Fire Dep't v. Harper

OATH Index No. 503/14, mem. dec. (Jan. 21, 2014)

Employee's application for stay based on pendency of state proceeding is denied. Application for discovery and to compel petitioner to produce witnesses is denied in part and granted in part. Employee's application to preclude agency from introducing a portion of his investigatory interview as beyond the scope of the interview notice is denied.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
FIRE DEPARTMENT
Petitioner
-against-
ANTHONY HARPER
Respondent

MEMORANDUM DECISION

FAYE LEWIS, *Administrative Law Judge*

Pending before me is respondent's motion for a stay, or alternatively, to compel discovery and request a 60-day adjournment of the trial scheduled for Friday, January 24, 2014. Respondent also seeks to prelude petitioner from introducing a portion of a transcript of his investigatory interview, conducted on December 20, 2012, pursuant to Mayoral Executive Order No. 16 ("MEO 16"), into evidence.

The charges in this case are discrete. Respondent, a firefighter, is alleged to have been absent without authority ("AWOL") from work on October 29, 2012, the date that Hurricane Sandy hit New York City. Additionally, respondent is charged with giving an interview to the *New York Post*, and allowing himself to be photographed wearing his Fire Department dress shirt and holding his daughter, without having received written approval of the Fire Commissioner and without communicating to his audience that his statements to the reporter were not made in his official capacity.

Respondent has filed a Notice of Claim in Supreme Court, New York County, seeking declaratory, injunctive, and equitable relief, plus monetary damages, arising out of allegedly unlawful discrimination, harassment, and retaliation by the Fire Department. In the Notice of Claim (Resp. Motion to Compel Discovery and Stay Proceeding and Mem., Ex. A), respondent asserts that he has been discriminated against because of his religion: he was christened Othaman Muhammad at birth, a Muslim name, which the Fire Department is aware of because they possess a copy of his original birth certificate. Respondent contends that he was subjected to a hostile work environment which included his being excluded from the meal table, given inferior positions of duty, assaulted, and, as relates specifically to this case, charged with AWOL for missing work on October 29, 2012, even though, respondent asserts, public transportation was shut down and the bridges were closed. Respondent argues that he was the only City employee charged with being AWOL during Hurricane Sandy (Ex. A at 7-8).

Respondent seeks to stay the disciplinary proceeding "in the interest of judicial economy, pending the outcome of the civil rights action, the issues of which clearly overlap with the instant proceedings" (Resp. Mem. at ¶17). In support, respondent cites to section 2201 of the New York State Civil Practice Law and Rules ("CPLR") which provides that "the court in which an action is pending may grant a stay of proceedings . . . ." Respondent further contends that a stay is appropriate under the decision in *Schoolcraft v. City of New York*, 2013 U.S. Dist. LEXIS 91781 (S.D.N.Y. 2013), in which Judge Sweet enjoined the Police Department from proceeding with an administrative disciplinary case against a police officer during the pendency of a federal lawsuit commenced by that officer.

Petitioner contends that the application for a stay should be "automatically denied," because in *Schoolcraft*, the stay application was made to a federal district court, where here it is made to an administrative tribunal. Barring that, petitioner contends that the application for a stay should be denied because *Schoolcraft* is inapplicable (Pet. Response at ¶¶ 20-23).

Contrary to petitioner's argument, there is no rationale for "automatically" denying respondent's application. Respondent's motion is properly before OATH, *see* 48 RCNY § 1-34 (Lexis 2013), and must be considered. However, respondent's motion should be denied, for the following reasons.

First, OATH conducts quasi-judicial administrative proceedings, which are not strictly governed by the CPLR, though we may look to the CPLR for guidance. *See* C.P.L.R. 101 (Lexis 2013) (CPLR applies to "civil judicial proceedings in all courts of the state"); *Dep't of Education v. Brust*, OATH Index No. 2280/07, mem. dec. at 22 (Sept. 25, 2009); *Dep't of Buildings v. Gelb,* OATH Index No. 1298/97 at 3 (Nov. 12, 1997), *aff'd*, Comm'r Dec. (Apr. 21, 1998) (citing *Infante v. Donohue*, 42 Misc. 2d 727, 731 (Sup. Ct. Albany Co. 1964) (an administrative disciplinary hearing is not a "civil judicial proceeding" within section 101 of the CPLR)); *Human Resources Admin. v. Ben-Siyon Man-of-Jerusalem,* OATH Index No. 790/91, mem. dec. at 8 (Nov. 12, 1991).

Moreover, the CPLR provision that respondent cites states only that a court "may" grant a stay. Whether or not to grant a stay is discretionary with the trial court. As a "general rule," a stay is granted "only where the decision in one action will determine all the questions in the other action, and the judgment on one trial will dispose of the controversy in both actions that a case for a stay is presented . . . . What is required is complete identity of parties, cause of action and judgment sought." *Medical Malpractice Ins. Ass'n v. Methodist Hosp. of Brooklyn,* 64 A.D.2d 558, 559 (1st Dep't 1978) (internal quotes omitted); 4-2201 New York Civil Practice: CPLR P 2201.05 (Matthew Bender & Company, Inc. 2013).

Respondent wants to raise as a defense in this pending disciplinary case that he has been subjected to unequal treatment based upon religious discrimination (Resp. Mem. at ¶ 21). He asserts that these are the same issues raised in the Notice of Claim (Mem. at ¶ 20). However, it is well settled that a selective enforcement or retaliation claim is not a proper defense in an administrative proceeding, even where the employee alleges discrimination based upon constitutionally suspect criteria. *See, e.g., 303 W. 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 693 n.5 (1979) (noting that a selective enforcement claim was not before the administrative tribunal, rather it was "properly brought only before a judicial tribunal"); *Bell v. NYS Liquor Auth.*, 48 A.D.2d 83, 84 (3d Dept. 1975) ("The proper manner in which to develop [a selective enforcement] defense is to raise it initially in an article 78 proceeding subsequent to the administrative hearing."); *Fire Dep't v. A. G.*, OATH Index No. 771/12 at 27 (July 5, 2012), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 13-02-SA (Feb. 6, 2013) ("An administrative

proceeding is not the proper forum for a claim of selective enforcement based upon impermissible discrimination. A selective enforcement defense may be addressed upon judicial review of any adverse administrative determination."); *Dep't of Correction v. LaSonde*, OATH Index No. 2526/11 at 21 (Aug. 18, 2011) ("[I]t is well settled that a selective enforcement or retaliation claim is not a proper defense in an administrative proceedings."); *Fire Dep't v. Dixon*, OATH Index No. 1758/10 at 7 (Sept. 7, 2010); *Dep't of Finance v Rodriguez*, OATH Index No. 430/10 at 2 (Mar. 5, 2010), *aff'd*, 2013 N.Y. Slip Op. 00427 (lst Dep't 2013). *See generally Dep't of Sanitation v. Yovino*, OATH Index No. 1209/96 at 2-3 (Oct. 9, 1996), *aff'd in part, rev'd in part*, NYC Civ. Serv. Comm'n Item No. CD 97-109-O (Dec. 4, 1997) (defense of selective enforcement only available if based upon claim of constitutionally suspect criteria and can be asserted only upon judicial review of an adverse administrative determination).

Thus, while respondent is free to testify during this proceeding about his motivations for giving the *New York Post* interview in issue, in which he complained of harassment and threats of physical violence, there is no identity of interest between the issues raised in this disciplinary proceeding and the issues asserted in the Notice of Claim. Further, determination of the issues raised in the disciplinary proceeding will not be preclusive of the issues raised in the Notice of Claim. For example, if respondent is found to have violated a rule about appearing in his dress uniform without permission, or found to have been absent without leave on the date of the hurricane,[1] that would not be determinative of whether the disciplinary charges were brought against respondent because of impermissible bias or animus. Respondent would remain free to litigate the issue of bias or discrimination in another forum.

Here, as petitioner notes, respondent has not filed a civil lawsuit, only a Notice of Claim, and it is unclear whether or when a lawsuit will be filed. However, even assuming that a lawsuit will be filed which incorporates the allegations in the Notice of Claim, the existence of a pending civil action does not in and of itself provide a basis for a stay of an administrative disciplinary proceeding. *See Askinazi v. Police Department*, 25 A.D.2d 429 (lst Dep't 1966) (finding that it was "a palpable abuse of discretion" for a lower state court to restrain an administrative departmental trial); *Fire Dep't v. Domini*, OATH Index No. 2047/11, mem. dec. (July 28, 2011)

[1] These are hypotheticals, and I stress that in no way have I made any judgment about whether or not the charges against respondent should be sustained.

(denying employee's request for an indefinite postponement of his disciplinary trial until the completion of the federal lawsuit which he had filed, even though the lawsuit contained several allegations related to the disciplinary charges); *Dep't of Housing Preservation & Development v. Afro Contracting Corp.*, OATH Index No. 95/1519, mem. dec. at 3 (June 27, 1995) ("We have uniformly held that the pendency of other, related litigation is not good cause for an indefinite adjournment of an OATH trial.").

To the extent that respondent relies upon *Schoolcraft,* that case is inapposite. As noted, while respondent's Notice of Claim asserts that he was subjected to disparate treatment because of his religion, that issue is not before me. By contrast, in *Schoolcraft,* both the disciplinary charges against Officer Schoolcraft and the federal lawsuit which Officer Schoolcraft filed related to discrete events on a particular date: the disciplinary charges alleged that the officer was AWOL while the officer alleged that the police department had subjected him to false arrest and involuntary confinement. Thus, in enjoining the disciplinary hearing, Judge Sweet found that it was possible that the outcome of the disciplinary hearing would have a "preclusive effect" upon the issues to be litigated in the federal case. *Schoolcraft,* 2013 U.S. Dist. LEXIS at *3. This is not the case here.

Accordingly, respondent's application for a stay of this case is denied.

In the alternative, respondent has requested an order to compel petitioner to produce discovery and witnesses, as well as a 60-day adjournment of the trial. The application for an adjournment is denied. The application for discovery is denied in part and granted in part.

Respondent's discovery demand is really a hybrid of a discovery demand and a demand that petitioner produce certain witnesses for trial. Respondent has requested that petitioner provide five witnesses, Battalion Chief Michael Gala, Lieutenant Thomas Bradley, Assistant Commissioner Margo Ferrandino, Deputy Chief Paul Mannix, and firefighter Rolando Romero (Gleason Aff. of Dec. 29, 2013). Petitioner has objected to all of the witnesses except Lieutenant Bradley, whom it has represented it will make available for trial (Pet. Response to Aff. and Supplemental Notice for Discovery). Respondent has since indicated that he is not seeking to compel the Fire Department to produce firefighter Romero, since Romero has indicated that he

will be testifying voluntarily (E-Mail of Gleason of Jan. 13, 2014). Thus, the question before me is whether petitioner should be obligated to produce Gala, Ferrandino, and Mannix.

Regarding discovery, respondent has sought production of eight documents, four of which petitioner has represented that it has already produced. The remaining items, which are in dispute, are: (1) the names and addresses of all Fire Department employees who on October 29, 2012 were served with charges for missing work due to Hurricane Sandy; (2) a verified copy of the Fire Department's file concerning Deputy Chief Mannix's press appearances; (3) a copy of the respondent's EEO files; and (4) a copy of Chief Gala's EEO training.

When asked for an offer of proof regarding Gala, Ferrandino, and Mannix, respondent asserted the following. Chief Gala is Chief of Personnel, and he would testify about whether Fire Department employees other than respondent who missed work because of Hurricane Sandy were charged with AWOL[2] and whether Fire Department employees other than respondent were charged with misconduct as a result of their media appearances. Deputy Commissioner Ferrandino would testify that respondent had a conversation with her regarding issues relating to the charges. Deputy Chief Mannix would testify because he has appeared in numerous press forums without indicating that his statements were made in his official capacity and reflected only his personal opinion (Gleason Aff. of Dec. 29, 2013).

Petitioner contends that both the demand for witnesses and the demand for documents are impermissible because the witnesses and documents are sought to bolster respondent's claim of selective prosecution (Pet. Response to Resp. Mem. at 6-8). I agree. Respondent's reasons for compelling the Department to produce the three witnesses as well as the documents in question reflect a desire to present a classic selective enforcement defense. As noted above, a claim of selective enforcement does not lie in an administrative disciplinary proceeding even where, as here, the employee alleges illegal discrimination. The appropriate forum in which to raise a selective enforcement defense is upon judicial review of any adverse administrative determination. Thus, respondent's demand that petitioner produce Gala, Ferrandino, and Mannix, and the four documents in issue, is denied, with one exception. It is reasonable for

[2] Respondent has indicated that he would accept a sworn statement by Chief Gala relating to whether Fire Department employees other than respondent were given AWOL charges for missing work due to Sandy, but would need Gala's testimony on the media appearance issue.

respondent to inquire whether there were particular policies instituted to cover absences during Hurricane Sandy, including whether employees would be considered AWOL if they did not report to work. If respondent wishes to so inquire, he must notify me and opposing counsel as promptly as possible and in no event later than close of business on January 22, 2014. In that case, petitioner will have the option of either presenting Chief Gala as a witness or presenting a sworn statement by Chief Gala regarding the issue of policies implemented to cover absences during Hurricane Sandy, including whether employees who did not report to work would be considered AWOL.

The issue of firefighter Romero's testimony is not currently before me, although petitioner remains free to move to preclude Romero's testimony. It is not clear to me that Romero's testimony would be relevant. In his offer of proof, respondent indicated that Romero would testify that he was on medical leave on October 29, 2012, and that when he sought postponement of his medical appointment, he was threatened with charges unless he appeared at the medical office. Romero appeared at the medical office and saw Chief Gala "hiding in a corner" of the office (E-mail of Gleason of Jan. 13, 2014). Romero, like respondent, has filed a Notice of Claim alleging that the Fire Department has discriminated against him; Romero alleges discrimination based upon his ethnicity (Resp. Mem., Ex. C). Thus, it seems that Romero's testimony would be attenuated at best and would not address the issues concerning respondent, even if those issues were broadly construed to include whether the Department singled out respondent by charging him with an AWOL during the hurricane.

Several issues remain. First, while denying most of respondent's discovery requests and request for production of witnesses, I will permit him reasonable latitude in his own testimony, particularly as it relates to his motivation in giving the *New York Post* interview. *See LaSonde*, OATH 2526/11 at 7 (respondent "given considerable leeway to testify on her own behalf regarding all her defenses and would be allowed to present voluntary witnesses and documentary evidence to the extent the evidence was relevant and not cumulative").

Second, respondent's request for a 60-day adjournment is denied. Adjournments are to be granted only for good cause shown, 48 RCNY § 1-32(b) (Lexis 2013), which has not been established. This case has been pending for some time. An initial settlement conference was

held on October 15, 2013, three months ago. The trial was originally scheduled on January 6, 2014, and was adjourned after respondent filed his motion for a stay and discovery, in order to permit petitioner to file responsive papers. Respondent's counsel has had ample opportunity to prepare for trial. Further, this is a disciplinary case which alleges two discrete instances of misconduct, concerning the purported AWOL on October 29, 2012, and the *New York Post* article published on November 19, 2012. Respondent's request that petitioner produce numerous witnesses and documents so he could raise a defense of selective enforcement and discrimination has been denied. The trial will proceed as scheduled, on January 24, 2014.

Finally, respondent's motion to preclude petitioner from offering a portion of his interview under MEO 16 is denied. Respondent has asserted that the portion of the interview from page 24, line 8, through the end of the transcript (page 66) should be denied because the questions went beyond the scope of the MEO notice, which related only to the AWOL charge and purported failure to sign the command discipline form (Resp. Mem. at ¶ 13, Ex. C). While review of the MEO transcript indicates that the questions posed to respondent went beyond the scope of the MEO notice, respondent was represented by counsel and it does not appear that his statements were made involuntarily. *See, e.g., Dep't of Correction v. Blanc,* OATH Index No. 2571/11 at 6-10 (Feb. 2, 2012), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 12-40-SA (Aug. 10, 2012) (motion to suppress statements made during DOI interview denied, absent any evidence that statements were made involuntarily). Respondent does not allege that the questioning violated respondent's contract, but even if it did, the proper remedy appears to be the filing of a grievance, not suppression of the statements. *Human Resources Admin. v. Alexander*, OATH Index No. 294/85 at 3 (Nov. 27, 1985). Should petitioner move to introduce the MEO 16 interview into evidence at trial, respondent retains the right to object to its admission on any other grounds.

In sum, respondent's application for a stay is denied. Respondent's application to compel discovery and the production of three witnesses and documents is denied, except to the extent that respondent may compel the Fire Department to produce Chief Gala or an affidavit by Chief Gala for the limited purpose of establishing what policies or procedures specifically existed with regard to employee attendance and absenteeism during Hurricane Sandy. Should respondent

wish to do so, he must alert me and opposing counsel no later than close of business tomorrow, January 22, 2014. Respondent's application to preclude petitioner from admitting a portion of his MEO transcript is denied.

Faye Lewis
Administrative Law Judge

January 21, 2014

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