Office of the Comptroller v. Martin

OATH Index No. 1680/12 (July 17, 2012)

Petitioner demonstrated that a community coordinator refused orders to remove her Bluetooth headset and was insubordinate to her supervisors. ALJ recommended a 15 work day suspension.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
OFFICE OF THE COMPTROLLER
Petitioner
- against -
RENAE MARTIN
Respondent

AMENDED REPORT AND RECOMMENDATION

ALESSANDRA F. ZORGNIOTTI, *Administrative Law Judge*

Petitioner, the Office of the Comptroller brought this employee disciplinary proceeding pursuant to section 75 of the Civil Service Law. Petitioner alleges that respondent Renae Martin, a Community Coordinator, committed misconduct by being insubordinate on two occasions and refusing orders to remove her Bluetooth headset (ALJ Ex. 1).

At the hearing on June 13, 2012, petitioner relied upon documentary evidence and two witnesses from the Bureau of Law and Adjustment: Director Courtney, respondent's immediate supervisor; and Director Courtney's supervisor, Bureau Chief Aaronson. Respondent testified on her own behalf and denied the charges. The record was held open until June 18, 2012, for the submission of relevant case law. I find that petitioner proved the charges and recommend that respondent be suspended for 15 work days.

ANALYSIS

Respondent started working at the Comptroller's office approximately 35 years ago. After an extended absence from the Bureau of Law and Adjustment, respondent returned there in 2010. Chief Aaronson testified that at a "Welcome Back" meeting attended by Assistant Comptroller Cohen, respondent wore a Bluetooth wireless headset connected to her mobile phone. During the meeting the phone rang. Respondent accepted the call and proceeded to

conduct a conversation over the Bluetooth device. Chief Aaronson testified, and respondent denied, that respondent promised not to wear the Bluetooth headset again (Aaronson: Tr. 27-28; Martin: Tr. 50).

It was undisputed that there were subsequent incidents where respondent was told by Director Courtney and Assistant Comptroller Cohen not to wear her Bluetooth headset at work (Aaronson: Tr. 28; Martin: Tr. 54). In fact, the agency's Code of Conduct was amended to specifically address an employee's use of Bluetooth headsets. Rule A6 of the Code of Conduct currently states:

> Employees are advised that all orders issued by supervisory personnel must be obeyed immediately. If the employee believes a particular order is not consistent with the terms of the existing labor contract, he or she must nevertheless obey the order, and then file a grievance through the proper channels. **This includes but is not limited to an order to turn off your personal communications or to remove a "Bluetooth" device from your person.**

(ALJ Ex. 2) (emphasis added).

In 2011, respondent was charged with refusing orders to remove her Bluetooth and a hearing was held at OATH on October 28, 2011. Both Chief Aaronson and Director Courtney testified. The current charges stem from the aftermath of the 2011 hearing and respondent's continued use of her Bluetooth device.

December 5, 2011- Charge of insubordinate conduct

Petitioner alleges that on December 5, 2011, respondent was insubordinate in an e-mail to Director Courtney in violation of rule 3D. Rule 3D defines misconduct as: "Disorderly, disruptive or insubordinate conduct" (ALJ Ex. 2).

On Friday, December 2, 2011, respondent e-mailed Director Courtney, protesting an order to move her workspace stating: "This is the fourth time in less than 2 years that I have been force [sic] to relocate. I would really prefer to remain in the location that I am in" (Pet. Ex. 1). Director Courtney replied that respondent had been informed of the move two months earlier, in October. She also explained that operational necessity required the move and ordered respondent to be ready by Wednesday, December 7 (Pet. Ex. 1).

On Monday, December 5, respondent responded to Director Courtney: "You speak not the Truth, Just as you did November 4th under oath. The truth is that you never mention [sic] anything to me about moving in October" (Pet. Ex. 1). It was undisputed that respondent's reference to November 4 was an error; that she meant to refer to Director Courtney's testimony at the OATH hearing on October 28 (Courtney: Tr. 10; Martin: Tr. 45, 59). Director Courtney testified that she was "totally floored" by the accusation that she had lied under oath, a criminal offense. After a day's deliberation she forwarded the e-mail to the Deputy General Counsel for the Office of the Comptroller (Tr. 11).

Respondent expressed surprise that Director Courtney took offense at the e-mail and claimed that she was merely trying to express her desire to remain where she was and to dispute that she had been previously informed of the move. In fact, respondent testified that she was "trying to be very careful about [her] words" (Tr. 44–46).

This tribunal has held that not every disagreement with a supervisor amounts to insubordination or misconduct. *Dep't of Citywide Admin. Services v. Phillip,* OATH Index No. 114/10 at 7 (Sep. 10, 2009). An employee may disagree with a supervisor as long as the disagreement remains within the bounds of decorum and discretion. *See Dep't of Correction v. Laboy,* OATH Index No. 783/96 (Aug. 12, 1996), *modified on penalty,* NYC Civ. Serv. Comm'n Item No. CD 00-90-M (Aug. 10, 2000); *Human Resources Admin. v. Bichai,* OATH Index No. 211/90 (Nov. 21, 1989), *aff'd,* N.Y. Civ. Serv. Comm'n Item No. CD 90-54 (June 15, 1990).

I find that respondent's e-mail was insubordinate and went beyond the bounds of decorum and discretion. If respondent objected to being moved she should have done so in a professional manner. Instead, respondent impugned her supervisor's character and honesty by essentially calling her a liar and, even worse, a perjurer. Contrary to respondent's contention, the fact that she was neither loud nor disorderly is not dispositive.

This case is similar to *Dep't of Sanitation v. Tripplin,* OATH Index No. 1016/07 (Apr. 5, 2007), *modified on penalty,* NYC Civ. Serv. Comm'n Item No. CD 08-14-M (Feb. 25, 2008), where an employee e-mailed to a supervisor stating, "you have already been exposed as a liar" was found to be abusive and disrespectful. *See also Dep't of Transportation v. Khan,* OATH Index No. 1093/06 at 4 (Apr. 27, 2006), *aff'd,* NYC Civ. Serv. Comm'n, Item No. CD-07-15-SA (Feb. 12, 2007) (finding of misconduct, based upon discourteous and inappropriate comments, where employee called supervisor a "liar"); *Admin. for Children's Services v. Papa,* OATH

Index No. 1622/05 at 6-7 (Aug. 30, 2005), *modified on penalty*, Comm'r Dec. (Oct. 21, 2005) (same). Respondent's claim that she "only" said that Director Courtney "spoke not the truth" is not enough to distinguish this case from *Tripplin*. The words chosen were clear and direct that no less offensive meaning could reasonably have been understood.

March 12, 2012- Charges of insubordination and disrespectful conduct

Petitioner alleges that on March 12, 2012, respondent refused two orders to remove her Bluetooth headset in violation of rules 3C and 3D of the Code of Conduct. Rule 3C defines misconduct as, "Refusing to obey a direct order, whether oral or written, or failing to carry out a direct order in an expeditious manner" (ALJ Ex. 2). Petitioner also alleges that respondent engaged in conduct prejudicial to good order and discipline when she spoke to Chief Aaronson inappropriately about Assistant Comptroller Cohen in violation of rule 3R.

At the time of the incident respondent's desk was located in a cubicle outside and away from Director Courtney's office. Adjacent to respondent's cubicle are three other cubicles that were occupied at the time by other employees (Aaronson: Tr. 29-30).

Director Courtney testified that on March 12, 2012, she heard respondent talking and asked her to come into the office to discuss an assignment. According to Director Courtney, she noticed that respondent was wearing a Bluetooth headset. When she asked respondent whether she was wearing one, she replied in the affirmative and stated, "don't tell me you are still on that" (Tr. 12). Director Courtney testified that she asked respondent to remove the Bluetooth and that respondent refused saying it is not written anywhere that she cannot wear one. According to Director Courtney, she pointed out that there was a rule about Bluetooth headsets in the employee manual, to which respondent replied, "Well, that's only in there because of me" (Tr. 12). When Director Courtney reiterated her request to remove it, respondent replied, "You do what you have to do, and I'm going to do what I'm going to do" (Tr. 13). Director Courtney testified that she followed up by stating, "I'm giving you a direct order." Respondent replied, "I'm not taking it off, I've told you that, I've told everyone else, and you would think you would get that by now." She then left the office (Tr. 13).

After the meeting, Director Courtney sent an e-mail to Chief Aaronson stating:

> I spoke with Renae Martin today asking her why she was wearing a Bluetooth. She stated that she can wear this, always has, always will. I instructed her to remove it and she refused. She stated there

> was no rule that states she can't wear it. I informed her that it is in the Employee Manual. She stated that it was only put in there because of her. She stated that I can do what I have to do. She also stated that she is not taking it off and that she has made that very clear to everyone.

(Pet. Ex. 2).

Chief Aaronson testified that after he spoke with Director Courtney, he went to respondent's cubicle to speak to her. He asked respondent if she was wearing the Bluetooth headset and respondent said that she was. At that point he noticed the headset on respondent's ear. According to Chief Aaronson, he asked respondent if Director Courtney had ordered her to remove it, to which she responded "I'm not taking it off" and she will "have to write [me] up" (Tr. 26). He then told respondent that he was sorry to hear it, that she was being insubordinate to Director Courtney, and now to him. Chief Aaronson left. When he was just beyond her cubicle, he heard respondent say, "Tell Karen to get off my back" (Tr. 27, 33), referring to Assistant Comptroller Cohen, who had previously taken a strong stance against respondent's use of the Bluetooth headset (Tr. 34).

Respondent agreed that she met with Director Courtney in her office and discussed her assignment. She claimed, however, that there was no conversation about her Bluetooth headset (Tr. 47-48, 53) but admitted that she was wearing it during the meeting (Tr. 50).

Respondent also testified that after her meeting with Director Courtney, Chief Aaronson came to her desk and mentioned that he had received an e-mail from Director Courtney about her wearing her Bluetooth. Respondent testified that she did not respond but instead "ignored" and "blocked [Aaronson] out" (Tr. 49, 56). She stated that Chief Aaronson told her to remove the Bluetooth headset, and that she did not reply. Chief Aaronson returned to his office. Respondent claimed that she removed the Bluetooth headset after he left (Tr. 49, 57). Respondent testified that at least one of her co-workers was present (Tr. 49, 55).

Respondent denied making a comment about Assistant Comptroller Cohen (Tr. 63) but acknowledged that the issue with the Bluetooth was originally raised by Assistant Comptroller Cohen (Tr. 50). At the hearing respondent complained that she was being singled out and that no one should tell her what to do with her time and that she is "really upset about it" (Tr. 51). Respondent further stated there is no standing order that employee's not wear a Bluetooth in the

office; there is only a "Renae order" (Tr. 52) and she has told everyone about it (Tr. 53). Respondent testified that since March 12, she has not worn her headset (Tr. 52).

Petitioner does not allege that respondent is prohibited from wearing a Bluetooth headset in the workplace. Rather, respondent is charged with refusing orders from Director Courtney and Bureau Chief Aaronson to remove it from her person. To prevail on a charge of insubordination, petitioner must show by a preponderance of the evidence that: (1) a supervisor gave an unambiguous order; and (2) the order was willfully refused. *Dep't of Sanitation v. Smyth*, OATH Index No. 2178/05 at 7 (Feb. 14, 2006), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-122-SA (Nov. 14, 2006). The order need not be in the form of a command, as long as it is a clear request. *Dep't of Environmental Protection v. Schnell*, OATH Index No. 2262/00 at 7-8 (Oct. 25, 2000) (obligation to comply even where supervisor does not use the phrase "direct order"). The refusal need not be announced; it may consist of a deliberate, passive failure to comply. *See Health & Hospitals Corp. (Correctional Health Services) v. LaSane*, OATH Index No. 1165/02 at 6 (Aug. 8, 2002).

To the extent resolution of these charges requires a credibility determination, this tribunal has looked to witness demeanor, consistency of a witness' testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness' testimony comports with common sense and human experience in determining credibility. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 4, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998). For the reasons below, I found Chief Aaronson and Director Courtney to be more credible than respondent.

I credit Director Courtney's testimony as corroborated by her contemporaneous e-mail that she repeatedly and unambiguously told respondent to remove her Bluetooth headset and that respondent defiantly refused to do so. Respondent's claim that there was absolutely no conversation about the headset was just not credible. Respondent admitted that she was wearing the Bluetooth at the time and that this has been an on-going issue. Under the circumstances, it is highly unlikely that Director Courtney would have ignored the Bluetooth in respondent's ear. Respondent's testimony that she was being singled out, that no one should tell her what to do, and that she is really upset about the Bluetooth rule was consistent with what Director Courtney testified respondent stated during the meeting.

With regard to Bureau Chief Aaronson's subsequent order that respondent remove the Bluetooth from her ear, respondent admitted that she heard the order and ignored it. The fact that respondent may have removed the Bluetooth after Chief Aaronson left, does not excuse her insubordination.

Once a directive has been given, an employee must obey the order and subsequently challenge it through formal grievance procedures if there are any substantive or procedural objections. *See Ferreri v. New York State Thruway Auth.*, 62 N.Y.2d 855 (1984). There are few exceptions to the "obey now, grieve later" principle, including orders that: (1) are clearly in excess of the agency's authority under the collective bargaining agreement; (2) are unlawful; or (3) would threaten the health or safety of any person if followed. *Health & Hospitals Corp. (Queens Health Network) v. Smith*, OATH Index No. 2019/08 at 4 (Oct. 17, 2008). The burden of proof is on respondent to demonstrate that an exception exempts compliance with an agency order. *Health & Hospitals Corp. (Coler-Goldwater Hospital) v. Hinkson*, OATH Index No. 163/04 at 4 (Nov. 21, 2003). Respondent did not argue that any of the exceptions apply here. Moreover, the order to remove a Bluetooth was not clearly beyond management's prerogative to determine the methods and means by which its operations are conducted. *See Ferreri*, 62 N.Y.2d 855 (order to work overtime was not clearly beyond the power of management); *Fire Dep't v. Seckler-Roode*, OATH Index No. 1901/02 at 9 (Feb. 19, 2003) (same).

I also find that respondent's comment, "Tell Karen [Cohen] to get off my back," to be misconduct. I credit Chief Aaronson's testimony that respondent made this comment while he was walking away from her cubicle over respondent's self-serving denial that she never said such a thing. Respondent admitted that she has been very vocal about her feelings regarding the Bluetooth issue and there is no apparent motive for Chief Aaronson to fabricate this claim. I credit his testimony that he found it to be a "sad comment" because the Assistant Comptroller had nothing to do with this particular incident (Tr. 34). It is not unreasonable to infer that respondent mistook the Assistant Comptroller as the source of the continued Bluetooth crackdown as she had been involved with it in the past and respondent acknowledged that she is still angry about it. Moreover, the charge that respondent's comment to Chief Aaronson was prejudicial to good order and discipline is further supported by her own admission that there was at least one co-worker present at the time.

FINDINGS AND CONCLUSIONS

1. Petitioner demonstrated that respondent's e-mail to Director Courtney on December 5, 2011, was insubordinate in violation of Rule 3D.

2. Petitioner demonstrated that on March 12, 2012, respondent refused orders from Bureau Chief Aaronson and Director Courtney to remove her Bluetooth headset in violation of Rules 3C and 3D.

3. Petitioner demonstrated that respondent's comment to Bureau Chief Aaronson on March 12, 2012, was prejudicial to good order and discipline in violation of Rule 3R.

RECOMMENDATION

Upon finding respondent committed misconduct, I requested and reviewed respondent's personnel history. Respondent started at the Office of the City Comptroller in 1979 as an Office Aide, and has received several promotions: Office Associate in 1989; Word Processor in 1990; Secretary in 1996; and Community Coordinator in 2006. This is the third disciplinary action against respondent related to her Bluetooth headset. The first sanction was a two-day pay fine in November 2010 for her refusal to remove a Bluetooth device from her ear. In December 2011 respondent was suspended without pay for 5 days for similar misconduct.

Petitioner requests a 15 work day suspension. In light of respondent's refusal to change her behavior despite numerous informal warnings and formal sanctions, this request is reasonable under the concept of progressive discipline. "It is a well-established principle in employment law that employees should have the benefit of progressive discipline wherever appropriate, to ensure that they have the opportunity to be apprised of the seriousness with which their employer views their misconduct and to give them a chance to correct it." *Dep't of Transportation v. Jackson*, OATH Index No. 299/90 at 13 (Feb. 6, 1990). The theory of progressive discipline is to modify employee behavior through increasing penalties for repeated same or similar misconduct. *Police Dep't v. Schaefer & McGrath*, OATH Index Nos. 1114/99 & 1169/99 (July 2, 1999), *aff'd, sub nom. Schaefer v. Safir*, 281 A.D.2d 163 (1st Dep't 2001). A fair penalty must take into account the particular circumstances of the incident and individual mitigating factors, as appropriate. *Admin. for Children's Services v. Goodman*, OATH Index Nos. 986/05 and 1082/05 (Aug. 12, 2005) (respondent's lack of a prior disciplinary record is a mitigating factor).

Despite her long tenure, respondent should understand that her continued insubordination could eventually lead to her termination from employment. *See Office of Management and Budget v. Perdum*, OATH Index No. 998/91 at 28 (June 17, 1991) (termination appropriate for nineteen year employee with no prior disciplinary record terminated who engaged in repeated insubordination and incompetence, where employee was "on clear notice that his conduct was unacceptable and was given ample opportunity to correct it"); *Dep't of Housing Preservation and Development v. Ray*, OATH Index Nos. 1460/00 & 2135/00 at 32 (Sept. 14, 2000), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 01-84-SA (Dec. 28, 2001) ("The critical question in all of these cases is whether a penalty short of termination will change the respondent's behavior."); *Health and Hospitals Corp. (Metropolitan Hospital Ctr.) v. Ahmed*, OATH Index No. 567/05 at 6 (Jan. 7, 2005) ("Despite ample warnings, respondent has not changed her conduct. Indeed, respondent has explicitly told her supervisors that she will continue to do things her own way. Respondent's refusal to change her behavior and unwillingness to follow supervision are grounds for termination").

The requested penalty is not so disproportionate to the sustained misconduct as to be shocking to one's sense of fairness. *Pell v. Bd. of Education*, 34 N.Y.2d 222 (1974). Accordingly, I recommend a 15 work day suspension without pay.

Alessandra F. Zorgniotti
Administrative Law Judge

July 17, 2012

SUBMITTED TO:

JOHN C. LIU
Comptroller

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