Human Resources Admin. v. Anonymous

OATH Index No. 212/13 (Nov. 21, 2012), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 13-25-SA (May 13, 2013), ***appended***

Evidence established that respondent was repeatedly intoxicated at work. Termination of employment recommended in light of respondent's history of similar misconduct.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
HUMAN RESOURCES ADMINISTRATION
Petitioner
-against-
ANONYMOUS[1]
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner brought this disciplinary proceeding under section 75 of the Civil Service Law, charging respondent, an associate job opportunity specialist ("AJOS"), with being intoxicated at work on April 11, 16, 25, and 26, 2012; being unable to process clients' cases on April 16 and 25, 2012, due to intoxication; insubordination on April 6, 2012; and discourtesy to his supervisor and leaving work without approval on April 11, 2012, in violation of petitioner's Code of Conduct, Executive Order No. 726, sections II (B) and (F), and III, paragraphs 1 and 25 (ALJ Ex. 1).

At the hearing on September 14, 2012, petitioner relied on documentary evidence and the testimony of respondent's supervisor Olabisi Lawal. Respondent testified in his own behalf and also offered documentary evidence. Following receipt of post-argument submissions, the record was closed on October 5, 2012.

For the reasons below, the charges should be sustained in part and respondent's employment terminated.

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[1] At respondent's request, his name has been withheld from publication to protect his privacy because this report and recommendation discusses sensitive personal medical issues. *See Dep't of Citywide Admin. Serv. v. H.M.*, OATH Index No. 1670/04 at 1 n.1 (July 26, 2004); 48 RCNY § 1-49(d).

ANALYSIS

Petitioner accused respondent of being intoxicated on duty on four occasions and related misconduct. Most of the charges were based on the testimony of Olabisi Lawal, respondent's supervisor at the customer service unit at petitioner's Jamaica Job Center (Tr. 19-22). Respondent, whose duties include interviewing clients and data entry, denied any wrongdoing (Tr. 22-25, 182). He testified that he takes more than a dozen medications for a wide range of illnesses including depression, anxiety, neurosyphilis, high blood pressure, and gastroenteritis (Tr. 129, 152). According to respondent, his medications and illnesses cause a variety of symptoms, including dizziness and vomiting, which give people the mistaken impression that he his intoxicated (Tr. 154, 218). He also made unsupported allegations that Ms. Lawal had discriminated against him because he was gay (Tr. 176).

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, I found Ms. Lawal far more credible than respondent. She offered convincing testimony, corroborated by documentary evidence. Moreover, she demonstrated no bias against respondent. In contrast, respondent offered implausible, self-serving denials, unsupported by any reliable evidence.

Though I credited Ms. Lawal's testimony, petitioner elicited insufficient details to prove the charges related to April 6, 11, and 16. However, the evidence was sufficient to prove that respondent committed misconduct on April 25 and 26. The charges are addressed as follows:

April 6, 2012 – Charge II, Specification II

Petitioner alleged that respondent failed to follow a directive from Ms. Lawal to process a client on April 6, 2012 (ALJ Ex. 1). This charge should be dismissed.

The principle "obey now, grieve later" obligates an employee to obey the lawful order of a supervisor and, if necessary, grieve it later through appropriate channels. *Ferreri v. NYS Thruway Auth.*, 62 N.Y.2d 855 (1984). Obeying an order after an initial refusal may be misconduct where there is unreasonable delay. *Dep't of Homeless Services v. Chappelle*, OATH

Index No. 1918/07 at 4-5 (Aug. 30, 2007) (despite brief lapse between initial refusal and ultimate compliance, insubordination found where respondent's change came only after a higher-level supervisor told him he had to comply with lower-level supervisor's order). Under some circumstances, however, a brief delay followed by compliance with an order is not misconduct. *See Transit Auth. v. Driess*, OATH Index No. 480/91 at 12-13 (Feb. 28, 1991), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 91-117 (Sept. 16, 1991) (transit officer who promptly handed his memo book to a sergeant, after initially refusing to do so, did not commit insubordination). Here, it is unclear whether respondent briefly delayed obeying an order or failed to obey it.

Ms. Lawal testified that she went to respondent's cubicle because there were clients waiting on line that he was supposed to call and he was sitting at his desk with medications on his table (Tr. 108-09). She told him to put away his medications and call his next client (Tr. 108). Moments later, respondent went to Ms. Lawal's desk and accused her of harassing him (Tr. 108-09). In a memorandum regarding the incident, Ms. Lawal noted that when respondent came to her desk to complain she said that they would discuss the matter after he finished servicing his client (Resp. Ex. B). It is unclear from the record what happened next.

Respondent testified that, when Ms. Lawal told him to see his next client, he asked her, "Do you mind if I take my medication?" and she said, "No, you need to call the next client" or "You need to put that medicine away and call your next client" (Tr. 172-73). According to respondent it only takes him "a few minutes" to take his medication (Tr. 172).

The credible evidence established that respondent's supervisor gave him a direct order to call the next client and, instead of serving the client, respondent got up from his cubicle to accuse Ms. Lawal of harassment. I was not convinced that respondent had a medical necessity to stop and take a few minutes to ingest his medication. Indeed, his actions – getting up from his desk to accuse his supervisor of harassment – undercut any suggestion that there was an immediate need to take medication. But petitioner failed to show how long this disagreement took, how long the client waited, or whether there was any noticeable disruption of service. It is entirely possible that, after complaining to Ms. Lawal, respondent went back to his desk and called the next client, as instructed. There was no evidence to the contrary. On this record, the evidence falls short of proving misconduct.

April 11, 2012 – Charge I, Specification IV; Charge II, Specification I

Petitioner alleged that respondent was intoxicated at work on April 11, 2012, and during a discussion about timekeeping that day, respondent was discourteous when he told Ms. Lawal that it was her responsibility to know what time he had left work on a previous day. The evidence was insufficient to prove either specification.

Petitioner's Code of Conduct prohibits employees from being intoxicated during working hours or on agency property. Executive Order 726, Code of Conduct for HRA Employees § III (25) (eff. Jan. 15, 2010). Vague innuendo or the detection of the odor of alcohol alone is insufficient to prevail on a charge of intoxication. *Human Resources Admin. v. Honey*, OATH Index No. 435/89 at 9-10 (Oct. 20, 1989). Instead, petitioner must present credible evidence of "specific observations about respondent's physical condition, such as incoherence, slurred speech, stumbling or odd behavior." *Human Resources Admin. v. Adams,* OATH Index No. 342/02 at 4 (Jan. 16, 2002), *modified on penalty,* Comm'r Dec. (Feb. 25, 2002), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 03-41-SA (Apr. 11, 2003).

Ms. Lawal candidly conceded that she did not recall her entire conversation with respondent on April 11, 2012 (Tr. 58). She testified that he was "drunk" and not feeling well in the afternoon (Tr. 59). Respondent spoke with a union representative and then told Lawal that he was leaving for the day (Tr. 59). She responded "okay" and he left (Tr. 59, 117-18).

Earlier that day, Ms. Lawal spoke to respondent about his failure to clock out the previous week (Tr. 115). Ms. Lawal asked respondent when he had clocked out, he said 5:00 p.m., and she told him that he had not done so (Tr. 115). According to Ms. Lawal, respondent then said something about timekeeping being her responsibility (Tr. 116). As Ms. Lawal testified, employees are responsible for logging in and out using an automated timekeeping system and she is responsible for reviewing those entries (Tr. 116-17).

Respondent testified that he told Ms. Lawal that he was not feeling well and that he needed to go home Tr. 170. She told him "okay," and he assumed that he had permission to leave early (Tr. 170). Respondent conceded that he had a conversation with Ms. Lawal that day about his failure to clock out on a prior occasion, but he was not questioned about the specifics of that conversation (Tr. 170-71).

The only evidence regarding respondent's intoxication on April 11 was Ms. Lawal's statement that he was drunk. Though I have no doubt about Ms. Lawal's sincerity, petitioner elicited no evidence from her to support the conclusion that respondent was drunk. There was, for example, no evidence regarding slurred speech, unsteady gait, or bloodshot eyes. The evidence that respondent asked permission to leave early, coupled with Ms. Lawal's opinion that he was drunk, does not satisfy petitioner's burden of proving that respondent was intoxicated while on duty. Instead, petitioner must present credible evidence of "specific observations about respondent's physical condition, such as incoherence, slurred speech, stumbling or odd behavior." *Adams*, OATH 342/02 at 4 (conclusory opinion, without evidence of specific conditions observed, is not enough to prove intoxication at work).

Petitioner also failed to prove the allegation that respondent left "without approval" on April 11. On the contrary, the evidence showed that respondent asked permission to leave early and his supervisor said "okay." There was no evidence offered to show that respondent was required to document his illness and failed to do so. Nor was there any evidence that Ms. Lawal revoked her approval for respondent's early departure.

Likewise, there was insufficient evidence that respondent was discourteous during his discussions with Ms. Lawal on April 11. The parties agree that there was a conversation about timekeeping and respondent's clocking out on an earlier date. But the evidence failed to show precisely what was said or how it was said.

April 16, 2012 – Charge I, Specification III

Petitioner alleged that on April 16, 2012, respondent was intoxicated while processing a client's case and he wrongly barred the client's caseworker from attending an interview (ALJ Ex. 1). This specification should be dismissed because petitioner did not question Ms. Lawal about the events of April 16 or offer relevant documents. Although respondent was questioned briefly about that date, his testimony did not prove that he committed misconduct.

According to respondent, a client was accompanied by a family court advocate. Respondent testified that he could not speak to the client or the advocate without required documentation, which he referred to as a "ticket" (Tr. 167-79). Respondent was unaware of any

client complaint regarding his actions that day (Tr. 169). Without more, this evidence is insufficient to prove misconduct.

April 25, 2012 – Charge I, Specification II

Petitioner alleged that respondent was intoxicated at work and unable to serve clients on April 25, 2012. This specification was supported by credible evidence and should be sustained.

Ms. Lawal testified that on April 25, 2012, three clients complained to her about respondent, alleging that he smelled of alcohol, was unable to communicate clearly, and was discourteous (Tr. 39-40, 43-44). In one instance, Ms. Lawal overheard respondent as he was unable to answer a client's question (Tr. 81). Ms. Lawal recalled that she had to take over respondent's duties because he appeared "really drunk" and did not know what he was doing (Tr. 48, 83-86). She testified that he smelled of alcohol (Tr. 93). After receiving the complaints, Ms. Lawal directed that no other clients should be sent to respondent that day (Tr. 87-88).

In a contemporaneous memorandum, Ms. Lawal documented her observations (Tr. 43, 56; Pet. Ex. 6). She noted that respondent appeared to be intoxicated, he smelled of alcohol, he looked sleepy, he had difficulty communicating, he kept getting up and turning off his computer, and a custodian had to be called because respondent vomited in the bathroom (Pet. Ex. 6).

Petitioner supplemented Ms. Lawal's testimony with the written complaints submitted by clients (Pet. Exs. 3, 4, 5). Respondent's objection to the complaints, on hearsay grounds, was overruled. Hearsay is generally admissible in administrative proceedings. 48 RCNY § 1-46 (Lexis 2012); *Gray v. Adduci*, 73 N.Y.2d 741, 742 (1988); *Vega v. Smith*, 66 N.Y.2d 130, 139 (1985); *Dep't of Correction v. Jackson*, OATH Index No. 134/04 at 4-5 (May 5, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 05-67-SA (Sept. 14, 2005).

The clients' complaints were especially reliable. They identified themselves and made timely reports based on personal observations. There was no evidence of collaboration or any indication that the clients had any bias. *See Dep't of Environmental Protection v. Cortese*, OATH Index No. 1613/06 at 7 (Sept. 12, 2006) (enumerating general factors to determine the probative value and reliability of hearsay evidence in administrative hearings). The clients' complaints contained specific details, including statements that respondent smelled of alcohol, was mumbling, and had difficulty communicating (Pet. Exs. 3, 4, 5).

Respondent initially claimed that he could not recall attending to any of the clients who filed complaints against him (Tr. 165-66). And he denied that he was intoxicated. He said that because of his medications it would be dangerous for him to drink alcohol (Tr. 166-67, 214).

Petitioner offered sufficiently detailed evidence to prove that respondent was intoxicated at work on April 25, 2012. Ms. Lawal's testimony and memorandum offered specific observations about the odor of alcohol on respondent, his bizarre behavior, and his inability to communicate. These observations were confirmed by three clients. Respondent's general denials of wrongdoing were not enough to rebut petitioner's credible evidence.

April 26, 2012 – Charge I, Specification I

Petitioner alleged that respondent was again intoxicated at work on April 26, 2012. This specification, supported by Ms. Lawal's testimony and a wealth of documentary evidence, should be sustained.

Ms. Lawal testified that respondent reported for work drunk on April 26, 2012. He was "staggering all over the place," he struggled to stand and had to grasp the cubicle (Tr. 26). He appeared sleepy and his eyes were blurry (Tr. 26). Respondent's pants were falling and dirty at the edges, and while his shirt was buttoned, the buttons were not properly aligned (Tr. 26). Above all, respondent reeked of alcohol, which Ms. Lawal could detect on his breath and clothes (Tr. 25-26, 65-68). She said that it made her nauseous (Tr. 67). Ms. Lawal, a supervisor, and a union representative met with respondent and told him that he did not know what he was doing and it would be best for him to go home (Tr. 26-27). Respondent agreed to go home, but then he went to the men's bathroom and vomited (Tr. 29). Someone called for an ambulance and respondent was taken to a hospital (Tr. 29).

In a memorandum prepared that day, Ms. Lawal noted that respondent "smelled of alcohol, was excessively sweating, slurring his words and unable to walk steady without supporting himself by holding onto the cubicle walls." The memorandum further noted that the paramedics were called for respondent's safety after respondent began to yell and bang on the stalls in the bathroom. (Tr. 26-29, 31-36; Pet. Ex. 1).

An incident report prepared by one of petitioner's security officers corroborated that at or around 10:00 a.m. on April 26, 2012, respondent was disoriented and vomiting in the men's

room, an ambulance was called and respondent was transported to Queens General Hospital for further observation (Pet. Ex. 2).

Petitioner introduced certified hospital records which indicated that respondent was diagnosed with "acute alcohol intoxication and alcoholism" on April 26, 2012 (Pet. Ex. 7). According to the discharge notes, respondent was cautioned against excessive alcohol use (Pet. Ex. 7). In a report prepared by the emergency medical technicians (EMT) who took him to the hospital, respondent denied alcohol or drug use, but smelled of alcohol and was perspiring (Pet. Exs. 7, 8). The initial EMT report was partly illegible but petitioner requested and received permission to supplement the record with an enlarged, more legible copy (Tr. 194, 237).

Respondent testified that his stomach bothered him when he arrived at work on April 26, and he was drowsy and incoherent (Tr. 130, 162). He recalled that he vomited in the bathroom where he had suffered a seizure and banged his head (Tr. 163-64). Respondent claimed that he was discharged after a few hours from Queens General Hospital (Tr. 162-65).

At the hearing, respondent offered a list of more than one dozen daily medications that he had been prescribed (Tr. 131-32, 141-43, 156, 161; Resp. Exs. C, D, E, F, G). The list was given to him in August 2012 but respondent claimed that the list was similar to the medications he took in April 2012 (Tr. 134-35, 137). Respondent requested and received permission to submit additional documentation concerning his medications (Tr. 236). He later submitted records confirming that many of the same medications that were listed on his August 2012 medical records were also prescribed to him in March 2012 (Resp. Exs. H, I).

Respondent testified that, among other side effects, his illnesses and medications caused dizziness and drowsiness (Tr. 152-53, 205). He also testified that gastroenteritis caused him to vomit frequently (Tr. 153, 219). And the vomiting made his breath smell like alcohol (Tr. 154). He also suggested that diabetes caused vomit to smell like alcohol (Tr. 218). Respondent denied that the hospital performed any breathalyzer or blood tests (Tr. 204-05, 223). He claimed that he spoke to the EMTs and hospital nurses about his underlying medical conditions, but he denied being treated by any doctors at the hospital (Tr. 220-21, 226).

Petitioner's evidence sufficiently proved this specification. Ms. Lawal's evidence, alone, adequately supported the charge. Her testimony and contemporaneous memorandum set forth specific observations of respondent to support her conclusion that respondent was intoxicated.

Besides smelling of alcohol, he had difficulty standing, his clothes were awry, and he was vomiting. Hospital records, including the EMT's report, confirmed Ms. Lawal's observations.

In contrast, respondent's testimony lacked credibility. Although he may suffer from several medical conditions that require medication, he offered no reliable evidence to support his claim that his illnesses or his medication would cause him to appear intoxicated. The more likely explanation for respondent's appearance and behavior was that he was intoxicated.

In sum, the evidence proved that respondent was intoxicated on duty on April 25 and 26, 2012.

FINDINGS AND CONCLUSIONS

1. Petitioner failed to prove that respondent was insubordinate on April 6, 2012, as alleged in Charge II, Specification II.

2. Petitioner failed to prove that respondent was intoxicated at work or discourteous on April 11, 2012, as alleged in Charge I, Specification IV and Charge II, Specification I.

3. Petitioner failed to prove that respondent was intoxicated at work or that he improperly failed to process a client's case on April 16, 2012, as alleged in Charge I, Specification III.

4. Petitioner proved that respondent was intoxicated at work and unable to serve clients on April 25, 2012, as alleged in Charge I, Specification II.

5. Petitioner proved that respondent was intoxicated at work on April 26, 2012, as alleged in Charge I, Specification I.

6. The remaining charges are duplicative.

RECOMMENDATION

After making the above findings and conclusions, I requested and received a summary of respondent's personnel record. Petitioner hired respondent in February 2008. In April 2012, he accepted a penalty of time served, after serving a 40-day suspension in satisfaction of five sets of disciplinary charges. Those charges included allegations that he was intoxicated at work on October 14, 17, and 31, 2011, and he was intoxicated at petitioner's office while on suspension

on November 9, 2011. Respondent's 2009 performance evaluation rated his work as very good, but a more recent evaluation from 2011 rated his work as unsatisfactory.

Petitioner now seeks termination of respondent's employment. That is appropriate. Being under the influence of alcohol at work is serious misconduct that generally results in a substantial penalty, especially if the employee has a significant disciplinary record. *See Health & Hospitals Corp. (Coler-Goldwater Specialty Hospital & Nursing Facility) v. Rhodes*, OATH Index No. 2506/11 at 4 (Sept. 20, 2011) (termination of employment for employee with a significant disciplinary history who was intoxicated at work); *Dep't of Correction v. Mason*, OATH Index No. 2229/99 at 6 (Sept. 14, 1999) (termination of employment recommended where employee was intoxicated while on duty and had a significant disciplinary record); *Dep't of Environmental Protection v. McGrath*, OATH Index No. 1111/95 at 10 (Mar. 24, 1995) (termination of employment recommended for on-duty intoxication and refusal to submit to testing, where employee had significant disciplinary history); *Transit Auth. v. Brady*, OATH Index No. 959/93 (Aug. 13, 1993) (officer terminated after second offense of being intoxicated on duty); *see also Dunning v. City of Newburg*h, 210 A.D.2d 404 (2d Dep't 1994) (upholding termination of employment for water department employees who were drinking on duty); *cf. Health & Hospitals Corp. (Kings County Hospital Ctr.) v. Ricketts*, OATH Index No. 535/03 at 9 (Mar. 27, 2003) (60-day penalty for 20-year employee who was intoxicated while on duty, where employee had previously been suspended 30 days for other misconduct).

Respondent is a relatively junior employee who has a history of repeatedly being intoxicated at work. He has offered no mitigation and presented no evidence that he recognizes the gravity of his misconduct. Nor has he offered any evidence that he has sought treatment for alcoholism. Instead, respondent offered implausible denials of any wrongdoing. Despite being suspended for 40 days last year for a similar pattern of misconduct, respondent has continued to be intoxicated at work.

Although respondent did not raise this as a defense, it appears that he suffers from a dependency on alcohol, which may qualify as a disability under New York's Human Rights Law. However, there is no evidence that respondent is rehabilitated or seeking treatment. And petitioner has shown that respondent's intoxication prevents him from performing his job. Under these circumstances, petitioner may terminate respondent's employment. *See Sills v. Kerik*, 5

A.D.3d 247 (1st Dep't 2004) (where employee alleged that he was disabled due to alcoholism, his employment may be terminated for on-duty intoxication where there is insufficient proof of rehabilitation); *Myszczenko v. City of Poughkeepsie,* 239 A.D.2d 584, 585-86 (2d Dep't 1997) (termination of employment upheld where alcoholism qualified as a disability, but municipal employer showed that there was insufficient proof of rehabilitation and "employee's alcoholism prevented him from performing the duties of the job"), *see also McEniry v. Landi,* 84 N.Y.2d 554, 560-61 (1994) ("alcoholic who is found not to be actually rehabilitated, or who is shown to have an established propensity to relapse may be found unable to perform the job in a reasonable manner").

Following his lengthy suspension in 2011 for similar misconduct, respondent should have recognized that further intoxication while on duty could lead to loss of employment. Yet he continued to engage in the same misconduct. There is no reason to believe that his conduct will improve. Accordingly, I recommend that respondent be terminated from his employment.

Kevin F. Casey
Administrative Law Judge

November 21, 2012

SUBMITTED TO:

ROBERT DOAR
Commissioner

APPEARANCES:

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THE CITY OF NEW YORK
CITY CIVIL SERVICE COMMISSION
----------X
IN THE MATTER OF THE APPEAL OF:

SYLVESTER, ROBERT **DATE: 05/13/13**

Appellant:
-against-

NYC HUMAN RESOURCES ADMINISTRATION
Respondent:

Pursuant to Section 76 of the New York
State Civil Service Law
----------X

PRESENT:
NANCY G. CHAFFETZ, COMMISSIONER
CHAIR

RUDY WASHINGTON, COMMISSIONER
VICE CHAIR

CHARLES D. MCFAUL, COMMISSIONER

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REPRESENTATIVE FOR RESPONDENT

APPELLANT PRESENT

STATEMENT

On Thursday, May 9, 2013 the City Civil Service Commission heard oral argument in the appeal of **ROBERT SYLVESTER,** Associate Job Opportunity Specialist, NYC Human Resources Administration (HRA), from a determination by the NYC HRA, finding him guilty of charges of incompetency or misconduct and imposing a penalty of **TERMINATION** following an administrative hearing conducted pursuant to Civil Service Law Section 75.

THE CITY OF NEW YORK
CITY CIVIL SERVICE COMMISSION

In the Matter of the Appeal of
ROBERT SYLVESTER
Appellant
-against-
NEW YORK CITY HUMAN RESOURCES ADMINISTRATION
Respondent
Pursuant to Section 76 of the New York
State Civil Service Law

DECISION

PRESENT:

NANCY G. CHAFFETZ, COMMISSIONER
CHAIR

RUDY WASHINGTON, COMMISSIONER
VICE CHAIR

CHARLES D. MCFAUL
COMMISSIONER

ROBERT SYLVESTER ("Appellant") appealed from a determination of the New York City Human Resources Administration finding him guilty of incompetency and misconduct and imposing a penalty of Termination following disciplinary proceedings conducted pursuant to Civil Service Law Section 75.

The Civil Service Commission ("The Commission") conducted a hearing on May 9, 2013.

This Commission has carefully reviewed the record in this case and the testimony adduced at the departmental hearing. Based upon this review, the Civil Service Commission finds no reversible error and affirms the decision and penalty imposed by the New York City Human Resources Administration.

NANCY G. CHAFFETZ, COMMISSIONER
CHAIR

RUDY WASHINGTON, COMMISSIONER
VICE CHAIR

Charles D. McFaul, Commissioner

Dated: May 13, 2013