

Dep't of Education v. Magassa

OATH Index No. 494/13 (Apr. 5, 2013)

Respondent, a custodian engineer, committed misconduct by: failing to return more than \$43,000 owed to the Department; issuing the Department a check for \$43,620, knowing that there were insufficient funds to cover that amount; and overpaying himself by more than \$14,000. Termination of employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF EDUCATION
Petitioner
- against -
BANDIOUGOU MAGASSA
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner, the Department of Education, brought this employee disciplinary action against respondent, custodian engineer Bandiougou Magassa, under section 75 of the Civil Service Law. The charges allege that respondent committed misconduct by: failing to repay more than \$43,000 in excess funds owed to the Department for the year 2010; issuing the Department a check for \$43,620, knowing that there were insufficient funds to cover that amount; and overpaying himself by more than \$14,000.

At a hearing on February 20, 2013, petitioner relied on documentary evidence and testimony from two witnesses: Jorge Liciaga and Anthony Salvadore. Respondent testified in his own behalf. For the reasons below, I find that petitioner proved the charges and recommend termination of respondent's employment.

ANALYSIS

The Department hired respondent as a custodian engineer in 2005 (Tr. 221). His duties include maintaining public schools and overseeing a budget for salaries, upkeep, and supplies

(Tr. 110). The Department apportions funds to custodian engineers based on the square footage of buildings that they maintain. Funds are kept in a custodial bank account which custodian engineers can access online (Tr. 49-50, 110, 235). Custodian engineers must repay the Department any excess funds that they receive each year (Tr. 42-43).

Audit Director Jorge Liciaga, of the Department's Office of the Auditor General, reviewed respondent's custodial bank accounts and expense reports (Tr. 43-45; Pet. Ex. 7). According to Liciaga, respondent had to repay the Department \$43,607.35 for excess funds that he received in 2010 (Tr. 52-53). Respondent issued the Department a check for \$43,620, dated April 14, 2011, but the check was returned due to insufficient funds (Tr. 53; Pet. Ex. 7 at 2535). In April 2011, respondent never had more than \$27,000 available in his custodial bank account (Tr. 82, 85; Pet. Ex. 7 at 2567-68). And respondent never had more than \$30,000 in his custodial account during the first five months of 2011 (Pet. Ex. 7 at 2562-68).

After reviewing Department records, Liciaga also stated that respondent had impermissibly used nearly \$15,000 of his 2010 allocation to repay the Department for excess funds that he received in 2009 (Tr. 55-56, 62, 67; Pet. Ex. 7 at 2552). Liciaga further noted that respondent was entitled to a net salary of \$83,430.37 for 2010, but he overpaid himself by more than \$18,000 (Petitioner did not explain why it only charged respondent with overpaying himself by more than \$14,000) (Tr. 44, 55, 96, 102; Pet. Ex. 7 at 2528).

Anthony Salvadore, respondent's supervisor and director of school facilities for the Bronx, met with respondent and a union representative on July 13, 2011 (Tr. 108, 121, 140, 149; Pet. Ex. 10). According to Salvadore, respondent admitted that he knew that the \$43,620 check would "bounce" when he wrote it (Tr. 143). In a contemporaneous memorandum, Salvadore also noted that respondent had acknowledged overpaying himself and his staff (Tr. 140-41; Pet. Ex. 11). As of the day of the hearing, respondent had not paid back the excess funds that he received in 2010 (Tr. 57, 141, 148).

During his testimony at the hearing, respondent denied that he had overpaid his staff, but he conceded that he may have overpaid himself (Tr. 230, 241). Respondent also admitted that he had used Department funds to pay his brother approximately \$15,000 in 2010 to import medicinal herbs from Africa (Tr. 244-246, 247, 249, 251). Moreover, respondent conceded that he knew when he issued the Department a check for \$43,620 that there were insufficient funds in his custodial bank account to cover that amount (Tr. 236). However, respondent claimed that he

did not know that the check had bounced until he spoke with Salvadore in July 2011 (Tr. 225-26).

In respondent's defense, his attorney argued that petitioner's calculation of the \$43,000 shortfall for 2010 was flawed because it included \$18,000 owed from 2009 and \$10,000 of emergency funds that he received in January 2010 (Tr. 255-56). Respondent also testified that he was treated for a serious medical condition in 2009, he suffered from an unspecified mental health condition, he received inadequate financial training, and he was not given a fair opportunity to repay the amount owed (Tr. 227-28, 230, 237, 241). Those claims lack merit.

According to Liciaga, the calculation of the amount that respondent owed the Department for 2010 excluded amounts due from 2009 and the 2010 emergency funding (Tr. 104-05; Pet. Ex. 7 at 2528). Even if petitioner's calculations had included those amounts, respondent was obligated to repay the Department for all excess payments that he received (Tr. 70). By issuing the Department a check for more than \$43,000 in April 2011, respondent acknowledged the amount that he owed. Indeed, in the memo item on the check, respondent wrote "excess 2010" followed by his school number (Pet. Ex. 7 at 255, 2534).

There was no credible evidence to support respondent's suggestion that he was physically or mentally unable to keep track of funds. He was well enough to maintain school buildings for all of 2010 and 2011 (Tr. 237-38). Nor can respondent blame his mismanagement of funds on inadequate training. He has been a custodian engineer since 2005, when he received training in recordkeeping along with a detailed instruction manual (Tr. 123, 127; Pet. Exs. 8, 9). Respondent was initially assigned a mentor and he has assisted other custodian engineers for more than 20 years (Tr. 221, 231-32, 234). If respondent's on-the-job and formal training were inadequate, he could have sought help. Furthermore, respondent had ample time to repay his obligations to the Department, but he has not paid back any of the money that he owed for 2010.

Respondent also argued that other custodian engineers had bounced checks or were permitted to repay excess balances in their custodial accounts without facing disciplinary action (Tr. 9, 253). That is not a valid defense. *See, e.g., 303 W. 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 693 n.5 (1979) (noting that selective enforcement is not a proper issue for administrative tribunal but may be "properly brought only before a judicial tribunal"); *Dep't of Sanitation v. Yovino*, OATH Index No. 1209/96 at 3 (Oct. 9, 1996), *aff'd in part, rev'd in part*, NYC Civ. Serv. Comm'n Item No. CD 97-109-0 (Dec. 4, 1997) (finding that selective enforcement

defense is only available for claims based on constitutionally suspect criteria and can only be raised on judicial review of an adverse administrative determination). Even if selective enforcement was a recognized defense, respondent offered no proof that any other custodial engineer had failed to repay such a substantial sum of money, had knowingly issued such a large check based on insufficient funds, or had overpaid himself as much as respondent had.

The specific charges against respondent are that he failed to repay the excess balance owed to the Department, submitted a check knowing that there were insufficient funds, overpaid himself, stole funds from the Department, and failed to manage or maintain Department funds properly (ALJ Ex. 1, specifications 1-5). Each of the specifications should be sustained. Petitioner's witnesses were more credible than respondent and they supported their testimony with compelling documentary proof. The evidence showed that respondent received more than \$43,000 in excess funds for 2010, he issued the Department a check for \$43,620 knowing that there were insufficient funds to cover that amount, and he overpaid himself by more than \$18,000. These were not inadvertent blunders. Respondent took money that did not belong to him and did not repay it.

Respondent's actions constitute neglect of duty, conduct unbecoming an employee, and conduct prejudicial to good order, in violation of the Department's Bylaws (Pet. Ex. 2 at § 5.3.1). He also neglected his duties and engaged in conduct unbecoming an employee in violation of the Rules and Regulations for the Custodial Force in the Public Schools (Pet. Ex. 5 at § 2.1.6). *See, e.g., Dep't of Education v. Cherry*, OATH Index No. 1236/09 at 10 (May 29, 2009), *adopted*, Chancellor's Dec. (July 6, 2009), *aff'd sub nom. Cherry v. Klein*, 2010 N.Y. Misc. LEXIS 3020 (Sup. Ct. N.Y. Co. 2010); *Dep't of Education v. Young*, OATH Index No. 1139/03 at 11 (Sept. 19, 2003).

Petitioner further alleged that respondent violated the Penal Law. Respondent's theft of money and issuance of a check based on insufficient funds appear to have been deliberate acts that may rise to the level of criminal conduct. *See* Penal Law § 155.35(1) (grand larceny in the third degree, stealing more than \$3,000); Penal Law § 190.05(1) (issuing a bad check). However, because respondent's actions constitute employee misconduct under the Civil Service Law, it is neither necessary nor appropriate for this tribunal to rely on the same acts to find that respondent committed crimes. *See Office of Comptroller v. Lattanzio*, OATH Index No. 1029/04 at 11, 13 (Oct. 13, 2004) (noting that administrative tribunal lacks jurisdiction to find violations

of the Penal Law, ALJ sustained allegations of misconduct but dismissed charges alleging that same misconduct constituted crimes).

FINDINGS AND CONCLUSIONS

1. Respondent failed to repay more than \$43,000 that he owed, in violation of the Department's by-laws and the Rules and Regulations for the Custodial Force in the Public Schools, as alleged in specification 1.
2. Respondent issued the Department a check for \$43,620, knowing that there were insufficient funds to cover that amount, in violation of the Department's by-laws and the Rules and Regulations for the Custodial Force in the Public Schools, as alleged in specification 2.
3. Respondent overpaid himself more than \$14,000 in 2010, in violation of the Department's by-laws and the Rules and Regulations for the Custodial Force in the Public Schools, as alleged in specification 3.
4. Petitioner proved that respondent stole money from the Department, as alleged in specification 4.
5. Petitioner proved that respondent failed to manage and maintain Department funds, as alleged in specification 5.

RECOMMENDATION

After making the above findings, I requested and received a summary of respondent's personnel history. Petitioner hired respondent as custodian engineer in 2005. His first year probation was extended an additional year. In January 2007, petitioner terminated respondent's employment while he was on extended probation. Petitioner reinstated respondent in August 2008. Prior to his termination in 2007, respondent's performance evaluations generally rated his work as satisfactory. Following his reinstatement in 2008, he received excellent ratings. Petitioner now seeks termination of respondent's employment. That is appropriate.

This tribunal and courts have repeatedly held that agencies may terminate employment of personnel who misappropriate City funds. *See, e.g., Ansbro v. McGuire*, 49 N.Y.2d 872, 874 (1980) (upholding termination of police officer who fraudulently padded overtime pay); *Van*

Gorder v. Bd. of Education, 140 A.D.2d 774, 776 (3d Dep't 1988) (upholding termination of account clerk found guilty of incompetence or misconduct based on her unauthorized transfer of public monies to herself). Respondent's recent performance evaluations suggest that he does an excellent job cleaning and maintaining schools. But more is expected of custodian engineers because they oversee substantial budgets. Integrity and competent management of funds are essential requirements of the job. See *Cherry*, OATH 1236/09 at 15 (recommending termination of employment where custodian engineer mismanaged funds, failed to document expenditures, and paid himself an excessive salary); see also *Dep't of Education v. Fred*, OATH Index No. 606/09 (Nov. 10, 2008), *adopted*, Chancellor's Dec. (Dec. 15, 2008) (employment terminated where, despite order to do so, custodian engineer failed to repay excess funds of \$9,267.50); *Dep't of Education v. Honan*, OATH Index No. 2231/07 at 26 (Mar. 14, 2008) (termination of employment recommended where custodian engineer overpaid himself by \$8,493.12, commingled funds, made late payments, and failed to maintain proper records); *Young*, OATH 1139/03 at 14-15 (termination of employment recommended where custodian engineer failed to return more than \$100,000 in excess funds and did not adequately account for funds in three consecutive years).

Petitioner entrusted respondent with funds for the maintenance and repair of public schools. Respondent misused those funds by failing to repay the Department and overpaying himself. It also appears that respondent spent about \$15,000 from the custodial account to pay for medicinal herbs and knowingly issued a check for \$46,320 without sufficient funds, in an apparent effort to avoid detection of his misconduct. Under these circumstances, petitioner can no longer trust respondent to be a custodian engineer.

Accordingly, I recommend termination of respondent's employment.

Kevin F. Casey
Administrative Law Judge

April 5, 2013

SUBMITTED TO:

DENNIS M. WALCOTT
Chancellor

APPEARANCES:

ANDREA CHILAKA, ESQ.

Attorney for Petitioner

GREGORY KUCZINSKI, ESQ.

Attorney for Respondent