Admin. for Children's Services v. M.H.

OATH Index No. 1460/14 (Aug. 27, 2014)

Petitioner proved that respondent, a research assistant, committed the crimes of assault, resisting arrest, intentional property damage, and public intoxication in July 2013, failed to notify the agency of circumstances of his arrest and conviction, and was absent without leave. Evidence also showed that respondent violated an order of protection in April 2013 and used disrespectful language in an email to an agency attorney. Termination of employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of

ADMINISTRATION FOR CHILDREN'S SERVICES

Petitioner

-against-

M. H.

Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner referred this disciplinary proceeding under section 75 of the Civil Service Law, alleging that respondent committed crimes in Virginia and New York in 2013 that reflected unfavorably on his fitness as an agency employee. Petitioner also alleged that respondent was absent without leave (AWOL), failed to provide proper notice of his Virginia arrest and conviction, and used disrespectful language in an email to an agency attorney (ALJ Ex. 1).

At a February 2014 pre-hearing conference the hearing was postponed until July 2014, over petitioner's objection, to give respondent an opportunity to resolve the criminal case in Virginia and obtain counsel on this disciplinary matter.

At the hearing on July 24, 2014, respondent requested a one-month adjournment to obtain counsel (Tr. 4-5). Respondent noted that he had consulted with an attorney provided by his union, but he did not agree with that attorney's advice (Tr. 8). Opposing the adjournment request, petitioner noted that it was unlikely that respondent would obtain an attorney in another month because he had rejected the union-retained attorney and had ample time to obtain a

different attorney. Petitioner also noted that respondent had previously said that he had tickets to travel to Senegal in the upcoming weeks (Tr. 10-11). After further questioning, I denied respondent's request for an adjournment because he had been given more than five months to obtain an attorney and there was no reasonable basis to believe that he would obtain an attorney following another adjournment (Tr. 18-20). *See* 48 RCNY § 1-32(b) (Lexis 2014) ("Applications for adjournments . . . shall be granted only for good cause"); *see also Dep't of Sanitation v. Garcia*, OATH Index No. 1140/98 at 4 (May 1, 1998) (right to counsel is not a right to delay proceedings); *Dep't of Correction v. Rebecca*, OATH Index No. 151/94, mem. dec. at 4 (Oct. 21, 1993) (burden is on the moving part to show that adjournment is not a dilatory tactic).

During the hearing, petitioner relied on documentary evidence and testimony from four witnesses. Respondent testified in his own behalf.

For the reasons that follow, I find that petitioner proved most of the charges and recommend termination of respondent's employment.

ANALYSIS

The Virginia Arrest and Convictions (Complaint 66053-523-003)

Petitioner alleged that respondent engaged in conduct that reflected unfavorably on his fitness as an employee when he fought with passengers in a bus travelling on Interstate 95 in Virginia. After the driver removed him from the bus, respondent allegedly: attempted to assault the driver of a car that had crashed after swerving to avoid him; struck another car's window, shattering glass that scratched the arm of a four-month old passenger; unlawfully resisted when a state trooper arrested him; failed to provide petitioner with timely and proper notice of his arrest and criminal conviction; and was AWOL. Petitioner proved each of these allegations by a preponderance of the credible evidence.

Certificates of conviction showed that, on November 8, 2013, respondent was tried and found guilty in a Virginia court of committing five misdemeanors: careless or malicious interference with orderly passage of vehicles while crossing a highway; resisting arrest; public intoxication; assault; and intentionally destroying, defacing, or damaging property valued at less than $1,000. Respondent was sentenced to 12 months in jail, with six months suspended for three years conditioned on good behavior, and $275 in fines (Pet. Exs. 1-5). Those criminal

convictions were conclusive proof of respondent's illegal conduct. *See Meades v. Spinnato*, 138 A.D.2d 579 (2d Dep't 1988).

Petitioner introduced an arrest report detailing the events leading to respondent's arrest. On July 12, 2013, a state trooper, responding to a report of an accident on Interstate 95, tried to arrest respondent who appeared heavily intoxicated on the side of the highway. Respondent ignored the trooper's orders and had to be physically restrained. The trooper obtained statements from witnesses who said that respondent had been standing in the highway. After swerving to avoid respondent, a car struck a guardrail. When the driver got out of the car, respondent spit at him and tried to hit him. Respondent went to another stopped car and smashed the rear window, causing glass to fall on an infant passenger (Pet. Ex. 6).

A YouTube video obtained by Virginia State Troopers, depicted events that occurred inside a bus prior to respondent's actions on the highway. A bus passenger, who appeared to be respondent, is shown fighting with other passengers on the bus and the driver removed the passenger from the bus (Pet. Ex. 10).

Mr. Beck, an Assistant Commissioner who manages the agency's Payment Services Division where respondent processes payments, testified that respondent did not report to work from November 12 to December 16, 2013 (Tr. 56, 59). Mr. Beck wrote to respondent on November 25, 2013, advising him that his absence was unauthorized and directing him to report to work, contact his office immediately, or document his absence (Tr. 61; Pet. Ex. 11). Respondent did not reply (Tr. 61). On December 18, 2013, respondent went to his work site to get some documents, but he did not say where he had been since November 12, 2013 (Tr. 62).

Ms. Persaud, respondent's supervisor, testified that he last worked on November 7, 2013 (Tr. 82). On November 12, 2013, she spoke to respondent's brother on the phone and he said that respondent would be out for four to eight weeks due to "a family emergency" (Tr. 83, 91; Pet. Ex. 12). Ms. Persaud forwarded that information to her supervisor and who sent respondent documents required by the Family Medical Leave Act (FMLA) (Tr. 84; Pet. Ex. 13).

Mr. Maye, Director of Employment Services, testified that respondent did not submit any FMLA documents and was not on approved leave (Tr. 86, 126; Pet. Ex. 17). Respondent was suspended for 30 days beginning December 16, 2013, and did not return to work after the suspension (Tr. 129). A few days before the hearing, respondent notified Mr. Maye that he had been released from jail and said that he wanted to return to work. Mr. Maye asked respondent

for documents regarding the dates of his incarceration and conditions of his release, but respondent did not comply with that request (Tr. 134-35).

The chief of staff to the agency's general counsel and the inspector general from the Department of Investigation (DOI) reported that their records indicated that respondent did not give the agency or DOI written notice of his July arrest or November conviction (Pet. Exs. 8, 9).

Respondent testified that he had a problem with alcohol and "did a lot of stupid things" in 2013, but after serving six months in jail he had "cleaned up" his act (Tr. 148, 155). He also noted that he sought help from the Employee Assistance Unit prior to 2013 (Tr. 186-87, 201-02).

According to respondent, his criminal convictions in Virginia were unconstitutional because he was tried without a lawyer. He expressed confidence that those convictions would be overturned on appeal. Thus, he invoked his Fifth Amendment right against self-incrimination and did not testify about the underlying acts that led to his arrest in Virginia (Tr. 12-13, 15, 149, 156-57). When petitioner showed the video during the hearing, respondent said that he did not wish to watch and he turned away (Tr. 21-22, 53). Respondent did not dispute that he was shown on the video, but he testified that someone stole his wallet on the bus and he was not charged with committing any crime on the bus (Tr. 183-84).

Respondent recalled that he was arrested in Virginia on July 13, 2013 (Tr. 161, 163). When he was released on bail two days later, he called Ms. Persaud and said that he was "in trouble" (Tr. 161, 163). Asked whether he told Ms. Persaud that he had been arrested, respondent initially claimed that Ms. Persaud told him, "Try not to say anything" (Tr. 164). When pressed, respondent claimed that he told Ms. Persaud that he was arrested but he did not give her any details (Tr. 165). He did not send written notices to the Commissioner's office or DOI, even though he knew from prior arrests that such notice was required (Tr. 192-93).

On November 7, 2013, respondent sent an email to Ms. Persaud stating that he was going to be out the next day. He did not mention that he had to go to court in Virginia (Tr. 180). Respondent claimed that he called another supervisor and said that he was not coming in that day because he had to "go through court and stuff" (Tr. 167).

The next day, respondent was convicted after trial and sent to jail (Tr. 168). He called his brother and asked him to call his boss and say that he would be out four to six weeks, but he did not tell his brother to say that it was a family emergency (Tr. 168, 172, 181). Respondent did not send any written notice of conviction to the Commissioner's office or DOI (Tr. 173, 183, 194).

He explained that he could only make collect calls from jail and the agency would not accept such calls (Tr. 182). Respondent also said that it took more than a week to get an envelope and paper in jail (Tr. 182). When he obtained an envelope, he used it to file an appeal (Tr. 183).

After filing his appeal, respondent was released from jail on December 10, 2013 (Tr. 169, 174). Following his release, he learned that he had been suspended from work for 30 days, starting December 16 (Tr. 169). On December 31, 2013, during an informal conference with his union representative and an attorney from ACS, respondent said that he was returning to Virginia on January 6, 2014, for a court appearance (Tr. 174-75).

On January 6, respondent learned that his appeal had been dismissed as untimely filed and he was returned to jail (Tr. 170-71). He did not report this to his employer (Tr. 176). Respondent remained in jail until he was released on July 18, 2014 (Tr. 179).

In determining whether a criminal conviction for off-duty activity constitutes employee misconduct, this tribunal has also looked to whether there is a sufficient nexus between the underlying act and the employee's position. *Dep't of Correction v. Parrish*, OATH Index No. 1386/03 at 2-3 (Aug. 6, 2003), *adopted*, Comm'r Dec. (Sept. 23, 2003), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 04-37-SA (July 8, 2004) (harassment and assault of sister, by punching her in the eye, is antithetical to the duties of a correction officer). Respondent committed crimes involving violence, causing damage to property, threatening others, and injuring a child. Such conduct fundamentally conflicts with the agency's mission. *See Admin. for Children's Services v. Solomon*, OATH Index No. 304/06 at 6 (May 15, 2006) (where an agency's function includes protecting children from violence, conviction for harassment constitutes misconduct).

The undisputed evidence also showed that respondent did not provide written notice of his arrest and conviction to the Commissioner and DOI as required by Sections II(E)(2) and II(E)(3) of petitioner's Code of Conduct. Respondent offered no plausible explanation for this failure. I did not credit his claim that he notified Ms. Persaud about his arrest or that she told him not to say anything. Ms. Persaud credibly testified that she had no knowledge of respondent's arrest or conviction in Virginia.

Petitioner also showed that respondent was AWOL from November 12 until December 15, 2013, when he was suspended for 30 days. He was again AWOL from January 15, 2014, until July 18, 2014. Excluding the suspension, all of respondent's leave was unauthorized.

The New York Arrests (Complaints 66053-001/002)

Petitioner alleged that respondent engaged in conduct that led to two arrests in New York and reflected unfavorably on his fitness as an employee. On March 16, 2013, respondent was arrested for assault, harassment, menacing, and criminal mischief after he struck and shattered a car window, injuring the driver and frightening a passenger. On April 8, 2013, respondent was arrested for criminal contempt and aggravated harassment after he allegedly violated an order of protection and called a woman on her cell phone, threatening to kill her (ALJ Ex. 1).

An arrest, without more, is not proof of misconduct. *See Health & Hospital Corp. (Lincoln Medical & Mental Health Ctr.) v. Jiminez*, OATH Index No. 1381/07 at 2 (June 21, 2007) ("It is well settled that an arrest, standing alone, is not punishable as misconduct, particularly where the actions which lead to the arrest are separately charged"). To prove the charges, petitioner relied primarily on an interview that Senior Investigator Tracey Jordan conducted with O. S. on March 24, 2014. Petitioner introduced an audio recording and transcript of the interview (Tr. 96; Pet. Ex. 14).

O.S. did not testify and her interview with the investigator was hearsay. Though hearsay is generally admissible in administrative proceedings and may form the sole basis for a finding of fact, such evidence must have probative value and bear some indicia of reliability in order to be given significant weight. *See Dep't of Housing Preservation & Development v. Davron*, OATH Index No. 1533/11 at 16 (Dec. 21, 2011); *see also* 48 RCNY § 1-46(a) (Lexis 2014); *People ex. rel. Vega v. Smith*, 66 N.Y.2d 130, 139 (1985).

Here, petitioner failed to meet its burden of proving that respondent committed crimes in March 2013. However, petitioner's evidence proved that respondent violated an order of protection and repeatedly harassed O.S. in April 2013. O.S.'s statements regarding the March incident were unclear, no supporting documentation was offered, and it appears that the criminal charges were dismissed. In contrast, O.S.'s detailed interview statements regarding the April incidents were supported by contemporaneous police reports and respondent only offered general, implausible denials.

In the interview, O.S. stated that respondent was her ex-boyfriend, their relationship ended prior to 2012, and she had a Family Court order of protection against him in 2013. She recalled that respondent was a passenger in a car parked outside her home on March 16, 2013. O.S.'s friends, including her boyfriend, argued with respondent, who appeared intoxicated.

According to O.S., one of her friends "pushed" respondent out of the car. Respondent fought with her friends. After O.S. and her friends got into their car, respondent broke one of the car's window with his head and pulled O.S.'s boyfriend from the car. It is unclear from the interview, but it seems that the police took both her boyfriend and respondent into custody. O.S. said that it may have looked to the police that respondent, who was bleeding, was an assault victim (Pet. Ex. 14).

Respondent conceded that he was in front of O.S.'s home, but he said that she only had a limited order of protection that barred him from calling her (Tr. 189, 191). He testified that he was in a friend's car and it was the friend's idea to park in front of O.S.'s house. Respondent told his friend not to park there because "I know this woman. She's trying to get me in trouble" (Tr. 190). According to respondent, he was the victim of an assault and the criminal charges had been dismissed (Tr. 151-52, 187-88).

Petitioner offered no police reports or other court documents regarding the March 2013 arrest, apparently because the record was sealed after charges were dismissed. Notably, respondent was not arrested for contempt, which suggests that he was not accused of violating an order of protection that day. Moreover, O.S.'s description indicated that respondent was not the initial aggressor. Based on her interview, it appears that one or more of her friends pushed respondent out of a car. I did not credit respondent's remarkable claim that he protested when his friend happened to park on the same block as O.S.'s residence. And the allegation that he smashed a car window was similar to conduct that he engaged in a few months later in Virginia. However, petitioner's uncorroborated hearsay evidence fell short of proving that respondent committed the charged crimes in March 2013. *See Dep't of Correction v. Silverman*, OATH Index No. 249/14 at 4-6 (Nov. 27, 2013) (dismissal of disciplinary charges recommended where criminal charges had been dismissed and agency's case rested on uncorroborated unsworn hearsay with "very little detail").

Petitioner offered more compelling evidence regarding respondent's later harassment of O.S.. In the interview she described obtaining a Family Court order of protection after respondent called her cell phone twenty times a day. She specifically recalled that respondent phoned her on April 1, 2013, and threatened to kill her. A few days later, he called and mentioned the phone number in Botswana where O.S.'s son lived with relatives. O.S. described

other threats that respondent made about her son. She noted that respondent was usually intoxicated when he made such phone calls (Pet. Ex. 14).

According to a police report and criminal court complaint, respondent was arrested on April 8, 2013, for criminal contempt and aggravated harassment after he phoned O.S. on April 1, 2013, and said, "Fuck you bitch I am going to kill you" (Pet. Exs. 15, 16). The reports indicated that respondent called O.S. again on April 6, 2013, and referred to her son's name and phone number. The police reports confirmed that there was a Family Court order of protection barring respondent from contacting O.S. (Pet. Ex. 16).

Respondent testified that O.S. was a "vengeful woman" who was "out to get" him (Tr. 150, 154). Though their relationship ended years ago, she kept trying to get respondent arrested and threatened to get him fired from his job (Tr. 150, 155). He also opined that the District Attorney's office did not "have a case" because he was offered the chance to plead guilty to disorderly conduct, which is a violation rather than a criminal offense (Tr. 152-53).

O.S.'s detailed interview, corroborated by contemporaneous reports, proved the charges. On the audio of the interview, O.S. did not sound like a jilted lover, as described by respondent. She sounded like a frightened victim of harassment. Her claim that respondent made threatening calls while intoxicated were consistent with his concession that he did a lot of "stupid things" in early 2013 due to a drinking problem. And respondent conceded that the Family Court order of protection barred him from calling O.S..

There is also a nexus between respondent's conduct and his fitness to work for petitioner. As its name implies, the agency's mission is to protect children. To accomplish that goal, agency representatives routinely appear in Family Court. Repeatedly ignoring a Family Court order of protection and threatening a mother and her child are wholly at odds with the agency's mission. This charge should be sustained.

Offensive and Abusive Language Directed at an Agency Employee (Complaint 66053-523-004)

Petitioner alleged that respondent engaged in discourteous and inconsiderate conduct in January 2014, when he sent an email to agency attorney referring to that attorney as "an asswipe" and instructing him to "fuck himself" (ALJ Ex. 1).

Petitioner relied on an affirmation from an attorney in its Employment Law Unit. The attorney reported that he provided discovery to respondent's union representative during an

informal conference on December 31, 2013. On January 2, 2014, the attorney received an email stating, "Go fuck yourself. U asswipe. I am curious as to what you were saying behind my back with my union rep" (Pet. Ex 10). Respondent's name, address and phone number are at the bottom of the email; the email refers to the conversation that the attorney had with respondent's union representative; and the message was from the same Yahoo.com email address that respondent used to contact authorities in Virginia (Pet. Ex. 10).

Respondent conceded that his email address was on the message, but he denied sending the message and said that his email account may have been hacked (Tr. 195-96, 199).

Based on the timing and contents of the email, as well as the other evidence connecting respondent to the email address, petitioner proved that respondent sent the offending message. I did not credit respondent's general denial and unsupported speculation that his email account had been hacked. This charge should be sustained.

FINDINGS AND CONCLUSIONS

1. Petitioner proved that respondent committed five crimes in Virginia, as alleged in Complaint 66053-523-003.

2. Petitioner proved that respondent was AWOL for more than six months, as alleged in Complaint 66053-523-005.

3. Petitioner proved that respondent failed to provide required notifications of the circumstances of his Virginia arrest and convictions, as alleged in Complaint 66053-523-003.

4. Petitioner proved that respondent violated a Family Court order of protection, and committed the crimes of criminal contempt and harassment in April 2013, as alleged in Complaints 66053-523-001/002, Charge I, Specification II.

5. Petitioner failed to prove that respondent committed the crimes of assault, criminal mischief, menacing and harassment in March 2013, as alleged in Complaint Complaints 66053-001/002, Charge I, Specification I.

6. Petitioner proved that respondent used disrespectful and insulting language in an email to an agency attorney, as alleged in Complaint 66053-523-004.

RECOMMENDATION

Upon making these findings, I requested and reviewed a summary of respondent's personnel history. Petitioner hired respondent in 2007. He has no prior disciplinary history. His recent performance evaluation generally rated his work as very good and prior evaluations rated his work as good. Petitioner now seeks termination of respondent's employment (Tr. 208). Emphasizing that he has a bachelor's degree, he did not cause problems during working hours, and he has no contact with children at work, respondent asked for a lesser penalty (Tr. 148, 204).

Though progressive discipline is preferred, termination of employment is appropriate for undependable employees who commit crimes or endanger the well-being of others. *See Admin. for Children's Services v. Rios*, OATH Index Nos. 1687/06 and 1985/06 at 9 (Nov. 1, 2006) (termination of employment recommended for motor vehicle operator who, among other things, was arrested for possession of stolen license plates); *Admin. for Children's Services v. Solomon*, OATH Index No. 304/06 at 10 (May 15, 2006) (termination of employment recommended where clerical associate did not notify agency of her arrest after she tried to slash a person with a box cutter, submitted a fraudulent medical note, and had poor attendance); *Human Resources Admin. v. Deas*, OATH Index No. 616/88 (Mar. 24, 1989), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 90-79 (Oct. 1, 1990) (termination of employment upheld where employee had poor attendance and threatened a supervisor).

There are multiple grounds for termination of respondent's employment. His long-term AWOL, alone, justifies such a penalty. He has not worked since November 2013. Such unauthorized absence is a fundamental form of misconduct which impedes agency operations. *Dep't of Sanitation v. Moore,* OATH Index No. 1035/10 at 5 (Feb. 2, 2010) (termination for AWOL lasting over six months); *see also Dep't of Correction v. Toujague,* OATH Index No. 298/10 at 10 (Jan. 21, 2010) (termination for two month AWOL and three instances of being out of residence). Mr. Beck testified that respondent's unit processes $2.8 billion in payments a year and respondent's absences put an additional burden on his co-workers (Tr. 57, 62-63).

The crimes committed by respondent – including acts of violence and endangering an infant in Virginia and threatening a mother and her child in New York – are particularly troubling. Even though the acts took place off-duty and respondent may not have contact with children at his job site, his conduct was antithetical to the agency's mission. Moreover, respondent's unpredictability gives his supervisors good reason to be concerned about workplace

safety. Respondent's offensive email and failure to give notice of the circumstances of his arrest or conviction were lesser acts of misconduct, but they further demonstrate his unreliability.

As Mr. Beck and Ms. Persaud put it, respondent is unsuitable for employment with the agency and he cannot be trusted (Tr. 62, 86-87). Based on the evidence presented at the hearing, I agree with those assessments. Accordingly, I recommend termination of his employment.

Kevin F. Casey
Administrative Law Judge

August 27, 2014

SUBMITTED TO:

GLADYS CARRIÓN
Commissioner

APPEARANCES:

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Attorney for Petitioner

M. H.
Respondent