Dep't of Education v. Oliver

OATH Index No. 1889/13 (June 18, 2013)

School food service manager was served with charges alleging she committed misconduct by engaging in conduct unbecoming to her profession by failing to report to work on time, being absent from work, failing to conduct meetings or submitting agendas for said meetings, failing to post employee work schedules, among other charges. Respondent moved to dismiss the charges on the grounds that they all occurred more than 18 months prior to service and, thus, were time-barred. Petitioner submitted revised specifications alleging the conduct constituted the crime of official misconduct, under section 195 of the Penal Law, and argued the proceeding was proper under the crimes exception. ALJ granted motion to dismiss.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF EDUCATION
Petitioner
-against-
JEANETTE OLIVER
Respondent

REPORT AND RECOMMENDATION

TYNIA D. RICHARD, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, the Department of Education ("Department"), pursuant to section 75 of the Civil Service Law. Respondent Jeanette Oliver is a School Food Service Manager charged with eleven specifications of misconduct which allege her failure to timely submit inventory reports, to conduct meetings and timely submit agendas for said meetings, to post employee work schedules, and to timely prepare or submit staff logs, cookbooks, and inventory reports. She is also charged with lateness, absence, and leaving work early. All of the acts allegedly occurred in 2008 and 2009. Respondent has moved to dismiss the charges on the grounds that they are time-barred by the statute of limitations. Petitioner opposes. The motion to dismiss is granted.

MOTION TO DISMISS

Respondent has moved to dismiss the charges on the grounds that they are time-barred by the 18-month limitations period set forth in section 75 of the Civil Service Law. The original Specifications, which allege misconduct occurring in 2008 and 2009, were served on respondent on December 12, 2012 (Respondent's Affirmation in support of the motion, dated May 16, 2013, at ¶2). The Department concedes they were not served within the 18-month limitations period (Petitioner's Affirmation in opposition, undated and submitted on May 24, 2013 ("Pet. Aff."), at 2), but in opposition to the motion, asserts that the crimes exception applies; that is, that the charges are not time-barred because respondent's conduct would constitute a crime if proven in a court of competent jurisdiction.[1] Specifically, petitioner claims that the misconduct alleged in the charges constitutes the crime of official misconduct, a class A misdemeanor set forth in Penal Law section 195.00.

Section 75(4) of the Civil Service Law states that:

> no removal or disciplinary proceeding shall be commenced more than eighteen months after the occurrence of the alleged incompetency or misconduct . . . *provided, however, that such limitations shall not apply where the incompetency or misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime*.

Civ. Serv. Law § 75(4) (Lexis 2013) (emphasis added). For the Department to prevail in its assertion that the charges are not time-barred, it must prove by a preponderance of the evidence all the elements of the crime as defined in the Penal Law. *Triborough Bridge and Tunnel Auth. v. McRae*, OATH Index No. 480/92 at 5 (Aug. 10, 1992); *Aronsky v. Bd. of Education*, 75 N.Y.2d 997, 1000 (1990).

The crime of official misconduct is defined with two subsections, as follows:

> A public servant is guilty of official misconduct when, with intent to obtain a benefit *or* to deprive another person of a benefit:

[1] Also in its opposition to the motion, petitioner conceded that Specifications 1 through 3 (alleging lateness, absence and leaving work early) are time-barred because the allegations, if proved, would not constitute a crime (Pet. Aff. at 2). Petitioner subsequently submitted an amended set of Specifications, on May 28, 2013, that omitted the three charges concerning lateness, absence and leaving work early and added a new charge alleging the crime of official misconduct under Penal Law section 195.00. I have marked the original Specifications and the amended Specifications ALJ Exhibits 1 and 2, respectively.

> 1. [Sh]e commits an act relating to [her] office but constituting an unauthorized exercise of [her] official functions, knowing that such act is unauthorized; *or*
> 2. [Sh]e knowingly refrains from performing a duty which is imposed upon [her] by law or is clearly inherent in the nature of [her] office.

Penal Law § 195.00 (Lexis 2013) (emphasis added). Petitioner claims that respondent's conduct violated subsection (2) (Pet. Aff. at 6).

To prove official misconduct, it must be demonstrated "that the public servant so charged has acted with the intent to obtain a benefit for himself or another." *People v. Esposito*, 160 A.D.2d 378, 379 (1st Dep't 1990). This element was included so that "neglect of duty, which, though possibly a proper basis for removal or disciplinary action in some instances," would not be the basis for the automatic imposition of criminal sanctions. *People v. Feerick*, 93 N.Y.2d 433, 446 (1999). As the Court of Appeals explained in *Feerick*, "Proof that a public servant intended to receive a benefit along with proof that he or she also knew the acts were 'unauthorized' *negates* the possibility that the misconduct was the product of inadvertence, incompetence, blunder, neglect or dereliction of duty, or any other act, no matter how egregious, that might more properly be considered in a disciplinary rather than a criminal forum." *Id*. at 448 (emphasis in original); *see also People v. Lucarelli*, 300 A.D.2d 1013, 1014 (4th Dep't 2002) ("unauthorized conduct in the absence of intent to benefit is not a crime, but that unauthorized conduct with such intent is within the ambit of Penal Law § 195.00"). Therefore, when a custodian engineer mixed up his check books and inadvertently used his City account to make a child support payment in *Department of Education v. Honan*, this tribunal found that he lacked the intent to personally benefit that would have converted his misconduct into a crime. OATH Index No. 2231/07 at 22-24 (Mar. 14, 2008).

Where the misconduct "complained of and described in the charges" (Civ. Serv. Law § 75(4)) fails to allege "that [the employee] acted with the intent to gain a benefit, an essential element required for an official misconduct conviction," the statutory crime exception may not be applied. *Rodriguez v. County of Albany*, 105 A.D.3d 1124, 1127 (3d Dep't 2013). Charges that were served untimely under section 75 were dismissed in *Rodriguez*, where they failed to allege the employee acted with the intent to gain a benefit. Here, petitioner's initial set of Specifications failed to allege that respondent acted with intent to gain a benefit; they failed even

to allege that respondent's acts constituted a crime. Under *Rodriguez*, these Specifications must be dismissed.

Petitioner has submitted an amended set of Specifications which adds the allegation that respondent committed official misconduct as defined in the Penal Law (ALJ Ex. 2). The amended Specifications, nevertheless, fail to satisfy the Civil Service Law requirement that "the . . . misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime." Civ. Serv. Law § 75(4). That is, they fail to identify any benefit.

The Penal Law defines "benefit" as "any gain or advantage to the beneficiary and includes any gain or advantage to a third person pursuant to the desire or consent of the beneficiary." Penal Law § 10.00(17) (Lexis 2013). While benefit "includes more than financial gain and can encompass political or other types of advantage," *Feerick*, 93 N.Y.2d at 447, it "must not be so remote, abstract, or theoretical as to create speculation as to its ultimate value to the receiver," *People v. Jackson*, 35 Misc. 3d 179, 186 (Crim. Ct. Kings Co. 2011) (quoting *People v. Cavan*, 84 Misc. 2d 510, 512 (Sup. Ct. Queens Co. 1975)); *see also Esposito*, 160 A.D.2d at 379 ("the automatic imposition of criminal sanctions in this case, based upon some ill-defined benefit to defendant's employer, does not satisfy the statutory requirements."). A benefit must be "more than merely tangential" and must have a "nexus personal to the defendant." *People v. Esposito*, 144 Misc. 2d 919, 921 (Sup. Ct. N.Y. Co. 1989), *aff'd*, 160 A.D.2d 378 (1st Dep't 1990).

OATH case law sets forth the range of "benefits" the tribunal has found adequate to meet the statutory requirement. In *Department of Sanitation v. Lowe*, OATH Index No. 1499/06 at 7 (Sept. 22, 2006), the tribunal found that "lunch money" requested by a sanitation worker in exchange for picking up trade waste constituted a benefit. In *Department of Correction v. Battle*, OATH Index No. 1052/02 at 58-59 (Nov. 12, 2002), the tribunal found that a correction officer intended to benefit herself when she submitted a false report seeking to have an inmate transferred in order to prevent the inmate from exposing their past improper relationship. In *Transit Authority v. Daly*, OATH Index No. 947/95 at 18-19 (Nov. 2, 1995), it was determined that respondent committed official misconduct when he misappropriated money from the office "sunshine fund" for his personal use. In *Department of Correction v. McFarland*, OATH Index No. 650/92 (Aug. 24, 1992), *aff'd sub. nom. McFarland v. Abate*, 203 A.D.2d 190 (1st Dep't

1994), a correction officer's failure to report and his participation in gambling with inmates constituted official misconduct because the officer acted with the intent to obtain a monetary benefit for himself. The electrical inspector in *Department of General Services v. Englander*, OATH Index No. 242/84 (July 12, 1984), engaged in official misconduct when he recommended a temporary service authorization be issued knowing that the work did not comply with the electrical code, so that he could avoid having to re-inspect the premises. In *People v. Maloney*, 233 A.D.2d 681 (3d Dep't 1996), a police officer was convicted of official misconduct for issuing a seatbelt violation to his former girlfriend's mother when she was properly restrained at the time. In *Feerick*, 93 N.Y.2d at 448-49, police officers were convicted of the crime for unlawfully entering an apartment in order to retrieve their lost radio, which was being used by drug dealers to taunt police.

The tribunal has found the intent to benefit element missing where a correction officer helped inmates purchase sneakers, *Dep't of Correction v. Thompson*, OATH Index No. 1412/96 at 8-9 (July 18, 1996), and where a bridge and tunnel officer shouted profanity at a subordinate, *McRae*, OATH 480/92 at 8-9.

Similar to the facts in *McRae*, the misconduct alleged in this case offers no discernible hint of benefit. The amended Specifications, submitted after respondent announced her intention to make the present motion to dismiss, add a single allegation that respondent committed the crime of official misconduct and quotes Penal Law section 195.00 (ALJ Ex. 2). These Specifications fail even to state which subsection of section 195.00 was violated by the misconduct alleged. The tribunal has eschewed attempts to "circumvent the application of the statute of limitations simply by drafting . . . pleadings in a way which mirrors the Penal Law elements of crimes, without regard to what [the] evidence would actually show." *Human Resources Admin. v. Man of Jerusalem*, OATH Index No. 936/90, mem. dec. at 16 (Aug. 2, 1990). Otherwise, the crimes exception could be "routinely applied" just "on the basis of bald assertions of criminal conduct in the charges." *Id.* In *Human Resources Administration v. Man of Jerusalem*, the tribunal granted a pre-trial motion to dismiss after finding the charges – which alleged that respondent failed to report for reassignment as directed, asked another to speak into a tape recorder, and generally interfered in the administration of the agency – even if proved would not constitute criminal conduct. *Id.* at 17-18.

In a motion to dismiss, the tribunal must "liberally construe the complaint," *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002), and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion, *Sokoloff v. Harriman Estates Development Corp.*, 96 N.Y.2d 409, 414 (2001). Petitioner defeats the motion if it has asserted a set of facts that, if proven, would subject respondent to liability. *Comm'n on Human Rights ex rel Hsu v. HSBC Bank*, OATH Index No. 522/09, mem. dec. at 5 (Jan. 22, 2010). The Specifications and papers opposing the dismissal motion fail to assert such facts.

Although the ruling in *Rodriguez* maintains that the "statutory directive" in section 75 requires review only of the allegations "complained of and described in the charges" (Civil Service Law § 75(4)) "without consideration of the proof or papers submitted" by petitioner in subsequent proceedings (105 A.D.3d at 1126), I have considered the assertions offered by petitioner in its papers opposing this motion and find them wanting.

In them, petitioner asserts that respondent "engaged in criminal conduct" by "failing to perform her duties" which "created a chain reaction [that] disrupted the regular course of business of the Office of School Foods and deprived staff and students of efficient food service at numerous educational facilities" (Pet. Aff. at 3-4); that respondent put her subordinates "in a precarious position where they were left with no guidance as to quantity and quality of the food items" (*id*. at 4); that respondent "impacted the lines of communications between students, parents, staff, and administration" by failing to conduct meetings (*id*. at 4); that respondent's failure to submit work schedules and reports left employees "with no guidance as to what work related functions and activities they are supposed to be performing" (*id*. at 5); that respondent's failure to submit staff logs "limit[ed] the ability to monitor and evaluate the activities" of the kitchen employees (*id*. at 5); that respondent's failure to conduct meetings and submit agendas caused "a breakdown of communication and confusion amongst staff" (*id*. at 5); and that respondent's failures "deprived her coworkers and the students attending the schools under her charge of the benefit of a professional and efficient work environment" (*id*. at 5). None of these assertions identify any benefit to respondent, or to others. *See, e.g., McRae*, OATH 480/92 at 9 ("There was no evidence remotely suggesting that respondent's treatment of Officer Weekes was motivated by any intent to obtain for himself or to deprive another of a benefit within the meaning of this statute."). The "neglect of duty" described by petitioner, "though possibly a

proper basis for removal or disciplinary action," *Feerick*, 93 N.Y.2d at 446, if proven, would not establish the elements of a crime and, therefore, is not a basis for imposing the statutory crime exception.

Pre-trial motions to dismiss are disfavored at OATH and are granted only in the clearest cases of failure by petitioners to state a viable claim. *See Bd. of Education v. Bracho*, OATH Index No. 477/91 at 2-3 (Apr. 9, 1991) (pre-trial dismissal where fewer than 60 latenesses were not misconduct under petitioner's rules and only 43 latenesses were pleaded); *Man of Jerusalem*, OATH 936/90 (pre-trial motion to dismiss granted on grounds that petition was barred by statute of limitations). The burden of establishing the legal necessity of dismissal is particularly high in cases such as this, where the OATH ALJ makes a recommended finding that is submitted for final decision to the agency. *See Dep't of Correction v. LaSonde*, OATH Index No. 2526/11, mem. dec. (July 8, 2011) (pre-trial motion to dismiss denied as premature, where movant acknowledged in her reply papers that there are issues of fact to be determined and witnesses to be presented in support of her legal arguments; ALJ reserved decision on the motion until after trial). I find that high burden met in this case and that dismissal of the amended Specifications is proper.

FINDINGS AND CONCLUSIONS

1. Petitioner failed to serve its Specifications within the 18-month limitations period set forth in section 75 of the Civil Service Law.

2. Petitioner failed to establish a basis for imposing the statutory crime exception in section 75.

RECOMMENDATION

I recommend that all Specifications be dismissed as time-barred under section 75(4) of the Civil Service Law.

Tynia D. Richard
Administrative Law Judge

June 18, 2013

SUBMITTED TO:

DENNIS M. WALCOTT
Chancellor

APPEARANCES:

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