Dep't of Environmental Protection v. Gavnoudias

OATH Index No. 648/17 (July 11, 2017)

Petitioner established that respondent has been absent for more than one year due to a work-related injury. ALJ converts disciplinary charge under Civil Service Law section 75 to a separation of service due to an occupational injury under section 71 of the Civil Service Law. Separation from employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Petitioner
- against -
JAMES GAVNOUDIAS
Respondent

REPORT AND RECOMMENDATION

KARA J. MILLER, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, the Department of Environmental Protection ("petitioner" or "Department"), pursuant to section 75 of the Civil Service Law ("CSL"). The charge alleges that from February 2015 to August 2016, respondent James Gavnoudias, a construction laborer, has been excessively absent from his job. Petitioner seeks termination of respondent's employment (ALJ Ex. 1).

At trial petitioner presented testimony of a Department personnel coordinator as well as documentary evidence. Respondent testified on his own behalf. Following trial, petitioner and respondent submitted briefs addressing whether the matter was properly brought under CSL section 75.

Upon review of the record, I find that the charge should be converted and that respondent should be separated from employment pursuant to CSL section 71.

ANALYSIS

The facts are undisputed. Respondent began working as a construction laborer in the Department's Bureau of Water and Sewer Operations in December 2004 (Tr. 4, 10). His responsibilities include various construction tasks, including breaking and moving concrete, installing and maintaining fire hydrants, and operating a jackhammer and other heavy machinery (Tr. 36). In November 2010, while exiting a Department vehicle with a broken step, respondent fell out of the truck, landing on his knees. As a consequence, he suffered injuries to both knees (Tr. 41).

The instant charge relates to respondent's extended absence from work in 2015 and 2016.[1] Respondent was out on worker's compensation from February 1, 2015 through July 26, 2015, and from July 31, 2015 through July 31, 2016, because of ongoing problems with his knees due to his 2010 injury (Pet. Exs. 3, 4; Tr. 28, 37, 47). Between February 1, 2015, and August 1, 2016, respondent was at work for only three days (Pet. Exs. 1, 4; Tr. 10, 12, 28). According to respondent, since 2010 his knees became progressively worse. In 2015, respondent had surgery on his left knee and he is still waiting for approval from the Workman's Compensation Board for surgery on his right knee (Tr. 49-50). Respondent testified that he has no control over his daily work assignment and could be assigned to sweep the yard or sent into the field to use a jackhammer all day to help repair a water main break, which would negatively impact his knees (Tr. 52-53).

Respondent argues that this matter should have been brought under CSL section 71, which applies where an employee is absent due to a work-related injury. He requests that the section 75 charge be dismissed, or in the alternative, be converted to a section 71 proceeding (Resp. Br. at 7-9, 13; Tr. 6).

Petitioner contends that it properly brought an excessive absenteeism charge under section 75. According to petitioner, respondent's excessive absence, even though medically justified, amounts to incompetence under section 75 (Pet. Br. at 5-9; Tr. 5). Petitioner asserts that respondent's absence during this time was excessive *per se* and posed a burden to the Department (Pet. Br. at 3, 7, 8).

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[1] In its post-trial briefs, petitioner addresses respondent's absences prior to February 2015 (Pet. Br. at 2). However, these were not charged and thus not a proper subject of consideration. Only the absences alleged in the charge will be considered (Tr. 17; ALJ Ex. 1).

CSL section 75 provides that an employer may discipline an employee for misconduct or incompetency after a due process hearing on the stated charges. Civ. Serv. Law § 75(1) (Lexis 2017). Respondent has been charged with incompetence. To establish incompetence, petitioner must provide "evidence of some dereliction or neglect of duty." *Dickinson v. NYS Unified Court System*, 99 A.D.3d 569, 570 (1st Dep't 2012) (citations omitted).

By contrast, CSL section 71 provides a more humane alternative to disciplinary action when an employee's absence is due to a work injury:

> Where an employee has been separated from the service by reason of a disability resulting from occupational injury or disease as defined in the workmen's compensation law, he or she shall be entitled to a leave of absence for at least one year, unless his or her disability is of such a nature as to permanently incapacitate him or her for the performance of the duties of his or her position.

Civ. Serv. Law § 71. Within one year after the disability has ended, the employee may apply to the civil service department for reinstatement to the same or similar position, provided that a "medical officer [certifies] that such person is physically and mentally fit to perform the duties of his or her former position." Civ. Serv. Law § 71. Once an employee has been absent for one year due to a work injury, he or she may be terminated from employment. *Duncan v. NYS Developmental Ctr.*, 63 N.Y. 2d 128, 135 (1984).

As explained by the Court of Appeals in *Allen v. Howe*, 84 N.Y.2d 665 (1994), the legislative intent behind CSL section 71 was to avoid penalizing an employee who was absent from work due to an injury or disability. The Court noted that "[f]rom the perspective of the State governmental employer, resort to a disciplinary proceeding was not viewed as a practical or appropriate response to the void created by the absent employee, and the stigma associated with a disciplinary proceeding obviously prejudiced the employee's future civil service career." *Id.* at 671-72. The Court went on to state that "[b]y establishing the point at which injured civil servants may be replaced, section 71 … strike[s] a balance between the recognized substantial State interest in an efficient civil service and the interest of the civil servant in continued employment in the event of a disability." *Id.* at 672.

Applying this rationale, where an employee's absences were due to a long-term work-related injury, this tribunal has converted disciplinary charges brought under CSL section 75 to separation under CSL section 71. In *Dep't of Correction v. Ervin*, OATH Index No. 1603/96 (Sept. 26, 1996), ALJ McFaul recommended that respondent be removed from her position under

section 71, not terminated under section 75, after she injured her leg on the job and had difficulty returning to work. ALJ McFaul pointed to the "remedial purposes of section 71," and held that where "the disability is shown to have been the cause for the misconduct complained of, then the only proper remedy is a leave of absence." *Id.* at 16. *See also Dep't of Environmental Protection v. D'Amore,* OATH Index No. 1307/17 (May 4, 2017) (ALJ dismissed section 75 charges where respondent's absence was due to a work-related injury and delay in worker's compensation process beyond respondent's control); *Dep't of Juvenile Justice v. Handy*, OATH Index. No. 276/82 at 15 (Aug. 31, 1983) (respondent was out on worker's compensation for over four years; ALJ recommended separation under section 71, rather than section 75, noting that "where physical disability due to occupational injury is established, the employee's status is properly governed by section 71…").

Even in cases in which this tribunal has held that disciplinary charges may be brought under section 75 for absences stemming from on-duty injuries, we have found that a "single long-term disability rendering [an employee] unfit to work" would appropriately be dealt with under section 71. *Triborough Bridge and Tunnel Auth. v. Cicero,* OATH Index No. 569/98 at 7 (Mar. 4, 1998), *adopted in relevant part, rev'd in part,* Auth. Decision (Apr. 14, 1998), *rev'd,* Index No. 109498/98 (Sup. Ct. N.Y. Co. 1998) (Schlesinger, J.), *rev'd*, 264 A.D.2d 334 (1st Dep't 1999). *See also Dep't of Correction v. Murray,* OATH Index Nos. 771/92, 772/92, 906/92, 907/92 at 8, 13 (Dec. 7, 1992) (distinguishing section 75 from section 71 and noting that "excessive sporadic absences, as opposed to a lengthy absence caused by a single disability, may be charged as incompetency under section 75.").

Petitioner asserts that excessive absences, even when medically excused, warrant termination under CSL section 75. Petitioner's reliance on the First Department's decision in *Cicero* to support this assertion is misplaced. *Cicero*, was initiated as a section 75 disciplinary hearing before Administrative Law Judge John B. Spooner. The charges alleged that Cicero, a bridge and tunnel officer, had toll shortages on four days, was excessively absent during a ten-month period, and was absent without authorization on various dates. ALJ Spooner found Cicero guilty of the toll shortages and one unauthorized absence. The remaining charges were dismissed.

In analyzing the excessive absence charge, ALJ Spooner determined that nearly all of Cicero's absences were attributable to two different on-duty injuries. Although noting that the

agency had discretion to discipline an employee for excessive absenteeism, he found that "disciplinary charges *would not be permitted* for absences which resulted from a long-term disability." *Cicero*, OATH 569/98 at 7 (emphasis added). ALJ Spooner further noted that in such circumstances, the absences would be more appropriately addressed by the disability remedies under sections 71, 72, and 73. ALJ Spooner, however, did not find Cicero's absences to be the result of a single long-term disability rendering him unfit to work.

ALJ Spooner ultimately dismissed the excessive absence charge based on his conclusion that Cicero was not provided with notice that his high rate of absenteeism might result in disciplinary action. The agency disagreed and terminated Cicero's employment, concluding that its rules provide adequate notice that excessive absence will be cause for dismissal.

On appeal, Justice Schlesinger agreed with ALJ Spooner that Cicero was not provided with adequate notice, and therefore found the agency's termination of Cicero to be arbitrary and capricious. *Cicero v. Triborough Bridge and Tunnel Auth.*, Index No. 109498/98 (Sup. Ct. N.Y. Co. 1998). The First Department reversed Justice Schlesinger's decision on appeal, finding that the agency's "rules clearly state that 'excessive absence . . . will be cause for dismissal.'" *Cicero*, 264 A.D.2d at 335.

ALJ Spooner's holding that a single long-term work related injury, rendering an employee unfit to work, should be dealt with under section 71 was never challenged. Indeed, the reviewing decisions by the agency head, New York State Supreme Court, and the First Department never addressed the issue, let alone mentioned section 71. Instead, the focus of the appeals was whether Cicero had been provided notice that his excessive absences would be cause for dismissal.

The other cases petitioner relies on are also inapplicable to the instant matter. Some of the cases involve non-work related injuries, *Dep't of Environmental Protection v. A.M.*, OATH Index No. 1410/16 (July 6, 2016) (termination recommended for excessive, sporadic medical absences, not work injury or illness); *Considine v. Pirro*, 38 A.D.3d 773 (2d Dep't 2007) (termination for excessive absences due to alleged non-work injury; respondent unable to prove she was unfit to perform her job under section 72); *Dep't of Correction v. Hodge*, OATH Index No. 264/14 (Apr. 11, 2014) (termination recommended for medical absences and positive test for marijuana; insufficient proof that absences were due to work injury). Other cases involve a work related injury, in addition to other charges of misconduct, *Dep't of Environmental Protection v.*

Post, OATH Index No. 1420/12 (Aug. 21, 2012), *adopted*, Comm'r Dec. (Sept. 4, 2012)*;* (termination recommended for excessive absenteeism due in part to on-the-job injury, as well as insubordination and use of profanity); *Dep't of Correction v. Givens*, OATH Index No. 393/09 (Dec. 29, 2008) (termination recommended for excessive absences and failure to follow Department protocol when making a criminal complaint against co-worker; no credible evidence that absences were due to occupational injury); *Triborough Bridge and Tunnel Auth. v. Lewis*, OATH Index No. 1592/03 (Feb. 10, 2004), *adopted,* Labor Relation President Dec. (Feb. 27, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD05-19-SA (Apr. 25, 2005) (termination recommended for excessive absences, in part due to a work injury, as well as failure to document sick leave and insubordination). These cases are distinct from the present case in which the sole basis of the charge is respondent's absence following an occupational injury caused by malfunctioning Departmental equipment.

Considering the legislative intent behind section 71 of the CSL, as articulated by the Court of Appeals, where, as here, respondent's extended absence results exclusively from an occupational injury, petitioner should proceed under CSL section 71, not section 75.

FINDINGS AND CONCLUSIONS

1. Due to an injury sustained at work, respondent only worked three days between February 1, 2015 and August 1, 2016.

2. Disciplinary charge brought under CSL section 75 should be converted to a separation of service due to an occupational injury under CSL section 71.

RECOMMENDATION

Respondent should be separated from employment under CSL section 71 following his absence from the workplace for over one year due to an occupational injury as defined in the workman's compensation law.

Kara J. Miller
Administrative Law Judge

July 11, 2017

SUBMITTED TO:

VINCENT SAPIENZA, P.E.
Acting Commissioner

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