Dep't of Correction v. Cronin

OATH Index No. 1861/19 (Oct. 22, 2019)

Oiler for the Department of Correction was charged with insubordination and inefficient work performance when he left his assignment on two occasions. The Department failed to prove the charged misconduct on either occasion. ALJ recommended the charges be dismissed.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
DANIEL CRONIN
Respondent

REPORT AND RECOMMENDATION

JOYCELYN McGEACHY-KULS, *Administrative Law Judge*

Petitioner, the Department of Correction ("Department" or "DOC"), brought this disciplinary proceeding under section 75 of the Civil Service Law, alleging that Respondent Daniel Cronin, an oiler for the Department, failed to efficiently perform his duties and brought discredit upon the Department when he left from two different assignments before their completion. Respondent is charged with insubordination and inefficient work performance, pursuant to sections 3.20.070 and 3.05.010, respectively, of the New York City Department of Correction Employee Rules and Regulations.

At trial, the Department presented the testimony of Mr. F. O'Donoghue, Senior Stationary Engineer and Respondent's former supervisor, in addition to documentary evidence. Respondent testified on his behalf and also presented documentary evidence. For the reasons set forth below, I find that Petitioner failed to meet its burden to establish that Respondent committed the charged misconduct and recommend that the charges be dismissed.

ANALYSIS

In this disciplinary proceeding, 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) (citation omitted). 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); *see also Dep't of Sanitation v. Figueroa*, OATH Index No. 940/10 at 11 (Apr. 26, 2010), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 11-47-A (July 12, 2011). Accordingly, we have held where the evidence is equally balanced, the charges must be dismissed. *See Rinaldi & Sons, Inc. v. Wells Fargo Alarm Service, Inc.*, 39 N.Y.2d 191, 194 (1976); *see also Dep't of Correction v. Singletary*, OATH Index No. 500/13 at 11 (June 28, 2013); *Health & Hospitals Corp. (Metropolitan Hospital Ctr.) v. McCaskey*, OATH Index No. 2195/08 at 9 (Sept. 29, 2008).

Respondent has been an oiler with the Department for 11 years. He is responsible for lubrication of the power plant, pumping, construction of equipment, and other related tasks (Pet. Ex. 3). Oilers are generally assigned to various DOC locations, depending on the needs of the Department. It is the Department's practice to assign two oilers to each job together to secure tools and keep inmates from accessing them. At the time of the two charges, Respondent was assigned to work at the Manhattan Detention Complex, under the supervision of F. O'Donoghue. The charges stem from two specific incidents that occurred on August 20, 2014 and August 25, 2014 (Pet. Ex. 3; Tr. 18, 21, 24, 79-83).

August 20, 2014

Mr. O'Donoghue testified that on August 20, 2014, he assigned Respondent to repair vents in an inmate area with another oiler. According to Mr. O'Donoghue, Respondent reported to the assignment but returned to Mr. O'Donoghue's office after some time and refused to continue with the assigned job. Respondent advised Mr. O'Donoghue that he felt "afraid for his life" (Tr. 25) and that he was afraid of working around inmates given a prior incident in Riker's Island where Respondent was assaulted by inmates[1] (Tr. 48-49, 84).

[1] Respondent testified that in August of 2012, he was walking with DOC staff to get to his work location at the Powerhouse in Riker's Island. There was a verbal confrontation between the staff and the inmates. Inmates threw something at him and spat at him. Respondent reported the incident (Tr. 83-85).

Mr. O'Donoghue was instructed by his superiors to document the August 20th incident (Tr. 30-31). He drafted a memo to A. Dinardo, Senior Stationary Engineer of the Ventilation Task Force, reporting that Respondent "left to come see me and have a job reassignment not around populated areas" (Pet. Ex. 1). Mr. O'Donoghue maintained, via testimony and in the document, that Respondent refused to perform the originally assigned task (Tr. 31). He testified that Respondent did not perform any other work that day, and that he had to complete Respondent's work assignment (Tr. 31).

Respondent testified that he and his colleague reported to the assigned cell and began working on the ventilation unit. They laid out the tools necessary for the job. Respondent was on the ladder dismantling the ventilation duct while the second oiler handed him tools and held the ladder. Respondent later noticed that the second oiler was no longer present in the cell with him. Respondent testified he was alone in a cell while inmates were being brought into the area where he was working (Tr. 104-105). He maintained that inmates were making comments and threats that involved foul language directed at him (Tr. 105-106). Respondent recounted that he left the cell and went to Mr. O'Donoghue's office. He told Mr. O'Donoghue that he felt "somewhat overwhelmed from being threatened and degraded" (Tr. 106). He acknowledged that no inmate physically harmed him (Tr. 48). Respondent testified that he asked Mr. O'Donoghue to reassign him to a different task and that Mr. O'Donoghue reassigned him to "grease pumps in the north MER chiller room." Respondent maintained that he completed this assignment (Tr. 107). The same day, Respondent wrote a memo to Mr. O'Donoghue confirming he was reassigned to grease pumps (Pet. Ex. 6).

As a general rule, civil service employees are obligated to comply with a supervisor's order when it is given, and address objections to the appropriateness of the order through the grievance process at a later time. *Dep't of Transportation v. Hines*, OATH Index No. 790/07 at 3 (Feb. 9, 2007); *Dep't of Environmental Protection v. Salinas*, OATH Index No. 1020/04 at 5 (Nov. 15, 2004), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 06-16-SA (Jan. 9, 2006). To establish insubordination, the petitioner must prove that: (1) an order was communicated to respondent; (2) that order was clear and unambiguous in its content; and, (3) having heard the order, the respondent willfully refused to obey. *Transit Auth. v. Wong*, OATH Index No. 1866/08 at 16 (Aug. 28, 2008); *Dep't of Sanitation v. Dobie*, OATH Index Nos. 2092/07, 2093/07, 2094/07 & 2095/07 at 8 (May 2, 2008). The directive need not be in the form of a

command, as long as the request was clear and unambiguous. *Wong*, OATH 1866/08 at 16; *Dep't of Sanitation v. David*, OATH Index No. 766/07 at 5 (Jan. 25, 2007), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 07-101-M (Oct. 25, 2007); *Salinas*, OATH 1020/04 at 5 (citing *Human Resources Admin. v. Aguirre*, OATH Index No. 1734/00 (Sept. 14, 2000); and *Police Dep't v. McKeon*, OATH Index No. 736/90 (Mar. 29, 1990)). Only under narrow exceptions, such as when the employee's health or safety is in jeopardy, may the rule be breached. In cases where the "health and safety" exception may apply, it is an affirmative defense to be established by the Respondent. *See Dep't of Sanitation v. Cunningham*, OATH Index No. 1332/02 at 19 (Nov. 4, 2002).

Respondent testified that he went to Mr. O'Donoghue for a reassignment after being left alone in an inmate area without another oiler present. Respondent's testimony that he was reassigned was corroborated by the memo he wrote to Mr. O'Donoghue on the same day. Mr. O'Donoghue also mentioned in his memo summarizing these events that Respondent sought a reassignment, but he did not indicate whether he reassigned Respondent to a different task.

Because Mr. O'Donoghue and Respondent offered divergent accounts of events, it is necessary to assess the credibility of each witness to give their respective testimonies appropriate weight. "Resolution of questions of credibility and the weight of evidence is primarily the province of the finder of fact, who has had the opportunity to see and hear the witnesses." *Bennett v. Phillips*, 175 A.D.2d 934 (2d Dep't 1991). When analyzing witness credibility, it is therefore, appropriate to consider such factors as witness demeanor, consistency of 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. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998); *see also Admin. for Children's Services v. Yu*, OATH Index No. 269/13 at 4 (Apr. 4, 2013*), aff'd,* NYC Civ. Serv. Comm'n Item No. 35136 (Dec. 9, 2013).

I credit Respondent's testimony over Mr. O'Donoghue's testimony because Respondent provided a more comprehensive account of the events. Respondent testified in a calm, detailed, and straightforward manner when describing the events of August 20, 2014. Respondent's testimony that he went to Mr. O'Donoghue after being left alone in an inmate populated area, that he asked Mr. O'Donoghue to reassign him to a different task, and that Mr. O'Donoghue

reassigned him to grease pumps was consistent with his memo (Pet. Ex. 6). Mr. O'Donoghue directed Respondent to write this memo and testified that he reviewed the memo after Respondent wrote it (Tr. 49).

Mr. O'Donoghue, on the other hand, maintained that Respondent did nothing else for the rest of the day (Tr. 31). His uncorroborated testimony is contradicted by the memo written by Respondent. Mr. O'Donoghue had an opportunity to address any inaccuracies in Respondent's memo about the incident when Respondent gave it to him or at trial and failed to do so. It is unlikely that Mr. O'Donoghue would have overlooked a statement in Respondent's memo he believed to be false. Mr. O'Donoghue's memo states only that Respondent asked to be reassigned, without offering any further details (Pet. Ex. 1).

Even if Mr. O'Donoghue's testimony is given the same weight as the Respondent's to determine the likelihood of reassignment, this court has held that where the evidence is equally balanced the charges must be dismissed. *See Rinaldi & Sons,* 39 N.Y.2d at 194; *McCaskey*, OATH 2195/08 at 9 (charges dismissed where testimony was not sufficient to establish that it was more likely than not that the confrontation between respondent occurred as described by the doctor).

Therefore, the Department failed to establish that Respondent was insubordinate on August 20, 2014. The Department also failed to establish the charge of inefficient work performance, given Respondent completed the reassigned work. Consequently, the charges related to this specification should be dismissed.

August 25, 2014

On August 25, 2014, Mr. O'Donoghue assigned Respondent and two other oilers to work on a ventilation project in the court side admission area of the Manhattan Detention Complex (Tr. 33-34, 113). Respondent and the oilers reported to the job, but all three returned to Mr. O'Donoghue's office before the completion of the assignment (Tr. 36-37). Mr. O'Donoghue testified that he spoke to Respondent about leaving his work before its completion and gave the Respondent two options: complete the assignment or submit a transfer request. Respondent requested to be transferred back to Queens House, which was subsequently granted (Tr. 37).

To memorialize the incident, Mr. O'Donoghue wrote a memo to his superior, A. Dinardo, dated August 25, 2014, stating that Respondent refused to work in inmate populated areas and

sought a reassignment to an area where inmates were not present (Pet. Ex. 2). Respondent wrote a memo to Mr. O'Donoghue dated August 25, 2014, where he stated he was assigned with two other oilers on the vent project in the courtside admission area. He further stated that he carried out the assignment. Respondent then gave his memo to Mr. O'Donoghue (Pet. Ex. 7; Tr. 114).

This tribunal has acknowledged an employee's obligation to accept work assignments that he or she does not like. *Transit Auth. v. Alday*, OATH Index No. 475/12 at 4 (Dec. 22, 2011). Further, civil service employees are obligated to comply with a supervisor's order when it is given, and address objections to the appropriateness of the order through the grievance process at a later time. *Hines*, OATH 790/07 at 3; *Salinas*, OATH 1020/04 at 5. As stated previously, to establish insubordination, the Petitioner must prove that: (1) an order was communicated to respondent; (2) that order was clear and unambiguous in its content; and (3) having heard the order, the respondent willfully refused to obey. The directive need not be in the form of a command, as long as the request was clear and unambiguous. *Wong*, OATH Index No. 1866/08 at 16-17.

The discussion between Respondent and Mr. O'Donoghue was not a command because it provided Respondent with options for a course of action rather than a clear and unambiguous request to continue with the original assignment. While it was clear from Mr. O'Donoghue's testimony that he felt frustrated with having an employee leave a job before its completion, his statement to Respondent was not a clear command to return to work. The testimony established that Respondent was given two options: request a transfer or return to work. Respondent requested a transfer. An insubordination charge requires the Department to prove that having heard the order, Respondent willfully refused to obey. Respondent did not disobey the order where he was given two options and chose one as instructed.

The Department failed to prove that Respondent was insubordinate as there is no credible evidence that Respondent refused an order to return to work. Accordingly, the charges relating to this conduct should be dismissed.

FINDINGS AND CONCLUSIONS

1. Petitioner did not establish that on August 20, 2014, Respondent refused a directive to perform his assigned duties, in violation of 3.20.070 of Petitioner's Code of Conduct.

2. Petitioner did not establish that on August 20, 2014, Respondent inefficiently performed his duties, in violation of 3.05.010 of Petitioner's Code of Conduct.

3. Petitioner did not establish that on August 25, 2014, Respondent refused a directive to perform his assigned duties, in violation of 3.20.070 of Petitioner's Code of Conduct.

4. Petitioner did not establish that on August 25, 2014, Respondent inefficiently performed his duties, in violation of 3.05.010 of Petitioner's Code of Conduct.

These findings of fact are final pursuant to section 1046(e) of the New York City Charter. Charter § 1046(e).

RECOMMENDATION

I recommend that the charges against respondent be dismissed.

Joycelyn McGeachy-Kuls
Administrative Law Judge

October 22, 2019

SUBMITTED TO:

CYNTHIA BRANN
Commissioner

APPEARANCES:

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