Dep't of Social Services (Human Resources Admin.) v. Aurel

OATH Index No. 1094/20 (Feb. 21, 2020)

Petitioner proved that respondent was insubordinate when he repeatedly refused to attend mandatory training sessions. Ten-day suspension without pay recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SOCIAL SERVICES (HUMAN RESOURCES ADMINISTRATION)
Petitioner
- against -
FAUBERT AUREL
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner, the Department of Social Services (Human Resources Administration), brought this proceeding under Civil Service Law section 75. The petition alleged that respondent, job opportunity specialist Faubert Aurel, committed insubordination and related misconduct by repeatedly refusing to attend mandatory Lesbian, Gay, Bisexual, Transgender, Questioning, and Intersex (LGBTQI) training from June to December 2018 (ALJ Ex. 1). Respondent claimed that he refused to attend the training based on his religious beliefs (Tr. 41).

At trial on January 29, 2020, petitioner presented documentary evidence and the testimony of two witnesses. Respondent testified in his own behalf.

For the reasons below, petitioner proved the charges.

ANALYSIS

The facts are undisputed. Petitioner hired respondent 18 years ago. He has spent his entire career at petitioner's Far Rockaway office and currently works in the second floor reception area (Tr. 35). His responsibilities include assisting clients in the waiting room (Tr. 31).

On three occasions in 2018 (June 20, November 20, and December 17), respondent failed to attend mandatory LGBTQI training at petitioner's offices on Clermont Avenue, Brooklyn. On

each occasion, respondent reported to his regular work location in Far Rockaway. Prior to each training session, respondent received an e-mail and other verbal or written orders directing him to report to training and respondent repeatedly replied via e-mail that, due to his religious beliefs, he would not attend the training (ALJ Ex. 2, Stipulated Facts; Pet. Ex. 1).

Respondent received warnings that training was mandatory and his failure to attend could lead to disciplinary charges. On December 10, 2018, the director of respondent's location met with him about this issue. Though the director did not testify at trial, the parties stipulated that respondent told the director, "No matter what happened, I will not attend this training because of my religious belief" (ALJ Ex. 2).

Director Elana Redfield oversees training of petitioner's staff for LGBTQI issues (Tr. 12). Redfield testified that a mayoral executive order mandates training for supervisors and front-line staff, including respondent, for transgender issues (Tr. 15). Petitioner developed its first transgender policy in 2009 in response to client complaints about unfavorable experiences with petitioner's employees (Tr. 15). Petitioner's 2017 LGBTQI Policy requires training for all employees (Tr. 16, 22; Pet. Ex. 5 at 11; Pet. Ex. 7). The Department of Citywide Administrative Services provides instructions for a mandatory online training refresher course on transgender inclusion and awareness for all of the City's employees (Pet. Ex. 9; Tr. 23).

To comply with relevant laws and to address community demands to serve LGBTQI people with dignity and respect, petitioner developed a training program tailored to its employees (Tr. 13). According to Redfield, the training program was intended to give employees a sense of what they can do in the workplace to assist LGBTQI people (Tr. 14). The training program contains three modules. The first two modules provided background, including terminology and concepts, social factors affecting LGBTQI people, and the intersection of LGBTQI issues with other issues (Tr. 17; Pet. Ex. 6 at 1). The third module, consisting of 95 PowerPoint slides, was customized for the division where respondent works (Tr. 17, 19; Pet. Ex. 6).

The stated objectives of the PowerPoint presentation are to inform staff about petitioner's policies; to learn best practices for working with LGBTQI clients; to practice what to do in common scenarios involving LGBTQI clients and co-workers; and to enable staff to locate resources for LGBTQI people (Pet. Ex. 6 at 3). The program also included notices about upcoming changes to agency policy resulting the settlement of a federal lawsuit (Pet. Ex. 6 at 89). *See Lovely H. v. Eggleston*, 05-CV-06920 (S.D.N.Y).

One of the first PowerPoint slides, entitled "Reminder: Respecting Differences," had the following bullet points:

- This training is **NOT** about changing your personal beliefs.
- This training **IS** about recognizing the unique experiences of the LGBTQI people accessing HRA services and giving you the tools to work with clients in a respectful and professional way.

(Pet. Ex. 6 at 4) (emphasis in original).

Respondent testified and identified himself as a Southern Baptist Christian (Tr. 37). He quoted Bible excerpts that disapproved of homosexuality (Tr. 39, 41). Respondent insisted that he refused to attend the training because of his religious beliefs, but he had no problem serving LGBTQI clients "because we have to love everyone and service everyone" (Tr. 41). He noted that he had served clients from all backgrounds for his entire 18-year career, before the enactment of laws or agency policies that protect the rights of LGBTQI clients (Tr. 43).

Civil service employees are obligated to comply with supervisors' orders when they are given and may later raise objections to the appropriateness of the orders through the grievance process. *See 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. CD06-16-SA (Jan. 9, 2006). To prove insubordination, petitioner must show 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. *See Transit Auth. v. Wong*, OATH Index No. 1866/08 at 16-17 (Aug. 28, 2008). Exceptions to the "obey now, grieve later" rule include orders that are unlawful, clearly beyond the supervisor's authority, or pose an imminent threat to the health or safety of the employee or others. *See Alper v. Gaffney*, 73 A.D.2d 644 (2d Dep't 1979).

This tribunal has held that an employee cannot be punished for disobeying an order that discriminates based on religion. *See Dep't of Correction v. Shabazz*, OATH Index No. 111/03 at 7 (Aug. 21, 2003) (dismissing insubordination charges where correction officer refused to trim his beard based on religious objections); *see also Jaggi v. Police Dep't*, OATH Index No. 1498/03 at 12 (Apr. 28, 2004), *aff'd*, Comm'n Dec. (June 29, 2004) (finding that Police Department discriminated against traffic enforcement agent, a member of the Sikh faith, by refusing to allow him to wear a turban while on duty). To prevail, respondent must show that he has a bona fide religious belief that conflicts with an employment requirement; he informed petitioner of this belief; and he was disciplined for failure to comply with the conflicting

employment requirement. *Shabazz*, OATH 111/03 at 7.

Here, respondent did not meet his burden of proving that petitioner's orders were unlawful. Respondent, who did not attend any of the training, failed to identify any aspect of the program that violated his religious beliefs. Though he testified that homosexuality was against his religion, he insisted that he treated all people respectfully, regardless of their lifestyles. When asked to reconcile his willingness to serve LGBTQI clients with his unwillingness to attend training, respondent stated, "A servant of God knows how to service clients" (Tr. 43). Thus, respondent's refusal to attend training was based on his self-assessment that anti-discrimination training was unnecessary.

Petitioner was not required to exempt respondent from agency and citywide training based on his assertion that he treated everybody respectfully. Bias can deceive its host. Well-intentioned employees may not realize when they have acted disrespectfully. And, even if respondent always treated clients respectfully, the training would have merely reinforced those practices.

All of petitioner's employees are expected to treat people with respect and dignity. That is a basic job requirement. The training program went well beyond the important basics of telling employees to be respectful. It focused on an array of relevant laws and regulations, it provided employees with other resources available for LGBTQI clients, and it delivered practical suggestions for handling issues that may arise at the workplace.

For example, the PowerPoint presentation included contact information for petitioner's Office of LGBTQI Affairs, an online guide maintained by the Comptroller's Office, and a borough-by-borough mental health guide issued by the Public Advocate's Office (Pet. Ex. 6 at 14, 17-18). More than twenty slides in the presentation provided guidance for common scenarios (Tr. 20). The program offered tips on how to call a case without inadvertently "outing" a transgender client, such as using a ticket number, last name, or preferred name or prefix if available (Pet. Ex. 6 at 35; Tr. 20). There were also suggestions on how to handle a situation where one client is harassing another or when a dispute arises concerning a transgender person's use of a bathroom (Pet. Ex. 6 at 36). The program provided practical guidance on how to handle a case where a name or gender on a document does not match the client's appearance, information on what name or gender may be entered in petitioner's database, suggestions on when and how to refer a client for a legal name change, advice on maintaining confidentiality,

and guidance on how to advise clients who seek coverage for hormone treatment or surgery (Pet. Ex. 6 at 37, 61, 64-68, 73).

Petitioner presented unrebutted evidence of the compelling need for LGBTQI training to prevent harassment and promote equality. To begin with, a mayoral executive order required the training. Similar training programs are often relied upon by employers to promote diversity and to prevent or remedy unlawful behavior by employees. *See, e.g., Burlington Industries v. Ellerth*, 524 U.S. 742, 765 (1998) (as defense to a harassment claim, employer may show that it exercised reasonable care to prevent or correct harassing behavior).

The evidence further showed that petitioner had a particularized need to train its employees. Petitioner offered unrefuted proof that it has been criticized for lack of sensitivity towards LGBTQI clients and that members of the LGBTQI community suffer greater levels of homelessness, hunger, and lack of health care than other people (Tr. 13). *See, e.g.*, S.E. James et al, Nat'l Ctr. for Transgender Equality, *Report of the 2015 U.S. Transgender Survey* 97, 150 (2016), *archived at* https://perma.cc/27HW-4B3R (one-third of transgender people reported having at least one negative experience with a health care provider in the past year related to being transgender, such as verbal harassment, refusal of treatment, or having to teach the health care provider about transgender people to receive appropriate care); M.V. Lee Badget et al, Williams Institute, *New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community* (June 2013), *available at* https://williamsinstitute.law.ucla.edu (African-American same-sex couples have more than twice the poverty rate of different-sexed married African-Americans). Up to 40% of runaway and homeless youth are LGBTQI (Pet. Ex. 7).

It is undisputed that petitioner repeatedly emphasized that employees were not being asked to change their personal beliefs. Director Redfield stressed that the training was not about changing beliefs and was designed to ensure that employees were provided with appropriate tools to comply with the law and serve clients effectively (Tr. 19). As one of the PowerPoint slides plainly stated, "You do not need to change your personal feelings or opinions about LGBTQI people. But you must serve all clients with respect" (Pet. Ex. 6 at 24). Courts have given significant weight to similar assurances. *See Altman v. Minn. Dep't of Correction*, 251 F.3d 1199, 1203 (8th Cir. 2001) (rejecting free exercise of religion claim where employer emphasized, "In no way is this training designed to tell you what your personal attitudes or beliefs should be"); *see also Morrison v. Bd. of Educ.*, 419 F. Supp. 2d 937, 944-45 (E.D. Ky.

2006), *aff'd*, 521 F.3d 602 (6th Cir. 2008) (rejecting free exercise claim where diversity program emphasized that it was not intended to influence religious beliefs, but instead was to teach students not to treat someone unfairly).

Petitioner established a compelling need for the training program. In contrast, respondent failed to show any burden or limitation on his religious beliefs. Unlike *Shabazz* and *Jaggi*, where employees were prevented from having a beard or wearing a turban, in direct contravention of their religious beliefs, respondent was not asked to forego any religious practice. Nor was he asked to give up any sincerely held belief. Instead, he was asked to attend a neutral training program, which did not promote LGBTQI lifestyles or disparage any faith. Requiring respondent to attend the training did not constitute unlawful discrimination. *See Altman*, 251 F.3d at 1204 (requiring employees to attend 75-minute training program, entitled "Gays and Lesbians in the Workplace," was not a substantial burden on their free exercise of religion); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 608 (9th Cir. 2004) (it would have constituted undue hardship for employer to accommodate employee by eliminating portions of its diversity program to which employee raised religious objections; to do so would have "infringed upon the company's right to promote diversity and encourage tolerance and good will among its workforce"); *see also Morrison*, 419 F. Supp. 2d at 944-45 (rejecting free exercise claim where student refused to attend diversity training, with emphasis on issues sexual orientation and sexual harassment, that had been mandated by a consent decree following earlier litigation).

In short, petitioner issued orders that respondent was required to obey. Respondent failed to prove that the orders were unlawful. The insubordination charge should be sustained. Because additional rule violations alleged by petitioner were based on the same facts and are duplicative, they should also be sustained without additional penalty. *See Human Resources Admin. v. Harris*, OATH Index No. 2536/18 at 16 (Dec. 20, 2018) (sustaining duplicative allegations but declining to make additional penalty findings).

FINDINGS AND CONCLUSIONS

1. Petitioner proved respondent was insubordinate on three occasions as alleged in the petition.

2. Petitioner proved additional rule violations, but they are duplicative.

RECOMMENDATION

Upon making these findings, I requested and reviewed respondent's personnel abstract. Petitioner hired respondent in September 2001. He has no prior disciplinary record. Petitioner seeks a 45-day suspension without pay (Tr. 47). That is excessive and inconsistent with principles of progressive discipline.

For employees with a lengthy tenure and minor disciplinary history, recommended penalties for insubordination have ranged from five to ten days' suspension without pay, depending on the nature and number of acts involved. *See Human Resources Admin. v. Brown,* OATH Index No. 0038/15 at 9-10 (Oct. 3, 2014) (ten-day suspension recommended where long-term employee, with minor disciplinary record, refused to make six home visits and failed to attend mandatory forum); *Human Resources Admin. v. Johnson,* OATH Index No. 637/01 at 17-18 (July 12, 2001) (five-day suspension recommended where long-term employee with minor disciplinary record failed to complete report in a timely fashion as directed by supervisor). Based on respondent's tenure and lack of a record, I recommend a penalty of ten-day suspension to cover all three acts of insubordination.

Accordingly, I recommend a penalty of ten days' suspension.

Kevin F. Casey
Administrative Law Judge

February 21, 2020

SUBMITTED TO:

STEVEN BANKS
Commissioner

APPEARANCES:

DANIEL KORENSTEIN, ESQ.
ROSALBA GLEIJESES, ESQ.
Attorneys for Petitioner

KRESIBERG & MAITLAND, LLP
Attorneys for Respondent
BY: JILL MENDELBERG, ESQ.