Dep't of Transportation v. Harris

OATH Index No. 1531/16 (May 18, 2016), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2016-543 (Nov. 10, 2016)

Petitioner demonstrated that a highway repairer intentionally pushed his supervisor but failed to show that he cursed at him. ALJ recommended that respondent be suspended for ten days.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF TRANSPORTATION
Petitioner
- against -
MAURICE HARRIS
Respondent

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORGNIOTTI, *Administrative Law Judge*

This disciplinary proceeding was referred by the Department of Transportation ("DOT") pursuant to section 75 of the Civil Service Law. Maurice Harris, a highway repairer, is charged with pushing his supervisor and cursing at him in violation of DOT rules (ALJ Ex. 1).

A hearing was conducted on May 4, 2016. The parties submitted documentary evidence. Petitioner called the complaining supervisor and two other supervisors who were present for the disputed incident. Respondent testified on his own behalf and denied the charges. He also called two highway repairers, his union president, and the responding police officer, none of whom were present for the incident, to challenge the reliability of petitioner's witnesses.

Petitioner demonstrated that respondent intentionally pushed his supervisor causing him to stumble but failed to show that he cursed at him. Respondent should be suspended for ten days.

ANALYSIS

Respondent has been a highway repairer for 18 years and repairs, among other things, potholes, chain link fences, and guardrails. At the time of the incident, respondent was assigned

to the 203rd Street yard in the Bronx. There were three highway repairer supervisors in the yard: Mr. Tena, Ms. Palmer, and Mr. Rodriguez. Their supervisor, Mr. George, was also present.

It was undisputed that Mr. Tena and Ms. Palmer have had prior issues with respondent and two of his witnesses, Mr. Valentine and Mr. Saxon, and that this has resulted in on-going friction among them (Tr. 23-27, 38, 67, 120-24, 246-48). Mr. DeMartino, the president of respondent's union, testified that he has complained to DOT about how Mr. Tena and Ms. Palmer supervise employees and handle discipline (Tr. 152-58). Respondent has not had any issues with Mr. Rodriguez (Tr. 76, 124). As a result of this incident, respondent was transferred to another yard (Tr. 103-04).

On Saturday December 5, 2015, at approximately 6:00 a.m. Mr. Tena entered the highway repairers' locker room to distribute vehicle keys for the day's assignments. Mr. Tena testified that he "underhand tossed" a set of keys to Mr. Carter while respondent was standing nearby. The toss "misfired" and the keys landed on a bag that respondent was holding. Mr. Tena immediately apologized and said it was unintentional. Respondent asked, "That's the way we hand out keys now?" Mr. Tena apologized again and started to walk out. According to Mr. Tena, respondent said, "You supervisors think you can do whatever you want." Mr. Tena turned around and said, "Listen, I apologized already. Let me apologize again. Whether you take it or not, I don't care." Mr. Tena walked out of the locker room and went to the supervisors' trailer. Mr. Tena denied cursing at respondent (Tr. 16, 28-30).

Respondent testified that as he was getting dressed, Mr. Tena intentionally hit him on the head with keys. When asked, "Is this the way we hand out keys?" Mr. Tena said, "Oh sorry." Respondent replied, "Instead of being sorry, how about not letting that happen again." According to respondent, Mr. Tena said, "I apologized and I really don't give a fuck if you accept my apology or not." Mr. Tena slammed the door and walked out of the room. Respondent thought the apology was insincere and he felt humiliated (Tr. 106-08, 126-27).

Mr. Valentine testified that he was tying his shoes and saw keys land on the floor. "There was profanity back and forth" and Mr. Tena apologized in a sarcastic way and left (Tr. 133). Mr. Valentine later claimed that only Mr. Tena cursed and explained that respondent was "not really" cursing but was "just defending his right" (Tr. 134, 136-37).

Shortly thereafter, respondent went to the supervisors' trailer and made physical contact

with Mr. Tena inside the trailer door. At issue was whether the contact was an accidental bump or an intentional shove and whether respondent cursed at Mr. Tena when he did so.

At the time of the incident, Mr. Tena, Ms. Palmer, and Mr. Rodriguez were inside the trailer discussing the day's assignments. According to petitioner's witnesses, Mr. Tena was standing with his back to the trailer door, facing Ms. Palmer's desk slightly to the left. Ms. Palmer was behind her desk facing Mr. Tena and the door. Mr. Rodriguez was near Ms. Palmer and was also facing Mr. Tena and the door (Tr. 18, 45, 62-65, 78-81). They agreed that there was enough room for someone to come into the trailer past Mr. Tena (Tr. 18, 46, 72).

Mr. Tena testified that respondent shoved him hard in his back right shoulder and said, "Get the fuck out of the way." He stumbled four or five steps forward (Tr. 17). Ms. Palmer testified that she saw respondent shove Mr. Tena in his back towards her desk and that Mr. Tena stumbled past her desk (Tr. 45). Mr. Rodriguez testified that he saw Mr. Tena's body lunge forward like someone had made contact with him and saw respondent behind him (Tr. 71-72). Neither Ms. Palmer nor Mr. Rodriquez heard respondent say anything to Mr. Tena (Tr. 58, 79).

Respondent testified that he walked to the supervisors' trailer to get his trip sheet and that he was "juggling" his lunch and his workbag in his hands. As he approached the trailer, he could see Mr. Tena standing in the doorway. He claimed that Mr. Tena was facing the door and could see respondent approaching. When respondent walked up the steps, he tried to squeeze through the narrow door and made "body contact" with Mr. Tena by accident. Respondent said, "What you in the doorway for?" and Mr. Tena said "Oh! You assaulted me." According to respondent, Mr. Tena had been told to "stay out of doorways" because of a prior incident. Respondent maintained that he did not see Mr. Tena because there was a corner by the door, there was a "white light," and he did not want to trip and fall. Respondent further claimed that Mr. Tena deliberately stood in the doorway to intimidate him (Tr. 108-15, 120-22, 124-25). Respondent denied cursing at Mr. Tena (Tr. 124) but acknowledged that he never said "excuse me" when he entered the trailer and never apologized for making physical contact with him (Tr. 128-29).

Mr. Tena was upset and loudly claimed that respondent had assaulted him and that he was going to call 911. Ms. Palmer told Mr. Tena to remain calm. Mr. Tena called the police, respondent was removed from the trailer, Mr. George was notified, and Mr. Tena and Ms. Palmer went to the clerk's office (Tr. 17-18, 38-39, 45-46, 61, 72, 80-84, 116-18).

When the police arrived, they spoke with Mr. Tena, Ms. Palmer, Mr. Rodriguez, and respondent. Mr. Tena claimed that he feared for his life because respondent had been involved in a fatal accident of a co-worker. After interviewing everyone and because Mr. Tena had no injuries, the police determined that no criminal offense occurred and that the matter would be handled by DOT. Mr. Tena filed a harassment complaint (Pet. Ex. 2; Tr. 18-22, 46-47, 89-97, 141-44). Respondent was upset that Mr. Tena mentioned the accident that had occurred ten years earlier (Tr. 117-18).

Mr. Rodriguez testified that respondent was on his work crew and they discussed the incident several times that day. According to Mr. Rodriguez, respondent told him that the episode in the locker room where Mr. Tena intentionally threw the keys at him was upsetting and led to the altercation. Respondent also felt that Mr. Tena was blocking the trailer door and Mr. Rodriguez told him that he could have asked Mr. Tena to move. Mr. Rodriguez also advised that if respondent has problems with Mr. Tena he should report them to Mr. George and that physical contact cannot be tolerated (Tr. 74-77, 85-86).

Immediately following the incident, Mr. Tena, Ms. Palmer, Mr. Rodriquez, and respondent prepared written statements and were subsequently interviewed (Pet. Exs. 3-8; Resp. Ex. B). The statements of Mr. Tena, Ms. Palmer, and Mr. Rodriquez were generally consistent with their trial testimony. Respondent's statements differed most notably from his testimony in that he asserted Mr. Tena braced himself in the doorway and leaned his weight on respondent as he tried to enter the trailer. Mr. Santana, a highway repairer who was not called as a witness, also prepared a written statement and was subsequently interviewed (Pet. Ex. 9; Resp. Ex. A).[1]

Petitioner "has the burden of proving its case by a fair preponderance of the 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) (citations omitted).

[1] There was an issue of fact whether Mr. Santana was in the trailer (Tr. 16, 33, 44, 55, 125, 135). Mr. Santana's statements indicate that he observed respondent push Mr. Tena from the front and curse at him. Respondent claimed the inconsistent statement about the push demonstrates that the charges were fabricated and requested a negative inference (Tr. 9-10, 98-99, 160-63). Petitioner stated that Mr. Santana was not called because his testimony would have been cumulative (Tr. 172). Except for respondent's speculation, there was no reason to believe that Mr. Santana would have contradicted his prior statements, or that his testimony would have rendered petitioner's proof unreliable, or that a negative inference would change the outcome of this proceeding. Moreover, respondent could have called Mr. Santana but did not seek leave to do so. Thus, the request for a negative inference is denied. However, Mr. Santana's hearsay statements will not be considered because there is a question about their reliability.

Preponderance has been defined as "the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence." Prince, Richardson on Evidence § 3-206 (Lexis 2008); s*ee also Dep't of Sanitation v. Figueroa*, OATH Index No. 940/10 at 11 (Apr. 26, 2010) (citations omitted). Petitioner sustained one charge but not the other.

To the extent resolution of these charges relied on a determination of witness credibility, this tribunal has looked to witness demeanor, the consistency of a witness' testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness' testimony comports with common sense and human experience in determining credibility. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 4, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998).

Mr. Tena appeared emotionally invested in his story and lacked objectivity in that he overreacted to the situation. Respondent also lacked objectivity, he had a motive to lie to avoid discipline, and his prior statements were inconsistent with his trial testimony. Moreover, the on-going labor-management disputes involving Mr. Tena, respondent, and Mr. Valentine undermined the reliability of their testimony about each other. While Ms. Palmer was also accused of unfairly disciplining highway repairers, she did not corroborate all of Mr. Tena's allegations and was overall a credible witness. Similarly, Mr. Rodriguez was neutral and reliable. He and respondent seemed to have a good relationship and he was not friendly with Mr. Tena and Ms. Palmer (Tr. 60). The police officer and Mr. DeMartino, neither of whom were in the yard during the relevant events, had no personal knowledge about the charged misconduct.

To the extent there was a prior incident in the locker room, resolution of the charges does not require a finding whether Mr. Tena intentionally hit respondent with the keys or whether Mr. Tena and/or respondent cursed at the other. All agree that there was, at a minimum, a verbal dispute in the locker room that generated hard feelings on both sides.

Petitioner alleges that respondent shoved Mr. Tena. Mr. Tena's assertion that respondent intentionally pushed him from behind and caused him to stumble, as corroborated by Ms. Palmer and Mr. Rodriguez, was credible. Respondent's claim that he accidentally bumped into Mr. Tena was not credible. Respondent admitted that he saw Mr. Tena standing by the door when he walked towards the trailer. Respondent, who is about 5' 11'' (Tr. 17), also acknowledged that the trailer doorway was narrow and that he never asked Mr. Tena to step aside so that he could

pass. Unrebutted, credible testimony further demonstrates respondent admitted to Mr. Rodriguez that he was upset about the earlier episode in the locker room and that this is what led to the charged incident. Thus, in light of the prior locker room incident, respondent's failure to ask Mr. Tena to step aside, the narrowness of the doorway, and respondent's deliberate decision to plow through knowing Mr. Tena was standing there, petitioner demonstrated that respondent intentionally pushed Mr. Tena. This misconduct violated DOT's rules concerning creating a disturbance, conduct prejudicial to the good order and discipline of DOT, and conduct tending to bring DOT into disrepute.

Petitioner alleges that respondent cursed at Mr. Tena. Mr. Tena's claim that respondent told him to "Get the fuck out of the way" was not credible. Neither Ms. Palmer nor Mr. Rodriquez heard respondent make this statement. Thus, petitioner failed to demonstrate that respondent cursed at Mr. Tena and this charge should be dismissed.

FINDINGS AND CONCLUSIONS

1. Petitioner demonstrated that respondent intentionally pushed a supervisor as charged.

2. Petitioner failed to demonstrate that respondent cursed at a supervisor.

RECOMMENDATION

Upon making these findings, I obtained and reviewed an abstract of respondent's personnel history for purposes of recommending an appropriate penalty. Respondent has been a highway repairer since 1998. In 2006, respondent was issued a written reprimand for failing to notify his work location that he was unable to report to work. In 2012, respondent was suspended for five days for using inappropriate language towards a supervisor. With the exception of respondent's 2012 evaluation that rated him conditional and noted his poor attitude towards supervisors, other recent evaluations have been either good or very good.

Petitioner seeks a 15-day suspension for the two charges, only one of which was sustained. Among the factors to be considered in determining the proper penalty are: respondent's tenure and prior disciplinary history; the degree of force used, the seriousness of any injuries; and the facts and circumstances surrounding the misconduct.

Penalties for physical altercations in the workplace generally range from ten suspension days for minor infractions to termination for serious or repeated acts of violence. *See, e.g., Health & Hospitals Corp. (Kings County Hospital Ctr.) v. Meyers,* OATH Index No. 1487/09 at 6-8 (Jan. 26, 2009), *aff'd*, NYC HHC Pers. Rev. Bd. Dec. No. 1349 (July 31, 2009) (ten-day suspension for hospital worker, with no prior disciplinary record, who intentionally chest-bumped a colleague, where incident was brief and no injuries resulted); *Human Resources Admin. v. St. Bernard*, OATH Index Nos. 378-79/88 (Jan. 20, 1989), *modified*, NYC Civ. Serv. Comm'n Item No. CD 90-13 (Feb. 16, 1990) (15-day suspension for workers involved in minor altercation of limited duration and no injuries); *Human Resources Admin. v. Harris*, OATH Index No. 484/92 (June 17, 1992) (60-day suspension for aide who struck co-worker in the head and face); *Cantres v. New York City Health & Hospitals Corp.*, 30 A.D.3d 164 (1st Dep't 2006) (termination of aide, with prior disciplinary history, who intimidated and threatened co-workers).

Respondent's 18 years of service and minor disciplinary record are mitigating factors. Moreover, his misconduct was limited, it did not appear that he intended to cause serious injury, and it was provoked by Mr. Tena's earlier conduct in the locker room. On the other hand, respondent engaged in a form of workplace bullying: he came from behind and intentionally pushed his supervisor causing him to stumble.

In light of principles of progressive discipline, respondent's recent misconduct for disrespect towards a supervisor, his long tenure, and the circumstances surrounding the misconduct, respondent should be suspended for ten days. *Health & Hospitals Corp. (Kings County Hospital Ctr.) v. Edinboro*, OATH Index No. 1867/10 (Apr. 28, 2010) (ten-day suspension for respondent who intentionally pushed a swivel chair into another worker); *Meyers*, OATH 1487/09. Respondent must recognize that similar misconduct in the future could result in a substantially higher penalty.

Alessandra F. Zorgniotti
Administrative Law Judge

May 18, 2016

SUBMITTED TO:

POLLY TROTTENBERG
Commissioner
APPEARANCES:

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THE CITY OF NEW YORK
CITY CIVIL SERVICE COMMISSION

In the Matter of the Appeal of

MAURICE HARRIS
Appellant

-against-

DEPARTMENT OF TRANSPORTATION- DOT
Respondent

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

CSC lndex No: 2016-0543

DECISION

MAURICE HARRIS ("Appellant") appealed from a determination of the Department of Transportation - DOT finding Appellant guilty of incompetency and/or misconduct and imposing a penalty of Suspension following disciplinary proceedings conducted pursuant to Civil Service Law Section 75.

The Civil Service Commission ("Commission") heard arguments from the parties on 10/27/2016.

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.

SO ORDERED

Dated: 11/10/2016