Dep't of Homeless Services v. Simmons

OATH Index No. 2042/12, mem. dec. (July 24, 2012)

Respondent moved to stay disciplinary hearing pending the outcome of a criminal investigation and any criminal charges arising therefrom. Because the criminal investigation is still ongoing and respondent has not yet been charged criminally, she did not show good cause for a stay of the disciplinary proceeding. Motion denied.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF HOMELESS SERVICES
Petitioner
-against-
SANDRA SIMMONS
Respondent

MEMORANDUM DECISION

INGRID M. ADDISON, *Administrative Law Judge*

The Department of Homeless Services ("DHS" or the "Department") brought disciplinary charges against respondent Sandra Simmons, pursuant to Section 75 of the Civil Service Law. A hearing on the charges is scheduled before me for August 3, 2012. On July 19, 2012, respondent moved this tribunal to stay the disciplinary proceeding pending the outcome of a criminal investigation. Petitioner opposed respondent's motion on July 20, 2012.

In its charges, DHS alleged that respondent fraudulently obtained two government-subsidized apartments, gave false information to the Department of Investigation ("DOI"), and engaged in other serious misdeeds. DOI referred the matter to the Bronx County District Attorney's Office for investigation and prosecution (Resp. Mot. at 2).

The sole remedy sought by respondent is a stay of the disciplinary hearing pending the outcome of the criminal investigation. No charges have yet been filed against respondent. However, operating on the premise that she "will be arrested in the near future," respondent

argues that the disciplinary hearing would force her to testify in violation of her Fifth Amendment right against self-incrimination (Resp. Mot. at 2).

Respondent acknowledges that she is not literally compelled to testify and may opt to remain silent. But she adds that if the hearing goes forward, she would need to testify in order to "properly defend herself" against the misconduct charges (Resp. Mot. at 2).

The Fifth Amendment permits a respondent to remain silent at a civil or disciplinary hearing, but it also permits an inference of guilt from a defendant's failure to testify about facts relevant to their case. *Baxter v. Palmigiano*, 425 U.S. 308, 316-17 (1976); *DeMarco v. City of Albany*, 75 A.D.2d 674, 674 (3d Dep't 1980); *Dep't of Correction v. Dasque*, OATH Index No. 1270/01, mem. dec. at 3-4 (July 26, 2001). The choice to either testify and waive Fifth Amendment rights, or remain silent and accept an adverse inference, is a constitutionally permissible choice respondent can be required to make. *Dasque*, OATH 1270/01, mem. dec. at 3-4 (citing *Baxter*, 425 U.S. at 316-20). No violation of constitutional rights occurs when a party is required to proceed in a civil proceeding before adjudication of related criminal charges. *Matter of Germaine B.*, 86 A.D.2d 847, 848 (1st Dep't 1982); *see also Tiana G. v. Gaston Y.*, 84 A.D.3d 1375 (2d Dep't 2011) (finding the argument that the Family Court should have adjourned the proceeding pending resolution of a related criminal proceeding "without merit").

In the absence of a constitutional bar, the application for an adjournment of respondent's pending disciplinary hearing is a matter addressed to the discretion of the administrative law judge, and granted for "good cause" shown. *See* 48 RCNY § 1-32(b) (Lexis 2012). The burden of demonstrating good cause is on the party seeking the adjournment. *Dep't of Correction v. Chalmers*, OATH Index No. 413/04, mem. dec. at 2 (Nov. 6, 2003); *Comptroller v. BQE Contracting Corp.*, OATH Index No. 1046/93, mem. dec. at 3 (Sept. 3, 1993).

Indeterminate stays of disciplinary cases are disfavored because granting them would deprive the employer of the ability to discipline employees facing criminal charges. *Fire Dep't v. Silvestri*, OATH Index No. 613/05, mem. dec. at 2 (Dec. 17, 2004); *Human Resources Admin. v. Rosario*, OATH Index No. 1828/00 (June 2, 2000); *Askinazi v. Police Dep't*, 25 A.D.2d 429, 429 (1st Dep't 1966) (the stay of a disciplinary hearing for a criminal matter to proceed was a "palpable abuse of discretion" because the employee was "still subject to disciplinary action for violation of the rules and regulations of the department.").

Respondent argued that a stay of the disciplinary proceeding would not be prejudicial to petitioner. I disagree. DHS has an interest in prompt resolution of misconduct allegations and having respondent, or someone else, fulfill her job responsibilities. *See Dep't of Environmental Protection v. Rodriguez,* OATH Index No. 1438/08, mem. dec. at 3 (May 15, 2008). Thus, a stay of the proceedings would effectively place petitioner in a state of limbo.

Consequently, I find no good cause for a stay during the pendency of other proceedings where the adjournment that is requested is of unknown length. *See Rodriguez,* OATH 1438/08, mem. dec. at 3 (denying stay where respondent's belief that criminal case would conclude soon was unsubstantiated); *Human Resources Admin. v. Small,* OATH Index No. 2019/04 at 2 (May 10, 2005) (request for indefinite stay denied); *Fire Dep't v. Silvestri,* OATH 613/05, mem. dec. at 2 (no good cause where the criminal case would conclude at an unknown future time); *Dep't of Correction v. Chalmers,* OATH Index No. 413/04, mem. dec. at 2 (Nov. 6, 2003) (no good cause where resolution of the other matter was not imminent). Respondent is not yet charged with a crime, and even if charges are forthcoming, she is unable to identify when she will be charged, and further, when those charges will be resolved.

Because respondent has failed to show good cause for the stay, and DHS has the right to conclude this matter promptly, respondent's motion is denied.

Ingrid M. Addison
Administrative Law Judge

July 24, 2012

SUBMITTED TO:

SETH DIAMOND
Commissioner

APPEARANCES:

GEANNETTA E. JACKSON, ESQ.
Attorney for Petitioner

SAM BRAVERMAN, ESQ.
Attorney for Respondent