

Employees Retirement System v. Murthy

OATH Index No. 2077/17 (Feb. 9, 2018), *modified on penalty*, Agency Dec. (Feb. 16, 2018),
appended

Petitioner proved that respondent, an associate retirement benefits examiner, failed to competently perform her duties by not meeting the unit standard of completing an average of three cases per day, but instead she averaged less than one case per day over a ten-month period. 30-day suspension recommended. Agency imposes a 25-day suspension.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
EMPLOYEES RETIREMENT SYSTEM
Petitioner
-against-
NAGAMANI MURTHY
Respondent

REPORT AND RECOMMENDATION

NOEL R. GARCIA, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, the New York City Employees Retirement System (“NYCERS”), pursuant to section 75 of the Civil Service Law. In its amended section 75 charges, NYCERS alleges that respondent Nagamani Murthy, a benefits examiner, failed to perform her assigned duties properly and efficiently by 1) receiving two unsatisfactory performance evaluations and by 2) failing to complete the required number of daily cases (ALJ Ex. 1).¹ NYCERS contends that the two charges constitute misconduct and/or incompetence under section 75 of the Civil Service Law and violates section D of its Code of Conduct Policy.

Over a three-day trial, petitioner presented the testimony of two supervisors, and also relied on documentary evidence. Respondent testified on her own behalf, and offered the testimony of six coworkers.

¹ Petitioner withdrew charge three of the amended section 75 charges.

For the reasons provided below, I find that the evidence is sufficient to prove the incompetence charge and recommend that respondent be suspended for 30 days.

ANALYSIS

Respondent has worked at NYCERS for 30 years, and holds the title of associate retirement benefits examiner (Tr. 257). At the commencement of her employment, she was assigned to the death benefits division, where she was progressively promoted from a level one to a level three associate retirement benefits examiner (Tr. 257-58). In 2011, respondent was transferred to the retirement calculations unit, where her main duty was to perform calculations that would help determine pension benefits for employees retiring from City employment (Tr. 17, 262). Petitioner alleges that from approximately May 1, 2014, to February 28, 2015, respondent failed to complete the required daily number of cases, and that she received two unsatisfactory performance evaluations within that time period (ALJ Ex. 1).

Petitioner's main witness, Mr. Berkowitz, is the supervisor for the retirement calculations unit (Tr. 16). He testified as to the types of cases handled by the unit, the organizational structure, and respondent's work productivity. His testimony was largely undisputed.

Mr. Berkowitz stated that when an employee chooses to retire, or retires due to a disability, his unit is responsible for determining the retiree's final average salary (Tr. 17, 26-27). This is referred to as a compensation base case ("comp. base") (Tr. 17, 26-27, 78). Mr. Berkowitz explained that determining the final average salary for a retiree who has minimal leave without pay ("LWOP") is a relatively straight-forward calculation (Tr. 49-51).

However, several factors can make a comp. base case time-consuming and complicated. One common factor is where a retiree has used a significant amount of LWOP time (Tr. 49-51). Other factors include whether the retiree's City agency has different types of pay items, the nature of those different payments, and prorated payments over different periods. Some comp. base cases are Tier 1 cases, which also require complex calculations (Tr. 50, 148-50).

The unit also performs a subsequent review of all completed comp. base cases, which are known as revision cases, and performs the calculations for ordinary death benefits ("ODB") (Tr. 17). While ODB and revision cases can be complex, examiners generally complete these types of cases in less time than comp. base cases (Tr. 158).

Mr. Berkowitz stated that the retirement calculations unit is comprised of 27 examiners. There are two titles and four different levels within the unit (Tr. 79). The assistant retirement benefits examiner title is the entry-level position. At this level, recently hired examiners are first trained to perform calculations for standard retirement and disability comp. base cases, including those with a LWOP component. When it is determined that an examiner is proficient with these cases, their training is gradually expanded to include basic calculations for revision and ODB cases (Tr. 19).

Beyond the entry-level position, there are three levels for the associate retirement benefits examiner title. These examiners are mostly reviewers. A reviewer receives a case completed by an assistant examiner to check and approve, as well as to provide feedback on initial calculations. A level one benefits examiner performs reviews but may also perform initial calculations, as needed. A level two benefits examiner performs reviews, but may be assigned to perform the calculations for the unit's more complicated cases, such as Tier 1 comp. base cases. The role of a level three benefits examiner is largely supervisory in nature (Tr. 18-21).

Mr. Berkowitz testified that he is a level three benefits examiner and has been respondent's immediate supervisor since December 2012. As supervisor, he is responsible for managing respondent's workflow, maintaining records of her daily production totals and providing assistance as needed (Tr. 21-22). During the period at issue, Mr. Khaled, the unit's manager and Mr. Berkowitz's supervisor, maintained administrative supervision of respondent, which included preparing her performance evaluations (Tr. 22).

Mr. Berkowitz testified that despite respondent's title as a level three associate retirement benefits examiner, due to her low productivity, her duties have been limited to processing entry-level comp. base cases (Tr. 23). Benefits examiners are expected to complete three cases per day, but respondent has averaged less than one case per day since joining the unit in 2011 (Tr. 33-34, 100, 263). Mr. Berkowitz explained that because respondent never significantly improved her productivity level, he could not assign her higher level work, or have her review the work of other examiners. He stated that while review work is less time-consuming, it carries greater responsibility because the reviewer is "signing off" on the case. However, without first showing proficiency with the comp. base cases, Mr. Berkowitz did not have confidence in respondent's ability to review the work performed by other examiners (Tr. 23).

Petitioner submitted into evidence a voluminous production log and two summary spreadsheets as proof of respondent's low productivity (Pet. Exs. 1, 7, 8). Mr. Berkowitz testified that examiners must report the number of cases they have completed on a daily basis (Tr. 25). The production log details the types and number of cases completed by various examiners (Pet. Ex. 1). The most useful spreadsheet, petitioner's exhibit 8 ("Unit Spreadsheet"), details the cases completed by all 27 examiners in the unit for the relevant time period. These documents established that respondent completed comp. base cases at a significantly lower rate than other examiners who likewise worked on the same types of cases as respondent.

Specifically, the Unit Spreadsheet shows that during the relevant ten-month period, respondent completed 70 comp. base cases and 94 disability comp. base cases. By comparison, during the same time period, the examiner identified as Employee 2 completed 730 comp. base cases and 79 disability comp. base cases. Employee 5 completed 278 comp. base cases, 79 disability comp. base cases, and 652 cases that fell into the category of "other." In only eight months, Employee 1 was able to complete 551 comp. base cases, 28 disability comp. base cases, and 214 "other" cases. Mr. Berkowitz noted that Employee 13 also worked on the same type of cases as respondent, and had a production level that needed improvement. Yet Employee 13 was still able to complete 255 comp. base cases and 2 disability comp. base cases during the same ten-month time period.

Petitioner stated that respondent was given notice that her productivity level needed to improve and that she was falling short of the unit standard. Petitioner submitted into evidence three performance evaluations for respondent that covered the periods of May 1, 2013, to April 30, 2014, May 1, 2014, to July 30, 2014, and July 31, 2014, to October 28, 2014 (Pet. Ex. 3). In all three performance evaluations, respondent received an unsatisfactory rating for the primary function of her title, the processing of comp. base cases (Tr. 98-99). The performance evaluations indicated that respondent's productivity level was below the unit's standard and needed to improve.

At trial, respondent did not seriously contest her low productivity, but instead claimed that the production log and spreadsheets were misleading and that she was not properly trained.

Charge I: Unsatisfactory Performance Evaluations

Charge one of petitioner's amended section 75 charges is entitled "Unsatisfactory Performance Evaluations." Specifications one and two of this charge state that respondent's performance was rated "unsatisfactory" for the primary function of her job title on the two performance evaluations that cover the periods of May 1, 2014, to July 30, 2014, and from July 31, 2014, to October 28, 2014, respectively (Pet. Ex. 3; Tr. 98-99). Both evaluations state that respondent's case completion rate was less than one a day, and that she needed to "improve the quantity and quality of cases worked to a satisfactory production level." Charge two of the amended section 75 charges states that respondent failed to perform her duties properly and efficiently, and specifies various time periods where respondent failed to complete the required three cases a day. Both of these charges sound in a claim of incompetence or misconduct based on underperformance, and they arise from the same set of facts. Therefore, charges 1 and 2 are duplicative.

Further, petitioner failed to provide any case law to show that unsatisfactory performance evaluations, standing alone, can constitute its own charge. Indeed, while an unsatisfactory evaluation is often used to prove that a respondent received notice of poor performance, a poor evaluation, by itself, is not sufficient proof of incompetence or misconduct. *See Dep't of Housing Preservation and Development v. Wilson*, OATH Index No. 1368/99 at 12 (July 14, 1999) (general "assessments of performance" are insufficient, standing alone, to sustain charges of incompetence).

Here, because charges one and two are duplicative, and because incompetence or misconduct cannot be proven based on unsatisfactory performance evaluations alone, charge one should be dismissed in its entirety.

Charge II: Failure to perform duties properly and efficiently

Specifications 1, 2, 4-10

Petitioner alleges that respondent failed to meet the unit standard of completing three cases a day, and that for certain time periods, respondent had zero comp. base cases completed, as follows: Specifications 1 and 2 state that from May 1, 2014, to August 29, 2014, respondent completed 51 cases, for an average of 0.69 cases per day, and had 25 days with zero cases completed; Specifications 5 and 6 state that from September 8, 2014, to October 21, 2014, respondent completed 26 cases, for an average of 0.87 cases per day, and had 7 days with zero

cases completed; Specifications 7 and 8 state that from October 21, 2014, to November 28, 2014, respondent completed 21 cases, for an average of 0.84 cases per day, and had 5 days with zero cases completed; Specifications 9 and 10 state that from December 1, 2014, to February 28, 2015, respondent completed 37 cases, for an average of 0.76 cases per day, and had 14 days with zero cases completed. These specifications amount to charges of incompetence or misconduct based on low productivity.

Petitioner proved the specifications. It is undisputed that respondent completed less than one comp. base case per day from May 1, 2014, to February 28, 2015, and that on 51 days during this time period, she completed zero cases. A careful review of the production log established that from May 1, 2014, to August 29, 2014, respondent completed 53 cases, for an average of 0.72 a day; that from September 8, 2014, to October 21, 2014, respondent completed 27 cases for an average of 0.90 a day; that from October 21, 2014, to November 28, 2014, respondent completed 19 cases, for an average of 0.76 cases per day; and that from December 1, 2014, to February 28, 2015, respondent completed 39 cases, for an average of 0.80 cases per day (Pet. Ex. 1).

Therefore, despite respondent completing a total of three more cases than alleged in Specifications 1, 5, 7, and 9, the production log and spreadsheets proved that respondent fell significantly short of the unit's daily case requirement, and that she never showed any significant improvement in her completion rate (Pet. Exs. 1, 7, 8).

Respondent did not contest her low productivity level, and stated that she knew that examiners were expected to complete three cases a day (Tr. 263). Indeed, she admitted that since being transferred to the unit, she "probably" completed only "one to two" cases per day (Tr. 263-64, 289). Instead, respondent argued that the production log and spreadsheets were misleading because they did not provide an accurate comparison with other similarly situated examiners (Tr. 282-83, 311-12). Respondent also contended that her production level was lower than that of other examiners because her cases were sometimes returned for corrections, which impacted the total number of cases that she completed per day, and because other examiners "often work[ed] overtime" and completed "as many as five additional comp. cases per week" than respondent (Tr. 263, 312).

Respondent's arguments are unavailing. Regardless of the productivity level of other examiners, it was uncontested that the unit standard for all examiners performing entry-level

work was three comp. base cases per day, and respondent did not show that such a standard was unreasonable. Rather, the evidence established that respondent failed to meet that standard during the 10 month period in question.

Further, Mr. Berkowitz's consistent and credible testimony established that he assigned cases evenly to all examiners doing entry-level work, except for assigning the most basic cases to the most recently hired examiners (Tr. 51-52). His testimony was corroborated by the testimony of respondent's own witness, Mr. Khurama. Mr. Khurama stated that he was an associate retirement benefits examiner level 1 assigned to review the comp. base cases completed by other examiners, including respondent (Tr. 174-75). When asked if respondent received cases that were more time-consuming than that of other examiners, he testified "No . . . other workers also [received] time consuming cases" (Tr. 182-83). The production log and spreadsheets likewise established that entry-level examiners and respondent processed the same type of cases.

In contrast, respondent's allegation that other similarly situated examiners were given less time-consuming cases was not corroborated by any evidence. Her testimony on this point was self-serving and speculative, and did not excuse her failure to process the required number of cases. Respondent's claim that her production was lower because other examiners worked overtime was also unsubstantiated. While Mr. Berkowitz acknowledged that some examiners did work overtime, no evidence was provided to show which examiners received overtime, the number of overtime hours they worked, and if they worked on the same type of cases as respondent (Tr. 146, 164). In any event, the fact that some unidentified examiners received overtime had no bearing of respondent's inability to complete her required case workload. Respondent's argument that her production level was lower because some of her cases were returned for corrections is wholly without merit. Respondent should not have expected a case to be marked completed if it needed to be returned to fix mistakes.

Lastly, respondent argued that, despite being in the retirement calculations unit since 2011 and with NYCERS for almost 30 years, her low productivity was the result of a lack of training. The credible evidence showed otherwise.

Respondent stated that when she was transferred into the unit, she "did not know anything" about the work the unit performed (Tr. 262). However, respondent testified that Mr. Franchino, an experienced examiner, trained her on how to perform the calculations for comp. base cases and how to use the unit's computer software programs. After her initial training, she

began working on “straight forward” cases, and continued to receive “on the job training.” The “on the job training” consisted of discussing her cases with experienced examiners if she had any questions, and receiving feedback if a case was returned to her for corrections (Tr. 262-63). Soon after, respondent encountered difficulties with comp. base cases with a LWOP component. She was directed to approach certain senior examiners, including Mr. Franchino, for assistance. Respondent testified that she did so (Tr. 265-66).

However, by September of 2014, respondent’s productivity level had not improved. Mr. Khaled stated that on September 5, 2014, he met with respondent regarding her work performance and that respondent was offered “additional training and/or any other relevant training” if she so requested (Tr. 87).

Thereafter, Mr. Franchino was assigned to observe respondent and to identify the cause of her low productivity (Pet. Ex. 2; Tr. 88). Mr. Franchino observed respondent on September 19, 2014, and wrote an observation report. In that report, he stated that “the major problem . . . was a tremendous amount of redundancy” and that respondent did “some things in a very inefficient way” (Pet. Ex. 2). He noted that respondent would unnecessarily perform calculations more than once, would inefficiently use the unit’s software programs, and would perform calculations by hand instead of using a calculator. Mr. Franchino provided respondent with suggestions to improve her efficiency, including tips on using Microsoft Excel. He stated that respondent appeared to accept most of his recommendations, although she mentioned that she preferred performing calculations by hand instead of using a calculator.

But the notes documenting a September 22, 2014, meeting between Mr. Khaled, Mr. Berkowitz and respondent revealed that respondent stated that aside from learning “one new thing” regarding the unit’s software programs, she did not learn anything new during her training with Mr. Franchino (Pet. Ex. 6). The notes reflected that Mr. Khaled and Mr. Berkowitz wanted to review the work steps for comp. base case calculations with respondent, but that the “meeting ended briefly in 2 to 3 minutes as [respondent] was very terse and didn’t show much interest.”

Mr. Khaled sent an e-mail the next day asking if respondent wanted “more assistance,” and that at “any time” she needed assistance, she “should come to ask” (Pet. Ex. 5). Again, on December 11, 2014, during a work performance and progress meeting, respondent was invited to speak to her supervisors if she wanted additional training (Tr. 90). Nonetheless, there was no evidence presented that respondent ever requested additional training.

In all, the evidence established that respondent received sufficient training to perform her job duties. The main issue with respondent's work performance was not her finished work product, but her efficiency. Specifically, while some of the comp. base cases respondent submitted were returned for corrections, Mr. Berkowitz stated that he would rate her ability to perform the required calculations on such cases as satisfactory (Tr. 72).

However, respondent's case completion rate did not increase despite receiving specific guidance to improve her efficiency. Indeed, despite receiving instructions to do so, the evidence suggests that respondent has been unwilling to use basic technological resources, such as a calculator and the full capabilities of the unit's software programs, to expedite the processing of her assigned cases. It is not unreasonable for petitioner to expect its employees to use such tools to perform their assigned tasks, or to establish production requirements based on completing tasks with the use of such resources. Further, respondent's complaint at trial that she did not receive sufficient training was not credible where respondent did not seek any additional training when invited to do so at the same time that her low productivity was being addressed by her supervisors.

In any event, the evidence established that from May 1, 2014, to February 28, 2015, respondent failed to complete an average of three comp. base cases per day, as required. The evidence also established that while respondent worked diligently on her assigned cases, she simply has been unable improve her case completion rate. Therefore, petitioner proved the charge of incompetence based on low productivity over a sustained period of time. *See Dep't of Education v. Thompson*, OATH Index No. 2135/15 (Oct. 7, 2015) (incompetence charge proven for quality assurance specialist who, over a 7 month period, committed repeated mistakes which constituted a failure to carry out his duties, and failed to seek assistance or retraining); *Dep't of Consumer Affairs v. Yampolsky*, OATH Index No. 2269/10 (Aug. 12, 2010) (incompetence charge proven for clerical associate who improperly or inefficiently performed her duties on 14 occasions over a 14 month period).

Specification 4 separately charges that based on Mr. Franchino's observation report, respondent maintained redundant and inefficient work practices. Mr. Franchino's undisputed report established that during his observation, respondent processed her cases "in a very inefficient way" (Pet. Ex. 2). However, the overall incompetence charge is established by

respondent's inability to meet the unit's case completion standard over a sustained period of time, and not on a report derived from one day of observation.

Specification 3

Specification 3 alleges that “[s]ubsequent to a September 5, 2014 meeting, [respondent] was instructed that she would need to provide comments on her production to justify and explain the number of cases completed on each date,” but that respondent failed to do so.

Pursuant to a memorandum written by Mr. Khaled on September 12, 2014, on September 5, 2014, Mr. Khaled held a meeting with respondent, Mr. Berkowitz and another supervisor (Pet. Ex. 4). The memorandum states that respondent was notified at the meeting that “going forward you should provide comments on your production report to justify/explain the # of cases completed on a specific date.” However, petitioner did not provide any evidence to prove that respondent failed to follow this directive. Accordingly, this specification should be dismissed.

FINDINGS AND CONCLUSIONS

1. Charge 1, Specifications 1 and 2 should be dismissed as duplicative with Charge 2, and because incompetence cannot be proven based only on unsatisfactory performance evaluations alone.
2. Petitioner proved by a preponderance of the evidence that respondent failed to perform her assigned duties properly and efficiently by using redundant and inefficient work practices and by not meeting the unit standard of completing three cases a day. Petitioner proved that from that from May 1, 2014, to August 29, 2014, respondent completed 53 cases, for an average of 0.72 cases per day, and had 25 days with zero cases completed; that from September 8, 2014, to October 21, 2014, respondent completed 27 cases, for an average of 0.90 cases per day, and had 7 days with zero cases completed; that from October 21, 2014, to November 28, 2014, respondent completed 19 cases, for an average of 0.76 cases per day, and had 5 days with zero cases completed; and that from December 1, 2014, to February 28, 2015, respondent completed 39 cases, for an average of 0.80 cases per day, and had 14 days with zero

cases completed. Therefore, Charge II, Specifications 1, 2, and 4 to 10 should be sustained.

3. Petitioner did not prove that respondent failed to provide comments on her production to justify and explain the number of cases completed on each date. Accordingly, Charge II, Specification 3 should be dismissed.

RECOMMENDATION

Upon making the above findings and conclusions, I requested and reviewed a copy of respondent's personnel file in order to make an appropriate penalty recommendation (ALJ Ex. 2). Respondent has worked for NYCERS since September 13, 1987. As discussed above, on three performance evaluations covering the periods of May 1, 2013, to April 30, 2014, May 1, 2014, to July 30, 2014, and July 31, 2014, to October 28, 2014, and on one other evaluation covering the period of March 1, 2012, to April 30, 2013, respondent received an unsatisfactory rating for the primary function of her title, the processing of comp. base cases (ALJ Ex. 2, Pet. Ex. 3). The evaluations did not contain an overall performance rating. Respondent has no prior disciplinary history.

The evidence established that respondent was consistently unable to perform her fundamental responsibilities as a benefits examiner. Despite holding the title of associate benefits examiner level three, respondent was unable to meet the productivity standard for an entry-level examiner. Petitioner proved that from May 1, 2014, to February 28, 2015, respondent was required to complete an average of three comp. base cases per day, but only averaged less than one case per day.

Most of the cases involving a prolonged and persistent pattern of unsatisfactory work performance have resulted in the employees being either terminated or demoted. *See Transit Auth. v. Kalligeros*, OATH Index No. 475/14 (Dec. 18, 2013) (staff analyst who consistently failed to complete assignments, accidentally deleted a critical electronic file, and submitted an inaccurate report terminated); *Human Resources Admin. v. Hampton*, OATH Index No. 517/08 (Dec. 12, 2007) (recommended demotion for a clerical employee who consistently demonstrated an inability to properly carry out required tasks, even after receiving detailed instructions from her supervisors).

Here, however, petitioner requested a penalty of 30 days suspension. Petitioner contends that a demotion will prove futile because respondent is unable to fulfill the duties of an entry-level examiner, despite her title as a level three associate retirement benefits examiner. Further, the trial testimony established that respondent's unit has adapted a different software program and spreadsheets that should help respondent improve her productivity (Tr. 212-13, 218-22, 240-46, 271-73). Respondent is encouraged to diligently seek to learn and employ all such tools, and petitioner is urged to provide training for these resources as needed.

Based on petitioner's request, and respondent's lengthy employment history, a 30-day suspension is recommended.

Noel R. Garcia
Administrative Law Judge

February 9, 2018

SUBMITTED TO:

MELANIE WHINNERY
Executive Director

APPEARANCES:

DESTYNI WILLIAMS, ESQ.
Attorney for Petitioner

RICHARD WASHINGTON, ESQ.
Attorney for Respondent

NYCERS determination (Feb. 16, 2018)

This is to inform you that pursuant to the decision rendered by the Office of Administrative Trials and Hearings (OATH), Index No. 2077/17, you are hereby suspended without pay from your employment at the New York City Employees' Retirement System for a period of twenty-five (25) days, effective Monday, February 19, 2018.

Vilma Ebanks
Director of Human Resources