

Dep't of Environmental Protection v. Dorste

OATH Index No. 2686/15 (Oct. 26, 2015)

Evidence failed to show that respondent engaged in conduct prejudicial to good order and discipline when he complained to a supervisor about having to work on a holiday and later, with his supervisor's consent, repeated his remarks to co-workers.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Petitioner
- against -
DONALD DORSTE
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner, the Department of Environmental Protection, brought this proceeding under section 75 of the Civil Service Law, alleging that respondent, environmental police officer Donald Dorste, engaged in conduct prejudicial to good order and discipline when he said that a supervisor was "screwing" him by preventing him from taking off on Christmas (ALJ Ex. 1).

At trial on October 9, 2015, petitioner relied on documentary evidence, including a statement written by respondent, and the testimony of two supervisors, Sergeant Shamro and Lieutenant Beers. Respondent relied on the testimony of his co-worker, Officer Galli.

For the reasons below, I recommend dismissal of the charges.

ANALYSIS

Background

The charges stem from a December 2014 dispute regarding the work schedule for environmental police officers at one of the Department's precincts in upstate New York. On December 4, respondent submitted a request to take off on Christmas Day. Due to staffing needs, respondent's supervisors denied his request, but they told him that he could take the day

off if he found another officer to cover his shift (Lieutenant Beers: Tr. 40-41). On December 5, respondent sent an e-mail to Lieutenant Beers, complaining that another officer, with less seniority, had received permission to take the day off (Pet. Ex. 3).

In two specifications, petitioner alleged that respondent engaged in conduct prejudicial to good order and discipline, by using inappropriate language when he later discussed this matter on December 18. The first specification alleged that respondent complained that his immediate supervisor, Sergeant Shamro, was “screwing him over,” or words to that effect (ALJ Ex. 1). According to petitioner, respondent made that remark directly to Sergeant Shamro and, shortly afterwards, repeated the comments to co-workers. The second specification alleged that respondent also said that he was “not going to screw” his co-workers, or words to that effect (ALJ Ex. 1).

Specification 1

The material facts concerning the first specification are not in dispute. Sergeant Shamro credibly testified that, while leaving work on December 18, he saw respondent in the precinct’s first floor gym (Tr. 14). Both men were in civilian clothing (Tr. 26). Sergeant Shamro told respondent that Lieutenant Beers had denied his request to take off on Christmas Day, unless he found someone else to cover his shift (Tr. 14, 26).

Sergeant Shamro testified that there was a brief conversation, which he could not recall, and respondent said, “Hey, let’s go upstairs and I’ll see with a show of hands who thinks you are screwing me in not getting Christmas off” (Tr. 14, 26-27). In response, Sergeant Shamro told respondent, “Okay, let’s go upstairs” (Tr. 35).

They went upstairs and respondent said to a group of four co-workers (a sergeant, two officers, and a clerk) in the lunch room, “Who here with a show of hands thinks that [Sergeant Shamro] is screwing me for Christmas off?” (Tr. 14). Though he was initially “stunned,” Sergeant Shamro replied, “No, I did not” (Tr. 14). Sergeant Shamro also told respondent that, before recommending approval of a co-worker’s request, he had asked Lieutenant Beers whether anyone else had requested off for Christmas Day (Tr. 14). In addition, Sergeant Shamro told respondent, “The only thing I messed up on is I should have probably waited a day and went directly to [respondent] to say, Hey, do you plan on taking Christmas off” (Tr. 14). According to

Sergeant Shamro, he may have also said “I screwed up but there’s nothing I can do about it” (Tr. 15).

The next day, Sergeant Shamro noted in a handwritten memo that, during the initial conversation on the first floor, respondent said that he (Shamro) was “always trying to screw him” (Tr. 27-28; Pet. Ex. 1). In a typed memo, prepared a few days later, Sergeant Shamro wrote that respondent had asked those present in the lunch room whether they thought that the sergeant was “screwing me over for Christmas” (Tr. 28; Pet. Ex. 2).

Officer Galli, who has worked as respondent’s partner for nearly 12 years, was in the lunch room on December 18, and heard the disagreement about the holiday scheduling (Tr. 47-48, 53). He recalled that respondent asked all of those present in the lunch room whether he was “being screwed for the holiday vacation” (Tr. 58). Sergeant Shamro said, “I screwed up the schedule” and respondent replied, “Oh, you screwed up? Fix it” (Tr. 58-59).

Respondent did not testify. Petitioner offered, without objection, a three page typewritten statement that he submitted at an agency conference regarding this matter (Tr. 65). In the statement, respondent described his background, which included 21 years in the military, and stated that he appreciated the need for order and discipline (Pet. Ex. 6). He asserted that, because vacation and holiday leave was ordinarily based on seniority, he contacted his union and other supervisors about the holiday scheduling rules (Pet. Ex. 6). When respondent saw Sergeant Shamro on the first floor on December 18, he asked, “How many rules are you willing to break to screw me over?” (Pet. Ex. 6). Sergeant Shamro replied, “You think I’m out to get you. It’s not me” and respondent said, “Let’s go upstairs and ask everyone if you’re being fair” (Pet. Ex. 2). They went upstairs, where respondent asked for a show of hands and said “Who thinks this is fair and who thinks he is screwing me” (Pet. Ex. 6 at 2). Respondent also asked Sergeant Shamro to fix his mistake (Pet. Ex. 6 at 2).

A verbal disagreement or expression of dissatisfaction with a supervisor is not always misconduct, even in a paramilitary setting. *See Health and Hospitals Corp. (Jacobi Medical Ctr.) v. Solomon*, OATH Index No. 334/02 at 9 (Jan. 25, 2002); *Dep’t of Correction v. Bond*, OATH Index No. 1589/97 (Oct. 16, 1997), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 99-59-SA (June 3, 1999). Determining whether a particular remark constitutes misconduct requires an objective assessment of all the circumstances, including the substance, tone, and context of the remarks, and whether the employee used profanity, threats, showed insolence, or disrupted

operations. *Solomon*, OATH 334/02 at 8-10 (officer's comments to a supervisor, "You don't even know the tour and you're signing my books?" and "Do not stand on my post . . . because I don't want anybody to get the wrong idea and think that I am fraternizing with you," were inappropriate, but not misconduct); *Dep't of Probation v. James*, OATH Index No. 535/90 at 7 (Feb. 6, 1990) (barging into an office and speaking loudly, without more, is not misconduct); *cf. Transit Auth. v. Ryan*, OATH Index No. 1037/99 at 9, 11-12 (Jan. 28, 1999) (face-to-face argument with a supervisor about vacation scheduling was not misconduct, but discussion with a second supervisor where employee called the first supervisor a racist bully who needed to "grow up" and suggested that the second supervisor was an "ass kisser" for following orders, was misconduct).

There were some minor discrepancies about what exactly respondent said to Sergeant Shamro during their one-on-one conversation on the first floor. However, I find that Sergeant Shamro's handwritten memo was the most accurate version of events. It was the first memorialized account of the incident, written shortly after it occurred. Because Sergeant Shamro wrote the note when his memory was fresh, I gave it more weight than his subsequent typed memo or respondent's memo, which was written at some later, unspecified date. Based on Sergeant Shamro's handwritten memo, I find that, when they spoke on the first floor, respondent initially accused Sergeant Shamro of always trying to "screw him" (Pet. Ex. 1).

"Screw" has many different meanings, depending on context. In some situations, it would be an obscenity, but that's not how respondent used it. Rather, he used the term to state his belief that he was improperly denied a day off. This is a common usage by those who feel that they have been wronged. *See* UrbanDictionary.com (defining "screwed over" as "deliberately putting someone in an unfavorable situation that he/she would not like"); Steinbeck, *In Dubious Battle* at 70 (Penguin ed., 1992) (available at books.Google.com) ("What you want to strike for? Cause we're gettin' screwed, that's why"); Terkel, *Working: People Talk About What They Do All Day and How They Feel About What They Do* (The New Press ed., 2011) (available at books.Google.com) ("I've been screwed many times myself because I've helped other people. They've turned around and just kicked me in the head").

Respondent's remarks were not loud, protracted, or profane. There was no evidence that he raised his voice or used an inappropriate tone. And Sergeant Shamro acknowledged that he has used rougher language at the workplace when he called an officer an "asshole" (Tr. 32).

Officer Galli testified that he and other colleagues put money in a “swear jar” whenever they used foul language at work, but nobody would have to put money in the jar for saying “screw” (Tr. 49-50).

In short, respondent was upset about having to work Christmas Day. He made a fleeting intemperate remark in a one-on-one conversation with a supervisor. Absent any other aggravating circumstances, this was not misconduct. *See Dep’t of Sanitation v. Montagnino*, OATH Index No. 2174/01 at 19 (Jan. 7, 2002) (sanitation worker’s mild profanity, “why don’t you admit you have a hard on for us,” during a disagreement with a supervisor about work assignment was a routine expression of frustration and not misconduct); *Fire Dep’t v. Donofrio*, OATH Index No. 2042/96 (Oct. 23, 1996) (firefighter who responded to lieutenant with a mild vulgarity, “stop breaking my balls,” while stating his belief that lieutenant was treating him unfairly, did not commit misconduct).

As for the later remarks in the presence of others, the evidence showed that, before going to the lunch room, respondent asked Sergeant Shamro, “Let’s go upstairs to have everyone see if they believe you are screwing me” (Pet. Ex. 1). Sergeant Shamro conceded that he replied, “Okay, Let’s go upstairs” (Tr. 35).

There was no need for Sergeant Shamro to agree to go upstairs. He could have ignored respondent. Or he could have told him that there was nothing to discuss or vote about. He could have told respondent that it was his own fault for not making an earlier request for the day off. Or he could have told respondent to take this issue up with Lieutenant Beers, who was responsible for approving leave requests. He could have told respondent to follow proper grievance procedures and discuss the issue with his union. Sergeant Shamro did none of those things. Instead, he agreed to respondent’s suggestion. Apparently, Sergeant Shamro thought that this was a way to clear up a misunderstanding and tell his side of the story.

Whatever the reason, Sergeant Shamro went along with respondent’s suggestion. Having agreed to “go upstairs” for a show of hands on the question of whether he had “screwed” respondent out of a holiday, Sergeant Shamro should not have been surprised by respondent’s actions. In effect, Sergeant Shamro gave respondent a green light to pose his question to the four co-workers in the lunch room.

Petitioner suggested that Sergeant Shamro went upstairs to the lunch room to sign out for the day because the timekeeping clock was nearby (Tr. 35). But that argument does not

withstand scrutiny. Based on Sergeant Shamro's express agreement to the suggestion to go upstairs, and his later responses to respondent's comments, he welcomed the exchange. Under these circumstances, where respondent announced his intentions in advance and his immediate supervisor agreed to go along, respondent's actions were not misconduct. *See Dep't of Correction v. Silva*, OATH Index No. 2054/99 at 2-3 (Nov. 4, 1999) (dismissal of misconduct charges recommended where correction officer referred to a procedure as "retarded," when the comment was made at "an open forum, where the whole purpose of the forum is to vent and to discuss some problems"); *Dep't of Correction v. Laboy*, OATH Index No. 783/96 at 29 (Aug. 12, 1996), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 00-90-M (Aug. 10, 2000) (correction officer's brief disagreement with a supervisor, including comments about being treated like an inmate and protests about the fairness of limits on distribution of union election literature, did not constitute misconduct). Specification 1 should be dismissed.

Specification 2

There was no testimony regarding the second specification. Petitioner alleged that while discussing the scheduling dispute respondent said "No, I'm not going to screw those guys," or words to that effect, on December 18, 2014 (ALJ Ex. 1). None of the witnesses testified about those remarks and Sergeant Shamro did not mention those comments in the report that he wrote the next day.

The only reference to "not screwing" co-workers appeared in Sergeant Shamro's typed report, prepared a few days later (Pet. Ex. 2; Tr. 28). In that report, Sergeant Shamro wrote that he told respondent that "it was brought to my attention and (sic) Officer said he would work for you and you said NO I'm (sic) going to screw those guys" (Pet. Ex. 2). According to Sergeant Shamro's report, respondent did not reply to that comment (Pet. Ex. 2).

Petitioner has the burden of proving its case by a preponderance of credible evidence. *Dep't of Correction v. Hall*, OATH Index No. 400/08 at 2 (Oct. 18, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 08-33-SA (May 30, 2008). Here, the second specification rests solely on a written summary of what some unidentified person told Sergeant Shamro that respondent had supposedly said at some unspecified time or place. Though the strict rules of evidence do not apply at this tribunal, a vague claim based on multiple layers of hearsay and unsupported by any testimony, fell short of proving what was said or the context in which it was said. *See Dep't of*

Correction v. Gritten, OATH Index No. 1116/04 at 5 n.2 (Aug. 2, 2004) (declining to attach any weight to claim based on triple hearsay). Thus, the second specification should be dismissed.

FINDING AND CONCLUSION

Petitioner did not prove that respondent engaged in conduct unbecoming to good order and discipline on December 18, 2014, as alleged in the petition.

RECOMMENDATION

I recommend dismissal of the charges.

Kevin F. Casey
Administrative Law Judge

October 26, 2015

SUBMITTED TO:

EMILY LLOYD
Commissioner

APPEARANCES:

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