Department of Education v. Naguib

OATH Index No. 1402/14 (Aug. 14, 2014)

Termination recommended for food service manager who was directed under section 2568 of the Education Law to report for three medical examinations scheduled for May 2012, and August 2013, and failed to appear for any of the examinations.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF EDUCATION
Petitioner
- against -
JAN NAGUIB
Respondent

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, the Department of Education, pursuant to section 75 of the Civil Service Law. Respondent Jan Naguib, a school food service manager assigned to the Division of School Facilities, is charged with failing to report on May 16, 2012, August 2, 2013, and August 14, 2013, for scheduled medical examinations with the Medical Administration Office of the New York City Department of Education, after having been directed to do so pursuant to section 2568 of the Education Law (ALJ Ex. 1).

A hearing was held on July 24, 2014. Respondent did not appear. Respondent's counsel appeared, and after her attempts to reach respondent, to determine whether he wished to testify by telephone, proved futile, requested and received permission to withdraw as counsel (Tr. 43). The hearing then proceeded as an inquest. Petitioner presented two witnesses, Alex Doulis, who had been respondent's direct supervisor in the Division of School Facilities, and Mercuria Gibson, supervisor of the scheduling and claims unit for the medical leave and records administration with the human resources division of the Department of Education.

For the reasons stated below, I find that the charges are sustained. I recommend that respondent's employment be terminated.

ANALYSIS

Preliminary Issue

On July 23, 2014, the day before the scheduled trial date, respondent's attorney requested an adjournment of the trial because respondent was in Ohio, caring for his ailing mother, and was unable to make other caretaking arrangements. However, the adjournment request was denied for lack of good cause. *See* 48 RCNY §1-32(b) (Lexis 2014) ("applications for adjournments are addressed to the discretion of the administrative law judge, and shall be granted only for good cause").

As petitioner noted in opposing the adjournment, the trial had previously been adjourned from June 16, 2014, to July 24, 2014, and the adjournment had been marked final. In requesting the initial adjournment, respondent said that he needed to be in Ohio to care for his mother. I granted the initial adjournment request, over petitioner's objection, to give respondent an opportunity to find somebody to care for his mother. In so doing, I stressed in an email to the attorneys for petitioner and respondent that the adjournment was marked final and that respondent should bring some documentation with him to trial to corroborate the reason for his adjournment request (ALJ Ex. 2).

Yet, the day before the rescheduled trial date, respondent's counsel requested an adjournment for exactly the same reason. Counsel was unable to explain why respondent had not been able to find somebody to care for his mother. Nor was counsel able to explain the nature of respondent's mother's illness or why it was necessary that respondent remain in Ohio to care for her. Finally, when respondent's counsel was asked how long it would take respondent to make appropriate caretaking arrangements, she indicated that respondent would not be available until October. Thus, respondent failed to establish good cause for the adjournment request. *See Cherry v. Klein*, 2010 N.Y. Slip Op. 31659U (Sup. Ct. N.Y. Co. 2010), *aff'g*, OATH Index No. 1236/09 (May 29, 2009) (denial of an adjournment not improper where an employee, who had already received multiple adjournments, failed to provide adequate documentation supporting his claim that he was medically unable to attend the hearing); *Dep't of*

Finance v. Zindel, OATH Index No. 1310/07 at 2-3 (June 22, 2007) (request for open-ended or prolonged continuance denied where the party's explanation for her absence, that she had a gravely ill relative and there were "other factors in her life," were vague and unsubstantiated).

Although I denied respondent's adjournment request, I advised counsel that respondent could participate in the hearing via telephone conference call and testify, if he so chose, and that I would permit her to take breaks in the proceeding to consult with her client. However, on the morning of trial, although respondent's counsel appeared, and was given repeated opportunities to try to speak with her client, she was unable to reach him (Tr. 5-7). Respondent's counsel made an application to withdraw as counsel in light of her failure to reach respondent, indicating that she would be unable to adequately represent her client without his participation (Tr. 9). Specifically, respondent would be unable to testify as to whether or not he actually received the notices to appear for the medical examinations (Tr. 39). Respondent's counsel was relieved (Tr. 43), and the case proceeded as an inquest (Tr. 44)

The Proof at Trial

Respondent is charged with failing to report for three medical exams that he was directed to undergo pursuant to section 2568 of the Education Law. Section 2568 permits the superintendent of schools in a city with a population of one million or more to require any employee of the "board of education" to submit to a medical examination ". . . to determine the mental or physical capacity of such person to perform his duties, whenever it has been recommended in a report in writing that such examination should be made." Educ. Law § 2568 (Lexis 2014). The report recommending such exam must be written by a supervisor or director of the employee being directed to submit to the medical exam. *Id.* An employee who fails to comply with a directive to attend such a medical examination may be subject to discipline and may be kept off the payroll until he or she complies with the directive. *Grassel v. Bd. of Education*, 301 A.D.2d 498 (2d Dep't 2003).

Here, petitioner's proof established that the Department of Education sent respondent three directives, by certified mail to his last known address, to report for a medical examination pursuant to section 2568 of the Education Law (Tr. 85). The medical examinations were scheduled for May 16, 2012, August 2, 2013, and August 14, 2013 (Pet. Exs. 6-8). The

directives were dated May 16, 2012 (Pet. Ex. 6), July 26, 2013 (Pet. Ex. 7), and August 2, 2013 (Pet. Ex. 8). However, although the initial directive was dated May 16, 2012, a certified mail receipt indicates that it was sent earlier, on May 9, 2012 (Pet. Ex. 6; Tr. 77). Respondent appears to have signed the certified mail receipt for the July 26, 2013 directive (Pet. Ex. 7). He did not sign the receipt for the August 2, 2013 mailing (Pet. Ex. 8), and petitioner did not submit a receipt for the initial, May 16 mailing.

The directives were signed by Herbert Guscott, who in 2012 was the Manager of HR Connect-Medical Examination and in 2013 was the Deputy Director of HR Connect-Medical, Leaves, and Records Re-Examination. Mr. Guscott indicated that the directives were made at the request of the Department's Chief Operating Officer (Pet. Exs. 5-7). The Chief Operating Officer was delegated by the Chancellor to require persons employed by the Department to undergo medical examinations pursuant to Section 2568 of the Education Law (Pet. Exs. 5, 7).

Ms. Gibson, supervisor of the scheduling and claims unit for the medical leave and records administration, testified that the directives were sent to respondent after her office received memoranda from respondent's supervisor and manager requesting that respondent be scheduled for a medical evaluation (Tr. 76-82). Initially, her office received a memorandum from Mr. Doulis, dated May 4, 2012, to the Chief Operating Officer (Pet. Ex. 5). In 2012, Mr. Doulis was special assistant to the Chief Executive Officer at the Division of School Facilities and respondent's direct supervisor (Tr. 55-57; Pet. Ex. 5). In his memorandum, Mr. Doulis stated that on March 9, 2012, he and respondent had had an e-mail exchange in which respondent sent an e-mail indicating that Mr. Doulis had "confronted him" and should "stay away" from him, as well as an e-mail indicating that Mr. Doulis had "threatened to kill" him (Pet. Ex. 4).

Subsequently, the medical appointments office received a memorandum from Mr. Shea, the Chief Executive Officer of the Division of School Facilities (Pet. Ex. 7), dated July 24, 2013, to the Chief Operating Officer. Mr. Shea indicated that he had managed respondent, and had supervised Mr. Doulis, and that as Mr. Doulis no longer worked for the Division of School Facilities, Mr. Shea was requesting that another medical appointment be scheduled for respondent, based upon the observations in Mr. Doulis's original report, which he referenced (Pet. Ex. 7).

Mr. Doulis outlined the March 9, 2012 incident in his trial testimony as well. He indicated that respondent had called the police after sending the last e-mail, and that police officers had arrived and taken respondent out of the building (Tr. 59-69). Respondent had pre-approved vacation from March 9, through March 18 (Pet. Ex. 5). It is unclear when he next reported to work.

Ms. Gibson testified that respondent never appeared for any of the scheduled examinations (Tr. 75, 82).

Based upon the unrebutted proof, petitioner established that respondent failed to comply with three directives to report for scheduled medical examinations. This constituted insubordination. *See Dep't of Homeless Services v. Chappelle,* OATH Index No. 1918/07 at 3 (Aug. 30, 2007) (insubordination requires proof that a clear and unambiguous order was given to an employee, which the employee willfully refused to obey). The charges, therefore, are sustained.

FINDINGS AND CONCLUSIONS

> Respondent failed to report for three medical examinations with the Medical Examination office of the New York City Department of Education, scheduled for May 16, 2012, August 2, 2013, and August 14, 2013, pursuant to section 2568 of the Education Law.

RECOMMENDATION

Upon making this finding, I requested a summary of respondent's personnel history. In response, petitioner informed me that respondent was appointed to his position on August 4, 2003. He has no disciplinary history.

Petitioner requested that I recommend that respondent's employment be terminated. This is appropriate. Respondent has been removed from payroll, and thus not at work, since May 17, 2012, as a result of failing to report for these medical examinations (Tr. 27). As respondent did not appear either in person or by telephone to offer any evidence in his defense or in mitigation, it is reasonable to infer that he has abandoned his job. *See Health & Hospitals Corp. (Metropolitan Hospital Ctr.) v. Cortijo,* OATH Index No. 1552/13 at 2 (Apr. 11, 2013); *Dep't of Finance v. McLaughlin,* OATH Index No. 1681/12 at 2 (June 15, 2012); *Admin. for Children's*

Services v. Scipio, OATH Index No. 2144/11 at 9 (June 21, 2011). Accordingly, I recommend that his employment be terminated.

Faye Lewis
Administrative Law Judge

August 14, 2014

SUBMITTED TO:

CARMEN FARINA
Chancellor

APPEARANCES:

PHILLIP OLIVERI, ESQ.
Attorney for Petitioner

No appearance by Respondent.