Dep't of Sanitation v. Alston

OATH Index No. 1512/15 (Sept. 21, 2015), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2016-0064 (Mar. 29, 2016), **appended**

Evidence established that respondent has been absent without leave from September 4, 2014 to the present. Termination of employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
- against -
BRENDA ALSTON
Respondent

REPORT AND RECOMMENDATION

SUSAN J. POGODA, *Administrative Law Judge*

Petitioner, the Department of Sanitation ("Department") brought this disciplinary proceeding under section 75 of New York's Civil Service Law against respondent, Brenda Alston, a sanitation enforcement agent ("SEA"). Petitioner alleged that respondent has been continuously absent without leave ("AWOL") since September 4, 2014, in violation of section 1.4 of the Department's Code of Conduct, General Order No. 2002-06 (Mar. 1, 2002).

A hearing was conducted on May 20, 2015. Petitioner relied on the testimony of Lieutenant Pascall, and offered documentary evidence. Respondent testified on her own behalf, presented the testimony of SEA Milan and offered documentary evidence.

For the reasons below, I find that petitioner proved the charges and respondent's proffered defenses are lacking in merit. I recommend that respondent's employment be terminated.

ANALYSIS

Respondent has been employed as an SEA since 2005. Her duties include patrolling and investigating violations of the Department's health and safety codes (Tr. 206).

There is no dispute that respondent has been AWOL from her job since September 4, 2014, the day she was required to report to her new assignment (Tr. 99, 101-102, 109, 215; Pet. Ex. 12).

On June 4, 2014, a Department Wide Anti-Corruption Plan ("Plan") to reassign SEAs was introduced to all zone coordinators. The Plan was designed to mitigate or eliminate corruption risks that SEAs and supervisors face in the field by rotating them to different zones, to reduce the likelihood of establishing entrenched corrupt relations with residents and commercial business owners in the City of New York (Tr. 31, 58; Pet. Ex. 3).

A process was set forth in the Plan which required the approximately 157 SEAs involved to submit a request for transfer form ("DS-87"). The form required each SEA to choose three different work locations, a borough, and shift. An employee could also submit an interview request form ("DS-380") for personal hardship consideration. Both forms were to be submitted to Deputy Director of Enforcement Burke by Monday, June 30, 2014 (Pet. Ex. 1(a) (b) (c)).

The Plan contemplated that the SEAs would be assigned to a zone with seniority as a deciding factor, subject to the review and approval by the Deputy Director of Enforcement in conjunction with the Deputy Chief and Assistant Chief of Enforcement (Pet. Ex.3).

Lieutenant Pascall, who was responsible for assigning, supervising, and monitoring the SEAs in the Department's Brooklyn Enforcement zone, testified that the SEAs were first notified of the Plan procedures at roll call on June 5, 2014 (Tr. 25, 52). It was undisputed that respondent, who was assigned to the Brooklyn zone, was present and refused to sign the DS-57 daily sign-in sheet and take the transfer forms (Tr. 41, 53-54; Pet. Ex. 2(a)). The SEAs were notified again of the Plan at the June 10 roll call and repeatedly until the last day prior to the June 30 deadline (Tr. 54, 66, 70, 75). The Plan was also posted on the Department bulletin board (Tr. 57).

It was undisputed that respondent failed to submit a DS-87 listing three separate work locations and/or a DS-380 to be interviewed for a hardship by the June 30, 2014 deadline (Tr. 54-55, 81-82).

At a July 9, 2014 meeting, Lieutenant Pascall gave respondent a direct order to fill out the DS-87 and a DS-380, if applicable and told respondent if she submitted the form with three different work locations then the form would be accepted (Tr. 210). Respondent refused to fill out the forms even though she was aware of the Plan and that transfers of SEAs might happen (Tr. 207). Respondent said that she did not ask to be transferred, she did not have three locations where she wanted to work and with her seniority she should be able to stay in the Brooklyn zone (Tr. 55-56, 210-211). Lieutenant Pascall and Captain Nieves, who was also present at the meeting, wrote contemporaneous statements consistent with Lieutenant Pascall's testimony (Pet. Ex.2(d)(e)).

Respondent failed to submit any proper DS-87 and/or DS-380 prior to the Plan's finalization on August 21, 2014.

SEAs were notified of their new assignments at roll call that day. Respondent was assigned to the 9:00 a.m - 5:00 p.m. tour in the Bronx zone (Tr. 81, 212; Pet. Ex. 6(b)).

On August 28, 2014, Deputy Director Burke ordered respondent to report to her new assignment at the Bronx zone at 9:00 a.m. on August 31, 2014.[1] Respondent replied that she understood the order when it was read at roll call and was aware she would face disciplinary charges if she did not follow the order assigning her to the Bronx zone (Pet. Ex. 5). Respondent failed to report to her assigned location on September 4, 2014 as directed (Tr. 81-82, 101-102, 212).

SEA Milan, a nine year employee at the Department testified that prior to the Plan's implementation he filled out a DS-87 choosing only one work location. His DS-87 was rejected (Tr. 128, 189, 90). Under the Plan, SEA Milan's work location was changed from Queens to Manhattan (Tr. 80, 90, 191). SEA Milan reported to his new work location as required (Tr. 81, 196-197).

On August 28, 2014, a Step I grievance was filed on behalf of the Communications Workers of America, Local 1182 ("Union") and respondent with the NYC Office of Labor Relations ("OLR") alleging that the Department transferred respondent from her work location in the Brooklyn zone to a work location in the Bronx zone in violation of the Traffic Enforcement Agent Contract and the Department's Code of Conduct (Pet. Ex. 10). The Step I

[1] Due to prior approved leave, respondent was to report to her new work location on September 4, 2014.

grievance was denied as were the Step II and III grievances. SEA Milan filed similar grievances, which were also denied (Tr. 196 -197, 242-243; Pet. Exs. 8, 9).

On December 18, 2014, after the Plan was implemented, and after working several months at his new assignment, SEA Milan requested a transfer to the Brooklyn zone (Tr. 82-83, 93, 192-193; Pet. Ex. 10A). Lieutenant Pascall testified that the transfer was granted on March 19, 2015, based on a vacancy in the Brooklyn zone, no other SEA requested the transfer and because SEA Milan reported to his new work location under the Plan (Tr. 93, 169, 175; Pet. Exs.10 (a), 11).

On January 5, 2015, the Union, on respondent's behalf, submitted a DS-87 transfer request to the Department seeking respondent's transfer back to the Brooklyn zone (Tr. 94, 99; Pet. Ex. 10(b)). Since respondent failed to report to the Bronx zone for more than three months and had not been evaluated by the Department's clinic to determine if she could be reassigned to the zone, her request was not considered (Tr. 99-102). Lieutenant Pascall testified that had respondent reported to her assignment under the Plan, the transfer request would have been considered (Tr. 102- 103.)

As of the date of this hearing, respondent has not reported to her assignment in the Bronx zone (Tr. 99, 102, 111, 113-114, 117, 246; Pet. Exs.12, 13).

Petitioner alleged that respondent has been continuously AWOL since September 4, 2014 without authorization, in violation of the Department's Code of Conduct section 1.04 which provides: "Employees may not be absent without authorization" (ALJ Ex. 1). Respondent admits she has not reported to work but claims she was justified in refusing to comply with the order to report to the Bronx zone.

Respondent argues that her seniority status entitled her to the work assignment she wanted in the Brooklyn zone (Tr. 229). Respondent is mistaken. The assignment of personnel within a title is within the discretion of the appointing authority. Charter § 1102; Admin. Code § 12-307(b); *Dep't of Buildings v Lamitola,* OATH Index No. 871/12 at 11 (Mar. 5, 2012); *Transit Auth. v. Dowd*, OATH Index No. 247/98 at 6 (Oct. 1, 1997); *Dep't of Parks & Recreation v. Baugh*, OATH Index No. 249/85 at 6 (Oct. 11, 1985), *aff'd*, 160 A.D.2d 617 (1st Dep't 1990). *See Ferreri v. New York State Thruway Auth.*, 62 N.Y.2d 855 (1984) (order to work overtime was not clearly beyond the power of management).

Once a directive has been given, an employee must abide by the principle of "obey now, grieve later." This means that if respondent disagreed with the order assigning her to the Bronx

zone her recourse was not to refuse to go to work but to obey the order and dispute the propriety of that order by going through the grievance process. *See Ferreri,* 62 N.Y.2d at 857; *Health & Hospitals Corp. (Queens Health Network) v. Smith,* OATH Index No. 2019/08 at 4 (Oct. 17, 2008). There are only a few exceptions to the "obey now, grieve later" principle, including orders: (1) that are clearly in excess of the agency's authority under the collective bargaining agreement; (2) that are unlawful; and (3) that would threaten the health or safety of any person if followed. *Smith*, OATH Index No. 2019/08 at 4.

Respondent went through the grievance process alleging that her transfer violated the Union contract and was unlawful. The grievances were denied (Pet. Ex. 8).

Respondent claims that her assignment to the Bronx zone posed a hardship for her even though, per the Plan procedures, she never submitted a DS-380 to the Department requesting a hardship interview (Tr. 212-213). Respondent testified that the transfer would increase her commuting time and there was no reason for her to drive more than 20 minutes to work or outside the borough where she lived (Tr. 210, 231). No evidence was presented that a transfer to the Bronx zone would be an imminent threat to respondent's health or safety.

Respondent failed to sustain her burden in proving that any of the narrowly defined exceptions exempted her from complying with the Department's unambiguous and clear order to report to the Bronx zone. *Health & Hospitals Corp. (Coler-Goldwater Hospital) v. Hinkson,* OATH Index. No. 163/04 at 4 (Nov. 21, 2003); *Health & Hospitals Corp. (Bellevue Hospital Ctr.) v. Tanvir,* OATH Index No. 797/10 at 6 (Dec. 17, 2009).

Moreover, respondent claims that her reassignment to the Bronx zone was discriminatory and punitive because she speaks up and challenges the rules (Tr. 224-225). This tribunal has stated that a respondent may not avail herself of a defense of selective enforcement in administrative trials. *Human Resources Admin. v. Ali*, OATH Index No. 2380/09 at 3 (July 20, 2009). Such a defense, if based on "constitutionally suspect criteria," may be raised only upon review of an adverse administrative determination. *See Dep't of Sanitation v. Yovino*, OATH Index No. 1209/96 at 3-4 (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). And even if it was a defense at this tribunal, there was no credible evidence of selective enforcement here.

Respondent alleges that dismissal of the charges is mandated pursuant to the legal doctrines of condonation and waiver. Respondent claims that the Department failed to follow its

own rules and procedures under the Plan by allowing three SEAs, one with lesser seniority, to list one work location on the DS-87, were assigned to that location and were not subject to discipline, while charges were filed against her (Tr. 226-227, 262). Under this principle, an agency may not lead an employee into believing that her conduct will not be considered a rule violation and then reverse its policy and seek to have the employee disciplined. *See Fahey v. Kennedy*, 230 A.D.156 (3d Dep't 1930); *Law Dep't v. Coachman*, OATH Index No. 1370/00 at 8 (June 13, 2000), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 01-13-SA (Apr. 11, 2001); *Dep't of Parks and Recreation v. Wilson*, OATH Index No. 398/91 at 3-4 (May 3, 1991); *Dep't of Sanitation v. Kaplan*, OATH Index No. 035/15 at 3 (Sept. 18, 2014).

In this case, respondent is being charged with being AWOL and not for any other misconduct or failing to fill out forms properly. There was no evidence that being AWOL would not subject an employee to discipline or that the Department regularly accepted employees being AWOL. In fact, at the August 28 meeting, respondent stated that she was aware she would face disciplinary action if the order regarding new assignments was not followed (Pet. Ex. 5). The condonation and waiver defenses are inapplicable in this case.

Accordingly, I find that petitioner has established that respondent was absent without authorization from September 4, 2014 to the present and that respondent's defenses are without merit.

FINDING AND CONCLUSION

1. Respondent has been absent without leave from September 4, 2014 to the present in violation of section 1.4 of the Department's Code of Conduct, General Order No. 2002-06 (Mar. 1, 2002).

RECOMMENDATION

Upon making these findings, I requested and reviewed an abstract of respondent's personnel history for purposes of recommending an appropriate penalty. Respondent was appointed as an SEA I in 2005, and promoted to SEA II in 2007. She has two prior disciplinary matters.

In 2013, respondent accepted a 7 day penalty for 4 acts of insubordination and failing to be in uniform at roll call on 13 occasions. In 2014, Administrative Law Judge John B. Spooner recommended respondent be suspended for 32 calendar days for 7 sustained acts of misconduct ,

including failure to obey direct orders and refusing to accept an assignment to drive a van. *See Dep't of Sanitation v. Alston,* OATH Index No. 473/15 at 14-15 (Dec. 4, 2014). In the Report and Recommendation, Judge Spooner warned respondent that any further acts of misconduct might result in her termination. *Alston,* OATH Index No. 473/15 at 14-15. Despite this warning, respondent refused to report to her new assignment and has been AWOL.

Respondent's evaluations from 2009 to 2011 rated her as unsatisfactory due to her lateness and absences. In 2012, she was also rated as unsatisfactory for attendance and punctuality and for failing to follow Department rules. In 2013, she was rated as unsatisfactory for absences' and for failing to accurately complete forms. Respondent wrote on both the 2012 and 2013 evaluations that she was filing grievances, although there is no indication that such grievances were filed or that the evaluations were amended. These unsatisfactory evaluations demonstrate a recurring pattern of attendance and insubordination issues which I have considered in my analysis of a recommended penalty.

The Department seeks termination of respondent's employment. Respondent argues mitigating circumstances warrant no penalty or a penalty short of termination. I find no mitigating circumstances that justify respondent's failure to report to work as directed.

Respondent's unauthorized absence since September 4, 2014 is a particularly serious form of misconduct that interferes with the agency's mission. *See Human Resources Admin. v. Agakpe,* OATH Index No. 318/15 at 9 (Nov. 7, 2014). Respondent's refusal to report to work, by itself, is grounds for termination of employment. *See Human Resources Admin. v. Griffin,* OATH Index No. 941/12 at 16 (May 10, 2012), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 12-52-SA (Oct. 26, 2012) (termination of employment recommended for caseworker who went AWOL after refusing to report to a new location); *Human Resources Admin. v. Shehid,* OATH Index No. 1603/05 at 4 (Aug. 26, 2005) (termination of employment recommended for staff analyst who went AWOL after refusing to report to a new location); *see also Human Resources Admin. v. Turnage,* OATH Index No. 538/12 at 2 (Dec. 14, 2011) (termination of employment recommended due to employee's long-term absence without leave); *Health and Hospitals Corp. (Bellevue Hospital Ctr.) v. Tanvir,* OATH Index No. 797/10 at 9 (Dec. 17, 2009) (termination of 20 year employee with no disciplinary record for refusing to accept assignments and being AWOL more than 9 months).

In light of respondent's escalating disciplinary history, the seriousness of the present charges, her history of misconduct and other acts of unprofessional behavior, evidence supporting respondent's attempt to dictate the assignment that she will accept, her continued refusal to adhere to Department rules and procedures including testifying if given the opportunity she would still submit a DS-87 listing only the Brooklyn zone leaves no room for any alternative but her dismissal (Tr. 224). *Strokes v. Albany*, 101 A.D.2d 944 (3d Dep't 1984); *Transit Auth. v. Dowd,* OATH Index No. 247/98 at 6 (Dec. 1, 1997); *Bd. of Education v. Green,* OATH Index No. 820/90 at 16-18 (July 13, 1990); *Dep't of Buildings v. Lamitola,* OATH Index No. 871/12 at 12 (Mar. 5, 2012).

Despite the imposition of several recent and significant penalties and clear warnings, respondent has not modified her conduct. Respondent's failure to report to work since September 4, 2014, demonstrates total disregard for her fellow colleagues which necessarily required them to not only do their own work but hers as well.

Accordingly, I recommend termination of respondent's employment. The Department is entitled as a public employer to hire someone ready and willing to perform the duties that respondent has essentially abandoned.

Susan J. Pogoda
Administrative Law Judge

September 21, 2015

SUBMITTED TO:

KATHRYN GARCIA
Commissioner

APPEARANCES:

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Attorney for Respondent

THE CITY OF NEW YORK
CITY CIVIL SERVICE COMMISSION

In the Matter of the Appeal of
BRENDA ALSTON
Appellant
-against
DEPARTMENT OF SANITATION
Respondent

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

CSC Index No: 2016-0064

DECISION

BRENDA ALSTON ("Appellant") appealed from a determination of the Department of Sanitation ("DSNY") finding Appellant guilty of incompetency and/or misconduct and imposing a penalty of termination following disciplinary proceedings conducted pursuant to Civil Service Law Section 75.

The Civil Service Commission ("Commission") heard arguments from the parties on March 3, 2016.

The Commission has considered the arguments presented on this appeal, and reviewed the record of the disciplinary proceeding. Based on this review, the Commission concludes that there is sufficient evidence in the record to support the findings of fact and the conclusions of law, and that the penalty is appropriate.

Therefore, the final decision and penalty imposed are hereby affirmed.

NANCY G. CHAFFETZ, COMMISSIONER
CHAIR

RUDY WASHINGTON, COMMISSIONER
VICE CHAIR

CHARLES D. MCFAUL, COMMISSIONER

Date: March 29, 2016