Taxi & Limousine Comm'n v. Neubauer

OATH Index No. 1618/13 (July 8, 2013)

Employee left work in mid-day after his last minute application for leave to attend Yankee game was denied. Given prior 60-day penalty and final warning for similar misconduct, and employee's statement that he plans to continue to attend home games even if his leave applications are denied, termination of employment is recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
TAXI AND LIMOUSINE COMMISSION
Petitioner
-against-
JOSEPH NEUBAUER
Respondent

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

This is a disciplinary proceeding brought by petitioner, the Taxi and Limousine Commission, ("TLC"), pursuant to Section 75 of the Civil Service Law. The charges allege that respondent, Joseph Neubauer, was absent without authorization on September 19, 2012, from 12:15 p.m. until 5:00 p.m., after his supervisors had disapproved his request for time off.

A hearing was held before me June 12, 2013, at which respondent's supervisor, Antoinette Jean-Louis testified for petitioner and respondent testified in his own behalf. For the reasons below, I find that respondent was absent without leave and neglected his duties, as alleged, but I find the proof insufficient to conclude that he committed insubordination, as also alleged. Considering respondent's prior disciplinary history, most notably the 60-day suspension and final warning for similar misconduct, I conclude that termination of his employment is appropriate, and I so recommend.

ANALYSIS

Respondent is an avid New York Yankees fan. He is also a 27-year employee of the Taxi and Limousine Commission, who in September 2012 was assigned as a secretary to the New Application Unit under the supervision of Ms. Jean-Louis (Jean-Louis: Tr. 7-8; Neubauer: Tr. 44; Pet. Ex. 1). It is undisputed that on September 19, 2012, soon after his tour began at 9:00 a.m., respondent asked Ms. Jean-Louis for annual leave, because he wanted to go to a Yankee game that had been rained out the night before and rescheduled for that afternoon, that Ms. Jean-Louis denied the leave, and that respondent left anyway and went to the game (Jean-Louis: Tr. 13-16; Neubauer: Tr. 46).

Ms. Jean-Louis testified that while she has granted respondent leave on other occasions to attend baseball games, on this occasion she did not have the staff available to let him go (Tr. 28). Three of the eight people in the unit were already absent, having been granted leave in advance for various reasons, and she had to divide the workload between the remaining five employees (Tr. 7, 14). It was undisputed that she told respondent he could not leave because she was short-staffed (Jean-Louis: Tr. 14-15; Neubauer: Tr. 46-48).

According to Ms. Jean-Louis, when respondent insisted that he needed to leave for the game, she told him that if he left, she would have to notify the Disciplinary Unit and he would be marked as AWOL. Respondent did not reply (Tr. 15). Later, at about 11:45 a.m., respondent approached her, and said he could not concentrate and he had to leave. Ms. Jean-Louis reiterated that if he left she would have to notify the Disciplinary Unit and he would be marked AWOL (Tr. 16). Nonetheless, respondent left, clocking out of CityTime at 12:13 p.m. (Tr. 16, 24). As respondent had not requested leave through CityTime, Ms. Jean-Louis generated a leave request for him (Tr. 24; Pet. Ex. 4). She memorialized the incident in an e-mail written that same day (Tr. 16; Pet. Ex. 2).

When asked why he went to the game after his leave had been denied, respondent replied, “I had a ticket, and it's something that I always do all the time” (Tr. 47). He has season tickets and he had the annual leave to use. He went to his first Yankee game at age ten, in July 1969, and since June 1975, he has attended every game played in New York City (Tr. 48, 56). There are 81 home games in a season, about five or six of which are weekday home games (Tr. 48). He intends to continue his streak, even if he is unable to get leave to attend a home game (Tr. 56-57).

Respondent further testified that he had "always gotten" the leave that he had asked for to attend Yankee games, with the exception of the past few years (Tr. 49). Ms. Jean-Louis grants other people leave even when their unit is short-staffed (Tr. 49); indeed, on Good Friday this past year, there were four people out on leave, including Ms. Jean-Louis (Tr. 50).

There are really no disputed issues in this case. Respondent asked for leave, his supervisor denied the leave, and told him twice that if he left work, his case would be referred to the Disciplinary Unit and he would be written up for AWOL. Respondent's desire to attend every Yankee game played in New York City may be understandable to lovers of the Yankees. Clearly he was driven, perhaps even obsessed, by his desire to continue this streak. However, this does not constitute a defense to leaving work after his leave request was denied. Hence, the when respondent left his place of employment on September 19,[1] he was absent without authorization. That charge should be sustained, as should the neglect of duty charge. *See Dep't of Education v. Matos*, OATH Index No. 214/04 (Feb. 13, 2004), *modified on penalty*, Chancellor's Dec. (Apr. 2, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD05-17-SA (Apr. 15, 2005) (employee neglected his duties where he left his workplace without authorization for more than six hours).

However, as it is not clear that respondent was given a direct order to remain at work, the insubordination charge was not proven and should be dismissed. *See Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Muniz*, OATH Index No. 1666/05 at 8 (Oct. 17, 2005) (insubordination requires proof that a clear and unambiguous order was communicated to an employee and that the employee willfully failed to obey).

FINDINGS AND CONCLUSIONS

Respondent was absent without authorization and neglected his duties, when he left work on September 19, 2012, after his leave request was denied. However, petitioner did not establish that he was insubordinate.

[1] It is not clear to me if respondent should be considered AWOL starting at 12:13 p.m. or 1:13 p.m., as respondent may have been entitled to leave at 12:13 p.m. to go to lunch. That issue was not addressed by either counsel.

RECOMMENDATION

After making these findings, I reviewed a summary of respondent's personnel file, which showed that he was appointed on October 20, 1985, and from 2001 through 2011, amassed three disciplinary penalties relating to leaving work to go to baseball games. In 2001, he was suspended one day for being AWOL while he attended a Yankee game. In 2010, he was suspended 25 work days for unauthorized use of a database and using sick or emergency leave to attend five Yankee games in 2009 and eight games in 2010. Most notably, on December 12, 2011, following a hearing, this tribunal recommended that respondent be suspended for 60 days following his absence without leave from July 11 through July 15, 2011, to attend the All-Star Game. *Taxi & Limousine Comm'n v. Neubauer,* OATH Index No. 584/12 (Dec. 12, 2011), *adopted,* Comm'r Dec. (Dec. 23, 2011), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD12-24-A (May 18, 2012). In adopting this recommendation, the Commissioner stressed that respondent should regard the 60-day penalty "as a last chance warning." Comm'r Dec. (Dec. 23, 2011).

Petitioner has requested that I recommend that respondent's employment be terminated, while respondent's counsel has asserted that terminating a 27-year employee for a half day AWOL would shock the conscience (Tr. 65).

Ordinarily, I would agree with respondent's counsel. Respondent has been on the job for almost 28 years. This was not a lengthy AWOL, and respondent returned the next morning and finished his incomplete work from the day before, clearing up any backlog. Moreover, Ms. Jean-Louis testified that respondent generally gets his work done (Tr. 35), and did not rebut respondent's testimony that he sometimes asks for extra work or volunteers to cover the window early (Tr. 35).

However, in December 2011, approximately ten months prior to this incident, respondent was put on notice that future misconduct of a similar nature would lead to termination of his employment. That warning was not heeded. Indeed, the facts of the 2011 AWOL are strikingly similar to the facts here. In 2011, respondent requested leave of his supervisor, Ms. Jean-Louis, to attend the All-Star game. While she was aware that he normally takes a week off in the summer to attend this game and, indeed, had accommodated him in the past, she told him that he could not take the week off because another employee, who previously had changed his vacation plans to accommodate respondent, was already scheduled for annual leave for the same week. As in this case, Ms. Jean-Louis denied the leave and warned respondent that if he took the time

off, she would refer the matter for disciplinary action. As in this case, respondent ignored her warning and did what he wanted to do. *Neubauer*, OATH 584/12. While the AWOL here was half a day, not a week, and thus much less disruptive to his office, it is striking that respondent engaged in precisely the same behavior that he had been told would lead to termination of his employment.

Additionally, respondent did not express remorse or acknowledge the legitimate scheduling needs of his office. Had he offered any indication that he might change his behavior, such as going to counseling to address his obsessive desire to attend every Yankee home game, I would consider recommending a penalty short of termination, even given the final warning. However, respondent did not do so. Instead, respondent stated that he would continue to attend every Yankee game in New York City, even if it meant that he had to miss work after a leave application was denied. His argument appeared to boil down to a statement that he should be allowed to attend every Yankee game in New York City because he has always been permitted to do so, except in recent history.

However, respondent can not expect his employer to automatically grant his leave requests, particularly if they are last-minute and the unit is short staffed. This is not fair to the unit or to the other employees. Indeed, as we noted in the 2011 OATH decision, "Other employees routinely forego cultural, sporting, and family events because they have to work. Those same rules apply to respondent." *Neubauer*, OATH 584/12 at 7. Moreover, as a result of the three prior disciplinary actions, respondent has been given ample notice that his employer will not grant him leave to attend baseball games no matter what.

It is sad that respondent has put his 27-year career at risk in this manner. However, despite prior warnings and discipline, respondent shows no signs of changing his behavior. Under the circumstances, petitioner's request for termination of respondent's employment is appropriate. *See 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 behavior and unwillingness to follow supervision are grounds for termination"); *Office of Management and Budget v. Perdum*, OATH Index No. 998/91 at 28 (June 17, 1991) (termination appropriate where employee was "on clear notice that

his conduct was unacceptable and was given ample opportunity to correct it"). I see no other recourse but to recommend termination of respondent's employment.

Faye Lewis
Administrative Law Judge

July 8, 2013

SUBMITTED TO:

DAVID YASSKY
Commissioner

APPEARANCES:

IRA GOLDAPPER, ESQ.
Attorney for Petitioner

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Attorney for Respondent