Dep't of Education v. Choudhri

OATH Index No. 722/06 (Mar. 9, 2006)

Based upon employee's admissions, charges of disobeying order to cease using the internet and of insubordination in replying to an explanation for internet use both sustained. ALJ held that employer's proof was insufficient to show excessive absence, excessive lateness, or submission of an improper leave request in violation of agency rules and that these charges should be dismissed.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF EDUCATION
Petitioner
- against -
TOQUIR CHOUDHRI
Respondent

REPORT AND RECOMMENDATION

JOHN B. SPOONER, *Administrative Law Judge*

This disciplinary proceeding was referred to me in accordance with section 75 of the Civil Service Law. Petitioner, the Department of Education, charged respondent Toquir Choudhri, an associate education analyst, with excessive absence, excessive lateness, early departures, making an improper leave request, and disobeying an order to cease using the internet for personal business.

A hearing on the charges was conducted before me on January 11, 12, and 26, 2006. Petitioner offered respondent's attendance records and called three supervisors to describe the problems with his early departures, leave requests, and internet usage. Respondent admitted using the internet despite his supervisor's order to stop doing so, but denied any other misconduct.

At the hearing, respondent's attorney moved to dismiss a number of the charges on the grounds that they were time-barred under section 75 (4) of the Civil Service Law, requiring that any disciplinary charges be served upon employees within 18 months after the misconduct

occurred. It was undisputed that the charges here were served on respondent on September 30, 2005, making the critical date for purposes of the statute of limitations March 30, 2004. Fifteen of the absences alleged in specification 1, 21 of the latenesses alleged in specification 2, and two of the early departures alleged in specification 3 all occurred prior to March 30, 2004. As petitioner's attorney acknowledged at trial, all of these allegations of misconduct are time-barred by Civil Service Law section 75 (4) and must be dismissed.

For the reasons provided below, I find that petitioner proved only the two insubordination charges and recommend that respondent receive a penalty of a reprimand.

ANALYSIS

Respondent works as an analyst in the Department Division of Human Resources. His job duties include ensuring the accurate collection of various attendance data for teachers. He also must respond to phone calls and emails from teachers concerning probation, seniority, and retirement issues. The five charges in this case allege that respondent was excessively absent, excessively late, and insubordinate.

Excessive Absence, Excessive Lateness, and Early Departures

Respondent's attendance records (Pet. Ex. 1) reflect that, from April 2004 to September 2005, respondent was absent for 33 days. During the same time, he is alleged to have been late 49 times and left work early 23 times. It was undisputed that leave was approved for all of the absences and for the early departures.

Turning first to the absences, I note that, the Department, like some other City agencies, has no specific rules defining excessive absence. Where the rules are silent, excessive absence may be found by the consideration of various factors, including lack of documentation, lack of approval, leave balances, lack of legitimate need, and impairment of office function. *See Bd. of Education v. Hunter*, OATH Index No. 384/90 (Mar. 5, 1990), *aff''d in part, rev'd in part*, Chancellor's Decision (Apr. 16, 1990), *aff'd*, 190 A.D.2d 851, 594 N.Y.S.2d 649 (2d Dep't 1993).

I believe that the majority of factors suggest that respondent's absences were not excessive. Despite the disparaging remarks of respondent's supervisors as to the quantity of respondent's absences, 33 absences over the course of a year and one-half (averaging roughly 22 per year) does not seem egregiously high. *See Dep't of Parks and Recreation v. Hubbard*,

OATH Index No. 1153/97 (Feb. 24, 1998) (21 absences in one year not found to be excessive); *Dep't of Transportation v. Bond*, OATH Index No. 217/91 (Oct. 11, 1990) (23 absences over one year found not excessive); *Bd. of Education v. Bracho*, OATH Index No. 477/91 (Apr. 9, 1991) (17 absences over a nine month period was not excessive). Supervisor Zenaida Tajada indicated that respondent called on all of the absence dates and reported that he would not be in (Tr. 33). All of the absences were approved for leave. Four of the charged dates (June 6, 13, 20, and 27, 2005) were taken as annual leave, approved after the absence occurred.

Of the remaining 29 dates, 21 were documented sick leave while eight were for self-treated ailments of fever, allergies, sinus headaches, and stomach problems. In July 2004, respondent missed four days while being treated for "reaction to medication." In December 2004 he had a back spasm. In January 2005 he had a gastric problem. In February, July, and August 2005, respondent was absent for three days for "hyperactivity." Respondent indicated that the three absences documented by notes from respondent's treating psychologist were due to depression (Tr. 252). Two of the absences are for unspecified personal business. He had bronchitis in May 2005. Notably, the number of undocumented, self-treated sick days did not exceed the twelve undocumented sick days per year permitted by Department rule 5.10.1. Eight of the absences were on a Monday or on a Friday and five of these were documented by medical notes.

The high number of documented absences corroborates respondent's statement that he was genuinely ill and felt unable to work. The eight absences occurring on a Monday or Friday did not appear suspicious, particularly considering that five of these were documented by medical notes. While the rate of sick leave usage during the charged period (29 days) exceeded the accrual rate for sick leave (approximately 18 days) for the same period, there was no indication that respondent completely exhausted his sick leave balances. Nor was there any proof that respondent's supervisors warned him, prior to April 2005, that his use of sick leave was excessive and might lead to disciplinary action. *See, e.g., Dep't of Parks and Recreation v. Brown*, OATH Index No. 1039/91 (Oct. 15, 1991), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 92-47 (Apr. 30, 1992) (excessive absence found where most of the absences were not requested in advance and many taken despite written disapproval); *Bd. of Education v. Anderson*, OATH Index No. 343/90 (Jan. 19, 1990), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 93-26 (May 20,

1993). The only timely warning given concerned latenesses and early departures, *see* Pet. Ex. 7, and made no mention of excessive sick leave usage.

Finally, petitioner did not establish that respondent's 33 absences had a significant impact on the office. Ms. Tajada testified that, in 2004 and 2005, the unit was "backlogged" and when respondent was absent his work was given to someone else (Tr. 31). Likewise, Ms. Tajada's supervisor William Nelson stated that respondent's absences were "disruptive" because his work had to be given to others, who were required to answer telephone calls and meet with teachers who visited the office (Tr. 75-76). Respondent disputed Mr. Nelson's statement that the unit was backlogged and indicated instead that the office was being given less and less work. He said that there were very few telephone inquiries and an extremely low number of walk-in visits (Tr. 219).

Thus, the evidence indicated that respondent's work consisted of taking occasional telephone calls and unscheduled visits from teachers concerning their attendance, payroll, seniority, retirement and leave records. According to Ms. Tajada, he was occasionally given unspecified individual assignments (Tr. 31). Petitioner offered no proof that any individual assignments were left incomplete or that assignments needed to be transferred to anyone else. Ms. Tajada's and Mr. Nelson's testimony as to the supposedly "disruptive" impact of respondent's absenteeism was undercut by several factors. The first supervisory warning given to respondent occurred on April 29, 2005, when Mr. Barton sent respondent an email about lateness and absences (*see* Resp. Ex. C). In a December 9, 2004 memo (Pet. Ex. 7) from Mr. Nelson, respondent was told only that his latenesses and unauthorized early departures were "disruptive," but no mention was made of any problem with regard to use of sick leave or absences.

The vague proof as to the consequences of respondent's absences, combined with the lack of any supervisory warnings on absenteeism, lead me to conclude that the workload of the office was, as respondent indicated, relatively light and that the effect of an individual employee's absence upon other workers was minimal. *Dep't of Parks and Recreation v. Hubbard*, OATH Index No.1153/97, at 17-19 (Feb. 24, 1998) (21 absences in one year not proven to be excessive where absences did not exceed the 37 days of accrued annual and sick leave year, were approved, were mostly documented, were not shown to have seriously impeded or disrupted agency operations, and employee had not previously been warned that his absence rate was considered excessive or unacceptable by the agency); *Bd. of Education v. Pace*, OATH Index No. 498/98 (June 3, 1998) (19 1/2 occasions over 14 months held not to be excessive); *Dep't of*

Transportation v. Bond, OATH Index No. 217/91 (Oct. 11, 1990) (23 absences over one year found not excessive); *Bd. of Education v. Bracho*, OATH Index No. 477/91 (Apr. 9, 1991) (17 absences over a nine month period was not excessive).

Thus, I did not find that respondent's absences were excessive and recommend that this charge be dismissed.

The Department rules on lateness make it clear that no excessive lateness violation occurred here. The rules expressly define a late arrival as one in excess of the grace period of five minutes. *See* Department Rules and Regulations Governing Non-Pedagogical Administrative Employees, 9.6.1.2. Two of the alleged latenesses by respondent were only five minutes and do not qualify as late under the Department rules. Nor do the remainder of the 47 latenesses over the course of one and one-half years constitute misconduct. Pursuant to Department Rule 9.6.3, excessive lateness is defined as 60 latenesses during a year running from May 1 to April 30. The attendance records (Pet. Ex. 1) presented here show that, from May 1, 2004, to April 30, 2005, respondent was late 38 times. While there can be no argument that this lack of punctuality reflects poorly on the employee, the latenesses do not constitute misconduct under the Department attendance rules. The lateness allegations must be dismissed.

Respondent's early departures followed a pattern whereby respondent notified his immediate supervisor, Ms. Tajada, or another supervisor that he would be leaving early on a given day. Ms. Tajada, Mr. Nelson, and Deputy Executive Director Gary Barton all described receiving either emails or phone calls (*see* Pet. Ex. 3) from respondent in which he would indicate that he would be leaving early, usually for a doctor's appointment. None of the supervisors replied to these messages from respondent and leave was approved for all of the early departures.

Respondent admitted being occasionally late and absent. He denied, however, that he was ever warned that his attendance was a problem until April 2005, when he received a memo (Resp. Ex. G) from Mr. Barton stating that he was to attend a meeting to discuss his latenesses, early departures, and absences. Respondent replied to this memo with his own memo (Resp. Ex. H) stating that he wished to have counsel accompany him to a meeting and asked that the meeting be postponed for one day until counsel was available. Mr. Barton did not reply to this memo.

The charged early departures were occasioned by doctor's and psychologist's appointments. Respondent started seeing a psychologist in February 2005 as a result of the harsh treatment by Mr. Barton. He indicated that he discussed these early departures with Ms. Tajada and she advised him to notify Mr. Barton and Mr. Nelson by email whenever he was leaving early. Respondent was not aware of a reason for this extra notification and was not aware of any other workers who were required to notify Mr. Barton and Mr. Nelson of anticipated absences. After he was charged with misconduct for the early departures, he terminated his sessions with the psychologist in November 2005 and informed his supervisors of this (*see* Pet. Ex. 3 and Resp. Ex. P).

Respondent stated that he had been in conflict with Mr. Barton since around November 2004, when Mr. Barton and Mr. Nelson chastised him for submitting a leave request after purchasing airplane tickets. He stated that he had repeatedly tried to be transferred away from Mr. Barton's supervision, but believed that transfers had been effectively blocked. He applied for regional liaison positions in October 2004, January 2005 and June 2005 and had not been so much as interviewed for any openings. On June 23, 2005, respondent filed a complaint (Resp. Ex. I) with the federal Equal Employment Opportunity office alleging discrimination on the basis of his religion of being a Muslim, his being Pakistani, and his age. After receiving a letter (Resp. Ex. J) from the Department EEO officer indicating that no complaint had been filed and that his case was being closed, respondent filed a letter of protest and received a request for further information. He submitted further information as requested (Resp. Ex. L) and filed a formal complaint of discrimination (Resp. Ex. N) on November 15, 2005. Respondent alleged that the disciplinary charges were initiated as retaliation for his complaints of discrimination.

All three supervisors conceded that respondent always informed them of any early departure, in obedience to the rule that he do so. They suggested that employees typically informed their supervisors of a need to leave work early for medical appointments in the manner employed by respondent, that is, by an email or telephone call notifying the supervisor of the intended departure time. They also indicated that supervisory approval of leave requests for medical appointments was invariably given. There was no indication that any of the supervisors told respondent that his manner of informing them of his need to leave early violated agency rules.

Petitioner's theory as to why the early departures constituted misconduct was that respondent informed his supervisors that he would depart early instead of requesting permission to do so. The supervisors believed that, because respondent informed them of his departures instead of requesting approval, he was violating the agency rules, although none of the supervisors specified a rule on this practice. Mr. Nelson expressed his anger at the manner in which respondent announced rather than requested permission for his departures, describing respondent as "arrogant and cocky." They further contended that, in respondent's case, they lacked authority to deny his leave because of the manner in which respondent stated his intentions. No authority was provided for the novel notion that a supervisor was somehow obliged to approve any leave request which was phrased as a declarative statement rather than as a tentative question.

It is readily apparent that petitioner's proof of the early departures did not constitute misconduct. The fact that respondent framed his communication as an announcement rather than a request for supervisory action violated no agency rule. Nor were his emails, which typically stated at what time he needed to leave the office, insubordinate in any way. This charge must be dismissed.

Improper Leave Request

This charge concerns a vacation request made by respondent in October 2004 which petitioner contended violated the established vacation request procedure. According to Department records (Pet. Ex. 4), on October 20, 2004, Mr. Barton sent the staff a memo instructing all employees in the division who wished to make a vacation request for the following three months to do so on a vacation request form submitted no later than October 25, 2004. The memo indicated leave requests could be for no more than two weeks. The memo also stated, "If you plan to travel, do not make arrangements (purchase tickets, reserve accommodations, etc.) until you have received approval of requested days."

On October 25, 2004, respondent sent a memo (Pet. Ex. 4) to Ms. Tajada requesting "an exception to the two [sic] requirement listed in the vacation memorandum" and asked for 17 days of vacation from December 12, 2004, through January 2, 2005. Respondent stated that he had purchased non-refundable tickets in August for $122 and attached copies of these tickets to his memo. Upon receiving this request, first Mr. Nelson and then Mr. Barton denied it. Mr. Nelson

wrote on the request, "Cannot approve three weeks in a row. No advance permission asked for. When were you going to request?" It seems to be undisputed that respondent appealed Mr. Barton's denial of the request to upper management, who overruled Mr. Barton and granted respondent two weeks of three weeks requested.

On November 22, 2004, Mr. Nelson wrote respondent a memo concerning the October vacation request. He stated that respondent's purchase of plane tickets "clearly ignores the rules . . . to ensure the effective operation of the office and provide equitable treatment to all staff." He stated that respondent's behavior was "an act of arrogation and willful disregard."

As with several of the other charges, petitioner's theory as to why respondent's submission of this vacation request constituted misconduct was obscure. On the one hand, as indicated in Mr. Nelson's memo, petitioner seemed to be contending that the purchase of the tickets in August violated the instructions that employees were not to purchase tickets until leave had been approved. Apparently recognizing some illogic to this position, Mr. Nelson claimed in his testimony that respondent's misconduct lay in the submission of a vacation request relying in part upon tickets previously purchased (Tr. 102). Mr. Nelson noted that he had discovered in reviewing respondent's file that he had done much the same thing a year before with a previous supervisor.

In arguing that respondent's manner of making his vacation request was in contravention of the Barton vacation memo, petitioner would appear to misconstrue the purpose of the memo. The vacation memo was intended not to prohibit employees from purchasing plane tickets but rather to articulate guidelines by which vacation leave requests would be approved, indicating that leave would be limited to two weeks, that travel arrangements should not be made until the leave was approved, and that personnel coverage would be a consideration in evaluating the requests. The memo suggests that a failure to adhere to these guidelines could result in having leave denied and vacation plans disrupted. Aside from these explanations, the only imperative portion of the Barton vacation memo was the direction that leave requests must be submitted by October 25, a direction respondent obeyed. Thus, the memo cannot be fairly interpreted to prohibit employees from making travel plans or purchasing plane tickets prior to having leave approved, just as it cannot be fairly interpreted to prohibit an employee from asking for more than two weeks.

In respondent's request, he asked for an exception to the two-week restriction and the advance plane purchase admonition. It may be, as observed by Mr. Nelson, that such a request was arrogant and manipulative, in that he was seeking to have priority given to his request due to the advance purchase of airline tickets. But the supervisors had full discretion to deny respondent's request, as Mr. Nelson and Mr. Barton did. There is no basis whatsoever to find that either respondent's advance purchase of airline tickets or his timely request for an exception to the leave guidelines violated any rule or can be considered misconduct. The fact that respondent's request was ultimately approved by another agency manager displays the speciousness of petitioner's argument that, on the one hand, making the request violated agency rules even though, on the other hand, the request was granted.

Specification 4, lacking support in either reason or logic, must clearly be dismissed.

Insubordination in Using the Internet

Specifications 6 through 8 allege that respondent used the internet for non-business purposes and, after having been ordered to cease this practice, continued to do so. Specification 5 alleges that respondent was insubordinate when, after his supervisor demanded a written explanation for using the internet for a non-business purpose, respondent wrote only one word: "reading." Specification 9 alleges that respondent was also insubordinate when, after his supervisor inquired again about his purpose in accessing the internet, respondent said he was checking the weather.

Ms. Tajada stated that employees in her office have internet access solely to view forms and other information on the Department website and are not permitted to go to any other internet site (Tr. 41). She testified that in January 2005 she was walking by respondent's desk and noticed that he was viewing a website on the internet. Respondent said he was reading his email. Ms. Tajada told respondent to return to work and later discussed the incident with Mr. Nelson and Mr. Barton (Tr. 39).

Mr. Barton requested that the technology staff run a report tracking the websites respondent visited on two random dates, September 4 and October 13, 2004. He reviewed the report, which showed visits to sites which could only have been for non-business purposes, and showed the list to respondent (Tr. 139-40). On January 5, Mr. Barton wrote respondent a memo

asking "what you were doing on the internet." Respondent returned the memo to Mr. Barton with the word "reading" written at the bottom (*see* Pet. Ex. 5).

On February 10, 2005, Mr. Barton sent respondent another memo (Pet. Ex. 5) summarizing the January incident and chastising respondent for "unprofessional" behavior and an "impertinent" response to his prior memo. Mr. Barton expressly warned respondent that "this misconduct" might lead to disciplinary action.

On July 15, 2005, at around 1:45 p.m., Mr. Barton walked by respondent's desk and saw him again on the internet and eating his lunch. Respondent said that he was checking the weather. Mr. Barton noted that respondent's lunch hour ended at 1:00. He told respondent to put away his food and get off the internet (Tr. 147).

Petitioner submitted reports (Pet. Ex. 6) from March 15 and 23, 2005, showing that on these work days respondent visited websites which included lonelyplanet.com, google.com, renewnyc.com, humanesociety.com, chinaadviser.com, cnn.com, aircanada.com, cbsnews.com, escapeartist.com, and islandsun.com.

In his testimony, respondent admitted that he had repeatedly used the internet for personal reasons in violation of Mr. Barton's instructions not to do so. He indicated that he did so only after completing all of his work for the day and never neglected a work assignment (Tr. 218). He indicated that other employees also used the internet for occasional personal reasons, including shopping and travel, without being disciplined (Tr. 221). He stated that the per diem book referred to by his supervisors as representing an ongoing source of work had only been provided to him as of June 2005 (Tr. 218).

Respondent admitted that, following being told by Ms. Tajada not to visit internet sites other than that of the Department, he regularly visited other websites including sites on travel and government scholarships (Tr. 220). This constituted insubordination in violation of Department Rules and Regulations Governing Non-Pedagogical Administrative Employees 9.1 and 9.18 and this specification must be sustained.

In addition, I find that respondent's one-word reply of "reading" to Mr. Barton's question of why he was accessing the internet was insubordinate. Mr. Baron's memo of January 5, 2005 to respondent clearly challenged the propriety of respondent accessing the internet for personal purposes during work hours and was requesting for clarification as to whether the reasons were related to his work. Under these circumstances, it was impertinent for respondent to reply only

that he had been "reading." This reply failed to answer the question asked as to why respondent had been accessing the web for non-work-related reasons and was intended to be sarcastic. Although respondent heatedly disputed the legitimacy of other charges, he never mentioned writing the response during his testimony. This silence also indicated that respondent had no innocent explanation for writing the reply. Specification 5 must be sustained.

FINDING AND CONCLUSION

1. Specification 1 should be dismissed in that petitioner failed to meet its burden of proving that respondent was excessively absent from April 2004 though September 2005 in violation of Department Rules and Regulations Governing Non-Pedagogical Administrative Employees 9.18.

2. Specification 2 should be dismissed in that petitioner failed to meet its burden of proving that respondent was excessively late from April 2004 though September 2005 in violation of Department Rules and Regulations Governing Non-Pedagogical Administrative Employees 9.6.3.

3. Specification 3 should be dismissed in that petitioner failed to meet its burden of proving that respondent's early departures from April 2004 though September 2005 violated Department Rules and Regulations Governing Non-Pedagogical Administrative Employees 9.18.

4. Specification 4 should be dismissed in that petitioner failed to meet its burden of proving that respondent's October 25, 2004 vacation request was in violation of Department Rules and Regulations Governing Non-Pedagogical Administrative Employees 9.18.

5. Specification 5 should be sustained in that, on January 5, 2005, in reply to a memo from Gary Barton asking for an explanation for working on the internet, respondent sarcastically stated that he was "reading" in violation of Department Rules and Regulations Governing Non-Pedagogical Administrative Employees 9.1 and 9.18.

6. Specifications 6, 7, and 8 must be sustained in that, on March 15, March 23, and July 15, 2005, respondent used the internet

for non-business purposes after having been previously ordered by Gary Barton to cease doing so, in violation of Department Rules and Regulations Governing Non-Pedagogical Administrative Employees 9.1 and 9.18.

7. Specification 9 should be dismissed in that petitioner failed to meet its burden of proving that respondent's statement on July 15, 2005, that he was checking the weather violated Department Rules and Regulations Governing Non-Pedagogical Administrative Employees.

RECOMMENDATION

After making the above findings, I requested a summary of respondent's personnel history. Although no information was provided, petitioner's counsel did state that respondent had no disciplinary record. Certainly respondent's 14 years of service to the Department (Tr. 211) and lack of any previous disciplinary problem offer substantial reasons to mitigate the penalty for the misconduct which occurred in this case.

There are other mitigatory factors to be considered as well. First, there were only the most minor of adverse consequences to respondent's use of the internet. It was apparent that the insubordination charges were largely the result of Mr. Barton's and Mr. Nelson's anger at their perceptions of respondent's arrogance rather than a general concern about office morale. All analysts were given unrestricted use of the internet and no other workers were apparently disciplined for occasional personal uses of the internet, which it must be assumed occurred with some frequency, as respondent indicated. Respondent credibly stated that he completed all assignments given to him by Ms. Tajada and used the internet while he awaited further assignments. These statements were corroborated by the absence of proof that respondent was ever criticized for poor productivity or for not completing specific assignments.

It should be observed that the internet has become the modern equivalent of a telephone or a daily newspaper, providing a combination of communication and information that most employees use as frequently in their personal lives as for their work. For this reason, City agencies permit workers to use a telephone for personal calls, so long as this does not interfere with their overall work performance. Many agencies apply the same standard to the use of the internet for personal issues. This widespread recognition that internet use is essential to living in the technological world does not excuse respondent's disobedience to Mr. Barton's order.

However, it does suggest that the order that only respondent was prohibited from using the internet for any personal reasons was unusually harsh and arbitrary, motivated by anger rather than a concern for office productivity.

There were other reasons to mitigate the penalty. To his credit, respondent acknowledged that his use of the internet in violation of Mr. Barton's order was insubordinate and stated that he should have refrained from using the internet for non-work-related matters. On the other hand, Mr. Barton's order that respondent not use the internet for any personal need, whether to check the weather or find the location of a store, seems to have been motivated by spite toward respondent rather than toward a legitimate concern about either respondent's or the unit's productivity.

Taking account of all of these mitigatory factors, I find that the most appropriate penalty for the disobedience which occurred here would be a reprimand, the most minor penalty available under the Civil Service Law, and I so recommend.

John B. Spooner
Administrative Law Judge

March 9, 2006

SUBMITTED TO:

JOEL I. KLEIN
Chancellor

APPEARANCES:

LISA M. BECKER, ESQ.
Attorney for Petitioner

MARTIN DRUYAN, ESQ.
Attorney for Respondent