use their personal vehicles for official business. Such employees are guaranteed a minimum allowance of at least 30 miles per day. Thus, even if an employee only drives one mile to conduct official business, the Department pays a car allowance of $8.40 (.28 x 30).

Petitioner alleged that respondents routinely "double-dipped" by submitting separate expense reports enabling each of them to receive daily allowances of $8.40 for field visits, even though they shared the same car and travelled together. Furthermore, petitioner alleged that respondents submitted fictitious odometer readings to create the illusion that they were using separate cars.

Respondents argued that their conduct was permitted by Department rules and they were entitled to receive separate reimbursements because they jointly owned two vehicles (Tr. 11). Alternatively, respondents argued that they were unaware that they were doing anything wrong because their supervisors knew about their actions and routinely approved their expense reports (Tr. 12).

To prevail, petitioner must prove by a preponderance of the credible evidence that respondents committed misconduct. Civ. Serv. Law § 75(2) (Lexis 2012); *Dep't of Environmental Protection v. Ambrosino,* OATH Index No. 741/04 at 2 (Apr. 13, 2004). In assessing credibility, factors to be considered include: demeanor; consistency; supporting or corroborating evidence; and the degree to which testimony comports with common sense. *See Dep't of Correction v. Hansley,* OATH Index No. 575/88 at 19 (Aug. 29, 1989), *aff'd sub nom. Hansley v. Koehler,* 169 A.D.2d 545 (1st Dep't 1991).

Here, the evidence showed that respondents repeatedly requested and received separate travel allowances when they used the same car and travelled together on field visits. This was misconduct. The evidence also showed that respondents helped conceal their misconduct by submitting false odometer readings.

According to respondents' monthly expense reports, most of their field visits occurred on the same days (Tr. 59). On 53 occasions, from September 2010 to September 2011, each respondent requested and received daily travel allowances of $8.40 (Pet. Ex. 3). Petitioner's investigator credibly testified that, when questioned about this, respondents acknowledged that they often went into the field together in the same vehicle (Freeman: Tr. 63, 72, 75, 77). Three supervisors testified that such double payments were impermissible and they were unaware that both respondents had received travel allowances when they travelled together in the same car for field visits (Billups: Tr. 32-33, 37; Horton: Tr. 121; Joseph: Tr. 142-45).

Laura Slabinsky testified that she usually commuted to work with her sister in one car (Tr. 231). When they went into the field, they travelled together (Tr. 198-99). Normally, after Laura Slabinsky inspected properties assigned to her, they would take a break in the office and, afterwards, her sister would inspect her assigned properties (Tr. 198-99, 231). Respondents suggested that use of one car was more efficient because they could cover a greater area with one of them reviewing tax maps while the other drove (Tr. 199, 303). Karen Slabinsky also said that, because she had a medical condition that made it difficult for her to travel alone, supervisors encouraged her to travel with her sister (Tr. 303).

However, respondents also testified that they occasionally drove two cars to work (Tr. 226-27). Laura Slabinsky estimated that they used two cars on the same day 10 to 15% of the time (Tr. 227). They even claimed that they drove one car in the morning and a different car in the afternoon (Tr. 228, 311, 314). There was no credible evidence to support this implausible scenario. It conflicted with respondents' claim that travelling together in one car was permissible, efficient, and medically necessary. Respondents never told the investigator that they drove two cars on the same day. This testimony regarding the use of two cars on the same day seemed to be a contrived effort to rebut the credible evidence that they routinely travelled together in one car for field visits.

Respondents said that they had no idea that it was impermissible to receive two travel allowances when they travelled together in one car for field visits (Tr. 195-96, 286-87). Senior Supervisor Horton, who supervised respondents from November 2008 to November 2010, refuted that claim (Tr. 97). According to Horton, she found it unusual that respondents worked together in the field (Tr. 97). Horton discussed the matter with Santoro, the manager who oversaw all of the commercial property assessors (Tr. 106-07, 115, 117). After Santoro said that

respondents could work together in the field, Horton told them that they could continue to work together as long as they did not submit the same expense reports (Tr. 109).

Horton was a credible witness. She did not embellish her account and she candidly conceded that she did not recall exactly what she told respondents, but she was clear that she warned them not to submit the same expense reports (Tr. 109-10, 128-29). Santoro had no recollection of Horton telling him that she had given any cautionary warnings to the respondents, but he confirmed that Horton spoke to him about respondents travelling together in the field (Tr. 170). That supported Horton's testimony that her primary concern was that respondents were conducting field visits together (Tr. 110).

Even without Horton's specific warning, respondents knew or should have known that it was improper for each of them to claim daily travel allowances when they went on field visits in the same car. The purpose of the travel allowance is to reimburse an employee for the use of a personal vehicle. *See* Office of the Comptroller, Internal Control and Accountability Directives, Directive 6 – Travel, Meals, Lodging, and Miscellaneous Agency Expenses § 4.5.1 (Revised Oct. 31, 2011) ("Employees may be reimbursed for personal vehicle use at the rate of 28 cents per mile, with a minimum guarantee for 30 miles for each day of use even if the actual mileage incurred for City business is less") (Pet. Ex. 1); Citywide Agreement between New York City and District Council 37, AFSCME, Art. VIII Car Allowances § 2 (during the relevant period "compensation to employees for authorized and required use of their own cars shall be" 28 cents per mile) (Pet. Ex. 2). A travel allowance serves to repay an employee for the costs of driving a car, including depreciation, repairs, maintenance, fuel, and insurance. When one car is shared by two or more people there is no justification for paying more than one travel allowance.

Respondents claimed to be unaware of the Comptroller's Directive or the Citywide Agreement (Tr. 173, 281-82). When asked about a "per diem allowance, in lieu of a mileage allowance," Laura Slabinsky, who has worked for the Department as a tax assessor or supervisor of tax assessors for more than 25 years, testified that she was "unfamiliar with that terminology" (Tr. 175). Yet respondents' own evidence, with which they were familiar, contains nearly identical language describing the travel allowance as reimbursement for use of the car (Tr. 177, 191-92, 282, 285). *See* Office of Labor Relations, Interpretive Memo 92 (eff. Dec. 13, 1989) (Resp. Ex. A); Regulations for City Vehicle Drivers (eff. Jan. 1997) (Resp. Ex. E).

As petitioner conceded, it does not have an explicit rule forbidding two employees who travel together from receiving two travel allowances. But that does not excuse respondent's conduct. If an agency had no rule specifically prohibiting theft at the workplace, that would not mean that employees could help themselves to the petty cash. Such conduct is inappropriate and subject to discipline even in the absence of a specific rule or prohibition. *See Howland v. Schuyler-Chemung-Tioga Bd. of Cooperative Educational Services*, 179 A.D.2d 955, 956 (3d Dep't 1992) (using employer's vehicles for personal purposes); *Admin. for Children's Services v. Camara*, OATH Index No. 285/04 at 10 (Feb. 2, 2004), *modified on penalty*, Comm'r Dec. (May 20, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-117-SA (Nov. 14, 2006) (discourtesy to supervisor is "so clearly inappropriate" that it may subject employee to discipline "even in the absence of a specific rule or prohibition"); *Taxi & Limousine Comm'n v. Meedan*, OATH Index No. 783/90 at 13 (May 2, 1990) (verbal and physical abuse of an inspector may result in revocation of taxicab driver's license "even though no specific rule forbids such conduct"); *Dep't of Environmental Protection v. Yehounatan*, OATH Index No. 413/84 at 8 (Feb. 7, 1985) (theft of co-worker's personal papers is prejudicial to good order). Employers are not required to anticipate every conceivable form of misconduct. For that reason, there are broad rules against using one's position for personal advantage, acting in a manner prejudicial to good order, and engaging in conduct detrimental to the agency. Respondents violated all of those rules.

In an effort to shift the blame, respondents also stressed that their expense reports were repeatedly approved by supervisors and at least one supervisor saw them in the parking lot travelling together in one car (Tr. 198). Thus, respondents contend that their supervisors were aware that they were both receiving travel allowances for using the same car (Tr. 197, 308). That argument lacks merit.

Respondents have different titles and they routinely submitted their expense reports to different supervisors for approval (Tr. 137, 151; Pet. Ex. 3). Thus, supervisors knew that respondents travelled together, but they credibly testified that they were unaware of respondents' double billing. Moreover, even if expense reports later ended up on the desk of one manager or some other central location, there was nothing in those reports that would have alerted anyone that respondents were both seeking travel allowances for travelling in the same car.

Indeed, petitioner proved that respondents took affirmative steps to avoid detection of their double billing. The odometer readings that they submitted with their expense reports were

wildly different. In September 2001, for example, Karen Slabinsky reported that her car had 64,791 miles on it at the beginning of the month and 64,933 miles at the end of the month (Pet. Ex. 3). Meanwhile, for the same month, Laura Slabinsky submitted odometer readings claiming that her car started at 87,265 and ended at 87,467 (Pet. Ex. 3). There were similar differences for the entire preceding year. Anyone reviewing those expense reports would think that each respondent drove a different car. The odometer discrepancies suggest that respondents knew that their conduct was improper and they were attempting to cover it up. *See Dep't of Sanitation v. Blount*, OATH Index No. 1127/02 at 7 (June 11, 2002), *aff'd* , NYC Civ. Serv. Comm'n Item No. CD 03-18-SA (Feb. 5, 2003) (employee's ruse in obtaining World Trade Center relief items was evidence of intentional wrongdoing); *Dep't of Transportation v. Delprete,* OATH Index No. 506/95 at 4 (Feb. 17, 1995) (employee's "secrecy and evasion" helped show that the employee knew that material "belonged to someone else" and was not abandoned rubbish).

Faced with this damaging evidence, respondents showed that co-workers routinely submitted false or inaccurate readings. For example, two co-workers submitted odometer readings with their monthly expense reports which included the dubious claim that they drove exactly 30 miles every day (Resp. Ex. F). Evidence that co-workers and their supervisors were careless does not excuse respondents' actions. Employees who used their cars for business were entitled to a minimum car allowance of $8.40, whether they drove one or thirty miles each day. Discrepancies in their odometer readings did not result in unauthorized payments.

Here, however, each respondent submitted odometer readings that were so different from each other that they appeared to refer to two cars. This was not an immaterial discrepancy. The reported odometer readings appeared calculated to conceal that respondents routinely travelled in the field together in one car (Tr. 232). Respondents offered no credible explanation for the discrepancies in their odometer readings. Karen Slabinsky testified that her odometer readings were a "guesstimate," based on previous readings and she did not know what her sister did (Tr. 291). That defied belief. Respondents lived together, co-owned two vehicles, commuted together, often worked together in the field, and submitted weekly expense reports. It was unlikely that they never discussed their odometer readings with each other.

Laura Slabinsky's testimony was similarly flawed. Asked whether the odometer readings that she submitted were "official business records," she answered, "I don't understand what you

mean by official --" (Tr. 237). Asked the same question again, she answered "no" (Tr. 237). Pressed on this point, she conceded that expense reports were official business records (Tr. 238).

According to respondents, "over many years" supervisors told them to put down any odometer readings they wanted (Tr. 201, 223, 244, 293). There was no credible support for that claim. Three current or former supervisors testified and they were never asked by respondents' counsel whether they had told staff that odometer readings were irrelevant. Pressed on this point, Laura Slabinsky claimed that three other supervisors, who had since died or retired, told her to ignore the actual odometer readings and the subject "never" came up with a more recent supervisor (Tr. 202-03, 223, 246, 248). Under these circumstances, I did not believe respondents' claim that supervisors specifically told them to submit incorrect odometer readings. They may not have insisted on precise readings, but that did not give respondents license to submit odometer readings that were so far apart that one or both were fictitious.

In their post-hearing submission, respondents argued that there was a "clear lack of intent" to falsify expense forms (Resp. Mem. at 5-6). Respondents cited several cases where disciplinary charges were dismissed due to insufficient evidence of intentional misconduct (resp. mem. at 6-7). For example, respondents relied on *Rotkiewicz v. Department of Health and Mental Hygiene*, 283 A.D. 458, 462 (4th Dep't), *aff'd*, 307 N.Y. 847 (1954), where disciplinary charges against a cafeteria worker for distributing excess food were dismissed because there was no evidence of wrongful intent.

Here, unlike *Rotkiewicz*, there was sufficient evidence of intentional misconduct. Respondents prepared their own monthly reimbursement forms, repeatedly fabricated odometer readings, and regularly received $8.40 more per day than they were entitled to. This was not isolated or inadvertent misconduct. It was deliberate fraud that unjustly benefited respondents.

The charges should be sustained.

FINDINGS AND CONCLUSIONS

1. Petitioner proved that respondents engaged in conduct unbecoming City employees by submitting false reports or false entries on official records when they submitted separate expense reports even though they travelled together in one car during field visits, as alleged in Charge I, specification 1.

2. Petitioner proved that respondents engaged in conduct unbecoming City employees by submitting false reports or false entries when they submitted automobile travel logs with different odometer readings, even though they travelled together in one car during field visits, as alleged in Charge I, specification 2.

3. Petitioner proved that respondents misused their official positions for personal benefit as alleged in Charge II.

4. Petitioner proved that respondents engaged in conduct that was prejudicial to good order and discipline, as alleged in Charge III.

5. Petitioner proved that respondents engaged in conduct that is likely to bring the agency or the City into disrepute.

RECOMMENDATION

After making the above findings, I requested and received a summary of respondents' personnel histories. Petitioner hired Laura Slabinsky in 1983 and Karen Slabinsky in 1985. They have no prior disciplinary records and their recent performance evaluations describe their work as superior. Laura Slabinsky also received a letter of commendation in 1992. Petitioner now seeks termination of employment for both respondents. That is appropriate.

This tribunal and state courts have repeatedly held that termination of employment to be the appropriate penalty for fraud or misappropriation of City funds. *See Ansbro v. McGuire*, 49 N.Y.2d 872, 874 (1980) (upholding termination of police office who fraudulently padded overtime pay); *Cipollaro v. Dep't of Education*, 83 A.D.3d 543, 544 (1st Dep't 2011) (upholding termination of teacher who defrauded the Department by enrolling children in New York City public schools even though they lived in Westchester, noting "lack of remorse," "failure to take responsibility," and "harm caused"); *Van Gorder v. Board of Education*, 140 A.D.2d 774, 776 (3d Dep't 1988) (upholding termination of account clerk found guilty of incompetence or misconduct based on her unauthorized transfer of public monies to herself); *Dep't of Education v. Nwabuoko*, OATH Index No. 1645/02 at 18 (Oct. 31, 2002) (food service manager fired for stealing $2,782 from the school lunch room).

Even where the amounts improperly taken were relatively small, termination of employment is generally imposed. *See Schaubman v. Blum*, 49 N.Y.2d 375, 379-80 (1980)

(upholding dismissal of a pharmacist from the Medicaid program who defrauded the government of $3.39); *Taxi & Limousine Comm'n v. Dubose*, OATH Index No. 177/11 at 11-13 (Aug. 13, 2010), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-27-A (May 4, 2011) (taxi inspector fired for stealing coins from a van that he seized during the course of his job, attempting to disable a camera in the van, and lying to investigators); *Health & Hospitals Corp. (Kings Co. Hospital Ctr.) v. George*, OATH Index No. 829/04 at 10 (May 17, 2004) (termination of employment recommended for dietary aide found to have stolen candy and hospital supplies); *Health & Hospitals Corp. (Kings Cty. Hospital Ctr.) v. Colter*, OATH Index No. 196/98 at 9 (Oct. 20, 1997) (theft of a turkey and attempted theft of dish soap by a hospital employee warranted termination of employment); *Dep't of Transportation v. Mascia*, OATH Index No. 403/85 at 23-25 (May 30, 1986) (long-term employee with no disciplinary history fired for theft of $28.50 in tokens from supervisor's desk).

In their post-argument submission, respondents rely on *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974), for the proposition that length of service, disciplinary history, and potential for hardship should be taken into account when determining the appropriate penalty for employee misconduct (Resp. Mem. at 9-10). However, in *Pell*, the Court of Appeals also held:

> Consideration of the length of employment of the employee, the probability that a dismissal may leave the employee without any alternative livelihood, his loss of retirement benefits, and the effect upon his innocent family, all play a role, but only in cases where there is absent grave moral turpitude and grave injury to the agency involved or to the public weal. But *deliberate, planned, unmitigated larceny*, or bribe taking, or demonstrated lack of qualification for the assigned job is not of that kind. Paramount too, in cases of sanctions for agencies like the police, is the principle that it is the *agency and not the courts which, before the public, must justify the integrity and efficiency of their operations.*

Pell, 34 N.Y.2d at 235-36 (emphasis added). In *Matter of Best v. Ronan*, one of the five cases decided in *Pell*, the Court upheld termination of employment for a long-term transit worker who defrauded the Transit Authority out of $1.26 over 18 days by misappropriating bus fares. 34 N.Y.2d at 239, *rev'g*, 41 A.D.2d 639 (1st Dep't 1973); *see also Dep't of Housing Preservation & Development v. Bomani*, OATH Index No. 1077/91 at 18-19 (Aug. 9, 1991) (termination of employment for submission of false expense reports, attendance sheets, and route sheets); *Dep't of Health, Office of the Chief Medical Examiner v. Fuseyamore*, OATH Index No. 295/88 at 18 (Aug. 25, 1988) (termination of employment for personal use of agency vehicle and false entries concerning mileage).

The nature of respondents' misconduct outweighed their length of tenure and good service. Respondents play a critical role in the City's collection of tax revenue. Integrity is an essential job requirement for tax assessors and their supervisors, who work with a great deal of independence. The evidence showed that respondents violated the trust that petitioner placed in them. If respondents cannot be relied upon to submit truthful expense reports, petitioner has good reason to doubt their integrity. Furthermore, respondents' misconduct was not isolated or inadvertent. They engaged in repeated, deliberate acts of dishonesty for their personal financial gain, and they falsified official records to conceal their misdeeds. Accordingly, I recommend termination of respondents' employment.

Kevin F. Casey
Administrative Law Judge

August 7, 2012

SUBMITTED TO:

DAVID M. FRANKEL
Commissioner

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